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## The African Union's Right of Humanitarian Intervention as Collective Self-Defense

Christian Wyse

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# The African Union’s Right of Humanitarian Intervention as Collective Self-Defense

Christian Wyse\*

## Abstract

*The African Union purports to have the right to intervene in its member states in “grave circumstances,” including when crimes against humanity have been committed. This treaty-based right stands in stark contrast to the U.N. Charter collective security system, which generally forbids the use of force outside of self-defense and Security Council authorization. This Comment explores the legal friction between the African Union’s claimed right of humanitarian intervention and the U.N. Charter’s strict limits on the use of force and the power of regional organizations. A common argument in support of the African Union is that because its member states consented in advance to humanitarian interventions, no Charter prohibitions are breached. However, the consent is invalid due to the limited role the African Union can play as a regional organization in the Charter system. This Comment argues that the African Union right of intervention can be read as a right of collective self-defense under Article 51 of the U.N. Charter. Under this reading, any humanitarian intervention would still need to meet the classic self-defense requirements of necessity and proportionality. These requirements would likely be met in any future intervention due to the practical limits of the African Union’s operational capabilities.*

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## I. INTRODUCTION

The African Union (A.U.), in Article 4(h) of its Constitutive Act, purports to give itself a right of humanitarian intervention in its member states in certain grave circumstances, including the commission of various war crimes.<sup>1</sup> This purported right stands in stark contrast with the collective security system established by the U.N. Charter, under which neither states nor regional organizations may use force in the territory of another country, subject to only a few exceptions.

The U.N. Charter contains a robust collective security framework. The bedrock principle of the framework, Article 2(4), bars states from using force against other states in almost all circumstances.<sup>2</sup> Under the Charter system, the only acceptable deviations from this principle are uses of force in self-defense, or uses of force with either the consent of the target state or the authorization of the United Nations Security Council (UNSC) acting pursuant to its Chapter VII powers.<sup>3</sup> The U.N. Charter system is further solidified by its constitutional character, as no derogation of Charter obligations is permitted by treaty or otherwise.<sup>4</sup>

The A.U., a regional organization comprised of all the African states, created a very different collective security framework when it claimed a right to forcible humanitarian intervention.<sup>5</sup> Article 4(h) of the A.U. Constitutive Act, which has been ratified by all A.U. member states, clearly identifies such a right. However, the A.U. Constitutive Act ignores questions of UNSC authorization of such interventions. Indeed, as the history of the A.U. shows, African leaders drafted and approved this provision as a clear workaround to what they saw as a failed UNSC.<sup>6</sup>

The divergent security frameworks have not been clearly reconciled through state practice. Interventions without UNSC approval have been conducted by a myriad of regional organizations, including the A.U., the North Atlantic Treaty Organization (NATO), and the Economic Community of West African States (ECOWAS). While these interventions challenge the UNSC's

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<sup>1</sup> Constitutive Act of the African Union art. 4(h), July 11, 2000, 2158 U.N.T.S. 3. Article 4(h) recognizes the following as a principle of the AU:

The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

<sup>2</sup> U.N. Charter art. 2(4).

<sup>3</sup> *Id.* at ch. VII.

<sup>4</sup> *Id.* at art. 103.

<sup>5</sup> Constitutive Act of the African Union, *supra* note 1.

<sup>6</sup> *See* Section II.B, *infra*.

authority to some extent, the A.U. has not yet invoked its purported Article 4(h) powers as a legal basis for its interventions. Instead, the A.U. has only deployed peacekeepers at the invitation of a target country. Further, interventions undertaken by ECOWAS and the A.U. have provoked little more than scholarly interest: each of these interventions have been either *ex post* approved or ignored by the UNSC.

Despite the current lack of conflict, growing tensions between the A.U. and the U.N. portend future discord.<sup>7</sup> If the A.U. manages to successfully develop its own peacekeeping forces and transform its demographic boom into international muscle,<sup>8</sup> close cooperation with the UNSC could end.<sup>9</sup> As the A.U. becomes established, it may seek to undertake more controversial and far-reaching interventions against the will of the UNSC. Other regional bodies, such as the Organization of American States (OAS), could follow suit. With a string of humanitarian interventions in the past two decades, the increasing strength of developing regions, and paralysis on the part of the UNSC, regional interventions could become a focal point of collective security.

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<sup>7</sup> See Gabriel Amvane, *Intervention Pursuant to 4(b) of the Constitutive Act of the African Union without United Nations Security Council Authorisation*, 15 AFR. HUM. RTS. L. J. 282, 284 (2015). Recently, for example, the Assembly of the African Union called for its member states to withdraw from the International Criminal Court due to the issuance of an arrest warrant for Sudanese President Omar al-Bashir over alleged war crimes. *African Union Backs Mass Withdrawal from ICC*, BBC (Feb. 1, 2017), <https://perma.cc/7CRT-2AUB>. And while the A.U. and the U.N. work quite closely on peacekeeping missions, money is a point of friction. See Gustavo de Carvalho & Leslie Connolly, *Can the AU and UN Work Together to Reform African Peace Operations?*, INT'L PEACE INST. GLOBAL OBSERVATORY (Sept. 19, 2017), <https://perma.cc/92VG-VNGN>; see also S.C. Res. 2320, ¶¶ 2, 3 (Nov. 18, 2016) (noting the need to further address funding but stressing cooperation). Theoretically, however, the A.U. may not need to continue the dependency on the U.N. The U.S. and China have independently contributed resources and hundreds of millions of dollars to support A.U. peacekeeping capabilities. The White House President Barack Obama, *Fact Sheet: U.S. Support for Peacekeeping in Africa*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Aug. 6, 2014), <https://perma.cc/98S9-U25V>; Eleanor Albert, *China in Africa*, COUNCIL ON FOREIGN REL. (July 12, 2017), <https://perma.cc/77QM-UVH8>; Peter E. Harrell, Note, *Modern-Day Guarantee Clauses and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force*, 33 YALE J. INT'L L. 417, 418 (2008).

<sup>8</sup> African population is projected to double by 2050. John May & Hans Groth, *Failure to Address Africa's Rising Population is Not an Option*, FIN. TIMES (July 6, 2017), <https://www.ft.com/content/a2ccd284-5668-11e7-80b6-9bfa4c1f83d2>. Such growth, if unchecked by economic development (the traditional suppressor of birth rates), could also lead to more humanitarian crises in which forcible intervention is necessary. See *id.*

<sup>9</sup> Due to Africa's traditional underrepresentation internationally, the African Union had long been a supporter of UNSC reform. See Executive Council of the African Union, 7th Extraordinary Sess., The Common African Position on the Proposed Reform of the United Nations ("Ezulwini Consensus"), § C(e), Ext/EX.CL/2 (VII) (Mar. 7–8, 2005) [hereinafter *Ezulwini Consensus*].

Thus, the conflict between the A.U. Constitutive Act and the U.N. Charter remains an important legal issue. Scholars have split on the question of whether the A.U. actually has a right to forcible intervention without UNSC authorization, or if the Charter simply voids the purported right.<sup>10</sup> Supporters of Article 4(h) focus on the fact that the A.U. Constitutive Act was consented to by all A.U. Member States. Thus, the argument goes, any Article 4(h) intervention is consensual and accordingly not a use of force prohibited under Article 2(4) of the U.N. Charter. Opponents argue that due to the *jus cogens* nature of Article 2(4), treaty-based advance consent is not sufficient to avoid the norm. Further, the U.N. Charter specifically cabins the powers of regional organizations such as the A.U. in Chapter VIII. To evaluate this debate, this Comment will proceed in three steps.

In Section II, this Comment analyzes the texts and histories of the U.N. Charter and the A.U. Constitutive Act to illuminate the friction between the two systems. The U.N. Charter system constructs a comprehensive security framework that leaves little room for unilateral regional action, but Article 4(h) of the A.U. Constitutive Act takes a different, perhaps irreconcilable, approach.

In Section III, this Comment will briefly recount several pertinent interventions undertaken by the A.U. and other regional bodies outside the formal UNSC process. History shows that legal friction between the two security frameworks has not been resolved through state practice. Indeed, past A.U. interventions have taken place in an operational system that works outside the formal scope of the U.N. legal system.

Section IV critically evaluates arguments scholars have made in support of this right of intervention. While the A.U. has a plausible right to intervention under a treaty-based consent theory, the strict cabining of regional organization powers under the U.N. Charter casts serious doubt onto this claim. A.U. member states can likely enter into *ex ante* treaty-based consent to intervention, but they cannot give that consent to a regional body such as the A.U.

In Section V, this Comment offers a practical legal solution: the A.U.'s right of intervention should be recognized to the extent that it is a use of force in lawful furtherance of collective self-defense allowed under Article 51 of the U.N. Charter. In order to meet the requirements of self-defense, any A.U. intervention must meet the requirements of necessity and proportionality. Under this pragmatic interpretation of Article 4(h), intervention as self-defense actually strengthens the U.N. Charter framework and eliminates many legal ambiguities. Finally, this collective self-defense interpretation maps closely to operational limitations that the A.U. faces in implementing its 4(h) capabilities.

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<sup>10</sup> See Sections II, IV *infra*.

## II. COMPETING COLLECTIVE SECURITY FRAMEWORKS

The heart of the issue is the presence of two competing collective security systems. The U.N. Charter lays out a well-known framework for international peace and security: namely, a balance of the prohibition on the use of force with both the UNSC's powers and the inherent right of self-defense. The Charter framework is based on traditional notions of sovereignty. The A.U. Constitutive Act tracks the general strokes of the U.N. Charter on a regional level, but it rests on the notion of sovereignty as the Responsibility to Protect (R2P).<sup>11</sup> The result is two very different systems. However, the main point of friction is not the different approaches, but rather the relationship between the two systems. In general, the U.N. Charter trumps any other treaty, including the A.U. Constitutive Act.<sup>12</sup> The limited role of regional bodies in the Charter system, combined with the supremacy of the U.N. Charter, greatly limit what actions the A.U. can undertake unilaterally.

### A. The U.N. Charter

The U.N. Charter collective security framework is a system of balance. On one side of the scale is a general prohibition on the use of force against member states, Article 2(4), and on the other side are the exceptions that seek to maintain international peace and security. The two main exceptions to the prohibition on the use of force are military action either authorized by the UNSC, under Chapter VII, or in self-defense, under Article 51. A further exception implied in Article 2(4) applies when the state consents to the use of force by another state.

The other key component of the U.N. Charter system is its supremacy: derogation is not allowed per Article 103. This constitutional nature of the Charter means that states wishing to use force must find a legal exception within the Charter's framework. This is difficult for regional bodies to do, as their role is explicitly cabined in Chapter VIII. The limits on regional bodies help to both maintain the supremacy of the Charter system and the viability of the balance struck among Article 2(4) and its various exceptions.

#### 1. Article 2(4): The Prohibition on the Use of Force

Article 2(4) of the U.N. Charter is the core provision of the U.N. Charter's collective security framework. It states:

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<sup>11</sup> Under R2P, state sovereignty is not only a right, but an obligation for a state to protect its citizens. Int'l Comm. on Intervention and State Sovereignty, Rep. on the Responsibility to Protect, 2.14–15 (2001) [hereinafter ICISS].

<sup>12</sup> U.N. Charter art. 103.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>13</sup>

This prohibition on the use of force is widely considered to be *jus cogens*, meaning that no derogation is permitted, including by treaty.<sup>14</sup> Because of its *jus cogens* status, the scope of the prohibition is key. Any treaty or action violating the prohibition is unquestionably void. On the other hand, a treaty is sound if it works around the scope of the prohibition to the effect of never implicating the *jus cogens*.<sup>15</sup>

By Article 2(4)'s own terms, the prohibited action is "force" or the threat thereof. In this context, "force" implies a lack of consent.<sup>16</sup> Some amount of coercion or aggression also seems to be contemplated.<sup>17</sup> After all, force in self-defense is allowed.<sup>18</sup> Some scholars have argued that any force not amounting to aggression is not implicated by the provision,<sup>19</sup> but others have argued that even "benign" interventions that involve coercion violate the prohibition.<sup>20</sup>

<sup>13</sup> *Id.* at art. 2(4).

<sup>14</sup> *See, for example*, Amvane, *supra* note 7, at 296; Ben Kioko, *The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L R. RED CROSS 807, 820 (2003); Kithure Kindiki, *The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal*, 3 AFR. HUM. RTS. L. J. 97, 106 (2003); Domingo E. Acevedo, *Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force*, 78 AM. SOC'Y INT'L PROC. 69, 69 (1984).

<sup>15</sup> *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if it *conflicts* with a peremptory norm of international law.") (Emphasis added). Academic arguments in favor of military action often rely on such actions falling outside of the scope of Article 2(4), usually because the action was consented to. *See, for example*, Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 558–59 (2013); Kindiki, *supra* note 14, at 107; Amvane, *supra* note 7, at 296.

<sup>16</sup> Valid contemporaneous consent to force is recognized as not implicating the prohibition on the use of force. *See, for example*, *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 150 (Dec. 19); David Wippman, *Treaty-Based Intervention: Who Can Say No*, 62 U. CHI. L. REV. 607, 615 (1995). Such a situation is quite common in practice. *Id.* at 620–22.

<sup>17</sup> Wippman, *supra* note 16, at 622. The U.N. Charter also lends contextual support to this notion. An enumerated purpose of the U.N. is "the suppression of acts of aggression or other breaches of the peace." U.N. Charter art. 1(1).

<sup>18</sup> *See* U.N. Charter art. 51.

<sup>19</sup> Suyash Paliwal, Note, *The Primacy of Regional Organization in International Peacekeeping: The African Example*, 51 VA. J. INT'L L. 185, 217–18 (2010).

<sup>20</sup> Karsten Nowrot & Emily W. Schebacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 345 (1998).



The coercion requirement is supported by the qualifier, “against the territorial integrity of political independence of any state.” However, that qualifier is generally not read broadly so as to exclude other motives, such as the protection of human rights.<sup>21</sup> This is justified in part because the U.N. Charter did not create the prohibition’s *jus cogens* status, but merely codified an existing peremptory norm.<sup>22</sup> The fact that the norm predates the U.N. Charter suggests that the possibly qualifying terms are meant to add color but not exceptions or substantive changes to the prohibition on the use of force. Further, the *travaux préparatoires* of the U.N. Charter strongly suggest that the phrase was added to underscore the breadth of the *jus cogens* norm by sealing gaps, not to limit it in any way.<sup>23</sup>

Further suggesting that the prohibition is meant to be read broadly, the next clause states: “or in any other manner inconsistent with the Purposes of the United Nations.” Including “any other manner” suggests breadth. The same clause also reinforces the notion that “against the territorial integrity or political independence” is meant to add color. Otherwise, it would be superfluous: the purposes and principles of the United Nations already include territorial integrity and political independence. An enumerated principle of the U.N. Charter is “sovereign equality,”<sup>24</sup> which strongly implies political independence. Another is the maintenance of “international peace and security,”<sup>25</sup> for which the UNSC has primary responsibility.<sup>26</sup> The Preamble also notes that “armed force shall not be used, save in the common interest;” the common interest itself is defined by the UNSC.<sup>27</sup> The modifiers in Article 2(4) overlap greatly. If they were each supposed to limit the prohibition, they would be superfluous. Thus, under normal construction, they logically do not act as discrete bounds to the norm, but rather as an emphasis on the prohibition’s breadth. In sum, Article 2(4) constructs a broad prohibition on the use of force, subject only to narrow exceptions.

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<sup>21</sup> However, a few commentators suggest otherwise. See Jordan J. Paust, *R2P and Protective Intervention*, 31 TEMP. INT’L & COMP. L.J. 109, 115–18 (2017) (arguing that an intervention for the protection of human rights is consistent with the U.N. Charter’s focus on human rights); Kindiki, *supra* note 14, at 107 (suggesting that if 4(h) was agreed to consensually, then a subsequent intervention is not against a state’s political integrity).

<sup>22</sup> Amvane, *supra* note 7, at 296.

<sup>23</sup> DAN KUWALI, THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(h) INTERVENTION 113 (2011).

<sup>24</sup> U.N. Charter art. 2(1).

<sup>25</sup> *Id.* at art. 1(1).

<sup>26</sup> *Id.* at art. 24(1).

<sup>27</sup> *Id.* at preamble.

Article 2(4) is generally a clear codification of the broad prohibition on the use of non-consensual force. Derogating the prohibition is in violation of both Article 103 of the U.N. Charter and *jus cogens*. The unresolved question is whether the A.U. Constitutive Act establishes valid consent so as to not be coercive force and thus not to implicate the prohibition in the first place.

## 2. Chapter VII: The United Nations Security Council

The UNSC is given “primary responsibility for the maintenance of international peace and security,”<sup>28</sup> and all member states must obey the UNSC’s decisions.<sup>29</sup> The UNSC deals with any threat to international peace pursuant to its Chapter VII powers.<sup>30</sup> Those powers include economic and diplomatic sanctions,<sup>31</sup> as well as armed force.<sup>32</sup>

The UNSC also has regularly extended its powers beyond what the drafters of the U.N. Charter contemplated—the body often authorizes purely humanitarian interventions.<sup>33</sup> It is not clear that such missions can be categorized as maintaining international peace and security, and it is arguable that they violate the U.N.’s non-intervention rule.<sup>34</sup> That being said, history has rendered this legal argument more or less moot, and the UNSC can and does authorize humanitarian interventions.<sup>35</sup> This historical development further solidifies the UNSC’s position as the sole legal enforcer of international peace and security, writ large.

Despite these broad powers, the UNSC is often paralyzed.<sup>36</sup> The veto powers of the permanent members of the UNSC have in many cases prevented

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<sup>28</sup> *Id.* at art. 24(1).

<sup>29</sup> *Id.* at art. 25.

<sup>30</sup> *Id.* at art. 39.

<sup>31</sup> *Id.* at art. 41.

<sup>32</sup> *Id.* at art. 42.

<sup>33</sup> Dan Kuwali, *The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention*, 9 AFR. J. CONFLICT RESOL. 41, 44 (2002).

<sup>34</sup> See U.N. Charter art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”).

<sup>35</sup> Kuwali, *End of Humanitarian Intervention*, *supra* note 33, at 43; Amvane, *supra* note 7, at 292 (“It should, therefore, be accepted that an armed conflict taking place within one state threatens international peace and security.”)

<sup>36</sup> See generally Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871 (2007); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539 (2002).

action.<sup>37</sup> Indeed, as discussed below, the inefficacy of the UNSC is what led the A.U. to create an alternative collective security framework.<sup>38</sup>

Despite practical limitations, the UNSC is still the core enforcement mechanism of the U.N. Charter's collective security agreement. Combined with the prohibition on the use of force in Article 2(4), the Charter constructs a system in which self-help is generally not allowed. The UNSC usually must be consulted—but not always. The next two provisions to be considered, Article 51 (the right of self-defense) and Chapter VIII (regional organizations), provide limited exceptions to the standard rule.

### 3. Article 51: Self-Defense

Article 51 of the U.N. Charter is an important counterweight to an otherwise rigid collective defense system. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>39</sup>

The right to self-defense is a compromise. On the one hand, the U.N. Charter deems the right “inherent,” and that it shall not be “impaired by the charter.”<sup>40</sup> On the other hand, that very same language necessitates a look back to the contours of the customary right of self-defense pre-Charter, and that right is not very broad. Self-defense is of course allowed in response to an “armed attack,” which is noted in Article 51. Classically, preemptive or anticipatory self-defense is judged under the 1837 Webster formula, or the *Caroline* test: the necessity for such self-defense must be: “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>41</sup> In other words, an

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<sup>37</sup> See generally Delahunty, *supra* note 36.

<sup>38</sup> Kioko, *supra* note 14, at 811–12.

<sup>39</sup> U.N. Charter art. 51.

<sup>40</sup> See also Jane A. Meyer, Note, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L. J. 391, 396 (1993) (arguing that the *travaux préparatoires* of the U.N. Charter shows that nothing in Article 51 was meant to limit the customary right to self-defense).

<sup>41</sup> Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 247 n. 9 (2011). The test arose from an exchange of diplomatic notes between Great Britain's Lord Ashbury and the U.S. Secretary of State Daniel Webster following a British attack on a U.S. ship, the *Caroline*, supplying Canadian insurgents fighting against British rule. *Id.* For the

imminent attack is required.<sup>42</sup> Further, any use of force must be proportionate to defend against such an imminent attack.<sup>43</sup>

Presently, the scope of the right of self-defense is the subject of vociferous debate. While the classical *Caroline* approach suggests the requirement of an armed attack, or at least an imminent threat of one, modern scholars have questioned that requirement.<sup>44</sup> The academic debate is far from settled, but many countries have taken a more expansive view of self-defense, allowing for preventative self-defense even when not facing an imminent attack.<sup>45</sup> Professor Jordan Paust has contested the armed attack requirement from another angle, arguing that human rights abuses are international crimes that affect the security of everyone; thus, humanitarian interventions are an exercise of self-defense.<sup>46</sup> That argument requires a generous reading of Article 51, as it does not account for the UNSC's role under the U.N. Charter framework in enforcing international peace and security. However, this Comment argues in Section V that humanitarian interventions can still be linked to self-defense through more traditional notions of security.

Collective self-defense is a key feature of Article 51. Given regional organizations' limited power to respond to breaches of peace under Chapter VIII, many states in the drafting of the U.N. Charter wanted to be assured of their right to have mutual defense pacts in the face of UNSC inaction.<sup>47</sup> Originally, the right of collective self-defense was meant to apply to self-defense pacts (such as NATO) and not regional organizations *per se*, but the line between the two has subsequently been blurred to the point that such a distinction is obsolete.<sup>48</sup> Thus, a regional body such as the A.U. could plausibly invoke self-defense.

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authoritative account, see John Bassett Moore, *Destruction of the Caroline*, 2 MOORE, A DIGEST OF INTERNATIONAL LAW 409 (1906) (providing the exchange of diplomatic notes between Great Britain and the U.S. in 1842).

<sup>42</sup> *Id.* at 247.

<sup>43</sup> Meyer, *supra* note 40, at 396–98; Nowrot, *supra* note 20, at 367.

<sup>44</sup> See Harrell, *supra* note 7, at 421. Also see Delahunty, *supra* note 36, at 877–79, for a discussion of how U.N. bodies have interpreted the armed attack requirement. According to Delahunty, the ICJ has taken a strict position on the need for an armed attack of some gravity, *id.* at 878, while ex-Secretary General Kofi Annan has taken the position that only an imminent “threat” is required, ignoring the semantics of what constitutes an “armed attack.” *Id.* at 878–79. Both reject preventative self-defense. *Id.* For a critique of ICJ self-defense jurisprudence, see generally Glennon, *supra* note 36.

<sup>45</sup> Reinold, *supra* note 41, at 245. Notably, the U.S. took this position in justifying the 2003 invasion of Iraq. Delahunty, *supra* note 36, at 873–75.

<sup>46</sup> Paust, *supra* note 21, at 120–21.

<sup>47</sup> Harrell, *supra* note 7, at 420.

<sup>48</sup> Christoph Schreuer, *Regionalism v. Universalism*, 6 EUR. J. INT'L L. 477, 490 (1995).

#### 4. Chapter VIII: Regional Arrangements

Chapter VIII of the U.N. Charter defines the scope of regional powers in the U.N. collective security framework. The role of regional organizations was hotly debated in the drafting of the U.N. Charter.<sup>49</sup> Some states were concerned with the prospect of UNSC inaction, while others were troubled by the possibility of regional military rivalries undermining the U.N. system.<sup>50</sup> The result was a compromise: Chapter VIII provides for an explicit but limited role for regional organizations.<sup>51</sup> As a result, the powers given to regional bodies in the U.N. Charter framework do not upset the legal balance between nonuse of force and its exceptions, self-defense and the powers of the UNSC.

Article 52 explicitly allows for states to form regional organizations to deal “with such matters relating to the maintenance of international peace and security as are appropriate for regional action.”<sup>52</sup> Article 52 goes on to state that such organizations must comply “with the Purposes and Principles of the United Nations,”<sup>53</sup> and that they should “make every effort to achieve pacific settlement of local disputes . . . before referring them to the Security Council.”<sup>54</sup>

Article 52 thus implies that the UNSC is the only body empowered to conduct non-pacific dispute settlement. The “before referring” language seems to assume that regional organizations do not have the use of force at their disposal.<sup>55</sup>

For regional organizations not acting in self-defense, there are only two steps: attempt pacific settlement, or refer the matter to the UNSC. Unlike Article 51 collective self-defense, there is no “military action” step. Although what counts as “appropriate” regional action is ambiguous, the conspicuous lack of military action authorization highly suggests that “appropriate” is limited to pacific actions. This reading is further supported by the requirement that states comply with the purposes and principles of the U.N. Charter, which include a defined collective security framework enforced by the UNSC. Regional organizations can thus engage in self-defense, support the UNSC, and, in all other cases, refrain from the use of force. Their role is to support the balance struck in the Charter framework, not to upset it.

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<sup>49</sup> See Harrell, *supra* note 7, at 419–21.

<sup>50</sup> See *id.* at 420.

<sup>51</sup> See *id.* at 421.

<sup>52</sup> U.N. Charter art. 52(1).

<sup>53</sup> *Id.* at art. 52(1).

<sup>54</sup> *Id.* at art. 52(2).

<sup>55</sup> See also Paliwal, *supra* note 19, at 190 (noting that regional organizations taking unilateral military action was beyond the contemplation of the U.N. Charter drafters).

This limited role for regional organizations is further defined by the prohibition of Article 53, which states:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.<sup>56</sup>

While Article 53 provides another role for regional organizations (namely, helping the UNSC, but only “under [the UNSC’s] authority”), the prohibition on unilateral regional action is more important. The text is clear: *prior* UNSC authorization is needed before regional organizations may take an “enforcement action.”<sup>57</sup> An enforcement action is a coercive military action that would violate the prohibition on the use of force but for the valid UNSC authorization.<sup>58</sup> Given this definition, it is likely that any intervention undertaken under Article 4(h) would, in form, count as an enforcement action.<sup>59</sup> However, if the A.U. intervention was not technically forcible due to *ex ante* consent, then perhaps it would not be an enforcement action requiring pre-authorization. As discussed below in Section IV, the consent argument, while plausible, impermissibly expands the role of regional organizations in the U.N. Charter collective security system.

### 5. Article 103: Non-Derogation

The U.N. Charter has a constitutional quality, as it trumps conflicting treaties. This principle is laid out in Article 103:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.<sup>60</sup>

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<sup>56</sup> U.N. Charter art. 53.

<sup>57</sup> *Id.* at art. 53.

<sup>58</sup> There is broad scholarly consensus on this interpretation. See Paliwal, *supra* note 19, at 193–94. The term was seemingly drafted to cover all enforcement measures that the UNSC could take under Chapter VII, including Article 41 economic and diplomatic sanctions, as well as Article 42 military force. Monica Hakimi, *To Condone or Condemn—Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT’L L. 643, 650 (2007). In subsequent practice, the term has narrowed to only military action. *Id.* at 650; Amvane, *supra* note 7, at 287. Regional organizations often impose either economic or diplomatic sanctions on their members. See Amvane, *supra* note 7, at 288. Even traditional peacekeeping operations (that is, purely observer missions), are not covered by the term. *Id.* at 289.

<sup>59</sup> Paliwal, *supra* note 19, at 193–94, 219; see also Amvane, *supra* note 7, at 290.

<sup>60</sup> U.N. Charter art. 103.

In other words, states cannot contract around rules of the Charter.<sup>61</sup> For example, the A.U. could not agree to disregard any UNSC resolution as a matter of principle. Similarly, the A.U. states could not agree to suspend the prohibition on the use of force on the continent.<sup>62</sup>

Thus, the A.U. must comply with both Article 2(4) and Article 53.<sup>63</sup> In order to legally save Article 4(h) intervention in the absence of UNSC authorization, it must be the case that it does not violate either provision. It could be argued that Article 4(h) finds a workaround to both provisions. Because there is consent, Article 2(4) is never violated, and thus no coercive enforcement actions are taken contrary to Article 53. An alternative argument, forwarded in Section V, is that unauthorized 4(h) interventions could be taken pursuant to the Article 51 right of self-defense. In either case, the balance of the U.N. Charter framework as a whole must not be disturbed by regional action. The robust collective security framework of the U.N. Charter, combined with the non-derogation principle, makes this a difficult task.

The U.N. Charter system is not perfect in practice. As discussed below, it was the very failure of the U.N. to act in the Rwandan genocide that spurred the competing A.U. collective security system. The central problem is that the Charter system is both inefficacious and comprehensive. It is difficult to work around a collective security system that is ineffective but generally prohibits alternative remedies. In the last two decades, the doctrine of R2P has appeared as a possible solution.<sup>64</sup> However, R2P itself is not designed to usurp the U.N. system, but to strengthen it.<sup>65</sup> Thus, if the A.U. wishes to create an R2P workaround within the legal confines of Charter system, it must operate in a manner that does not undermine the current regime but rather complements it. This Comment submits in Section V that collective self-defense, and not simply treaty-based consent, is the best way to do so.

## B. The A.U. Constitutive Act

The A.U. Constitutive Act constructs an alternative collective security framework exclusive to Africa. In theory, any alternative security framework is

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<sup>61</sup> Paliwal, *supra* note 19, at 225.

<sup>62</sup> See Kuwali, *End of Humanitarian Intervention*, *supra* note 33, at 46; Amvane, *supra* note 7, at 291.

<sup>63</sup> Given the *jus cogens* status of Article 2(4), the non-derogation does not do much work there except to underscore that the A.U. must comply with the prohibition on the use of force *as codified* in the U.N. Charter.

<sup>64</sup> For a comprehensive evaluation of R2P in practice, see Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI. J. INT'L L. 420 (2018).

<sup>65</sup> ICISS, *supra* note 11, at 6.14.

potentially suspect, given the U.N. Charter's non-derogation principle. Additionally, as discussed below, the A.U. Constitutive Act was not drafted with much attention paid to the niceties of the U.N. Charter system. The Constitutive Act sets up two types of permissible interventions: first, an Article 4(h) intervention undertaken by the A.U. in "grave circumstances;" and, second, an Article 4(j) intervention undertaken at the behest of the target state.<sup>66</sup>

### 1. History of the A.U.

The A.U. Constitutive Act was adopted by heads of state on July 11, 2000, and the A.U. officially launched on July 10, 2002.<sup>67</sup> The A.U. replaced the erstwhile Organization of African Unity (OAU), which was regarded as being an ineffective "club" where leaders did not criticize each other.<sup>68</sup> Indeed, the OAU revolved around a principle of non-interference grown out of African leaders' distrust of colonial interference with African sovereignty.<sup>69</sup>

The A.U., in contrast, was founded with a wide variety of goals, including peace and stability, speedy economic development, and promotion of African unity.<sup>70</sup> The main theme of the new organization was "African Solutions for African Problems."<sup>71</sup> Following this theme, the drafters included a right of intervention. The drafters of the A.U. Constitutive Act were frustrated with the international community's slow response to the 1994 Rwandan genocide.<sup>72</sup> In future conflicts, leaders did not want to have to wait to get either the consent of the target state or the authorization of the UNSC.<sup>73</sup> The possibility of requiring UNSC authorization was dismissed "out of hand," as African leaders took as given the slow pace of the UNSC and the lack of international focus on African problems.<sup>74</sup> The A.U., born out of the shadow of Rwanda, saw a particular kind of unity, diametrically opposed to OAU principles. Under the new regime, African states would be proactive and seek to solve continent-wide problems.

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<sup>66</sup> Article 4(j) recognizes "[t]he right of Member States to request intervention from the Union in order to restore peace and security." Constitutive Act of the African Union, *supra* note 1, art. 4(j). This is the provision under which all prior A.U. interventions have taken place.

<sup>67</sup> Kindiki, *supra* note 14, at 99.

<sup>68</sup> Kioko, *supra* note 14, at 810.

<sup>69</sup> Amvane, *supra* note 7, at 294.

<sup>70</sup> Kioko, *supra* note 14, at 810.

<sup>71</sup> Amvane, *supra* note 7, at 295.

<sup>72</sup> Kwame Akonor, *Assessing the African Union's Right of Humanitarian Intervention*, 29 CRIM. JUST. ETHICS 157, 158 (2010).

<sup>73</sup> Kioko, *supra* note 14, at 811–12.

<sup>74</sup> *Id.* at 821.



## 2. Article 4(h) Intervention

Article 4(h) shows a commitment of African leaders to move past the shadow of the OAU and Rwanda, and the provision is unique among regional organizations.<sup>75</sup> Article 4(h) recognizes the following as a principle of the AU:

The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.<sup>76</sup>

This provision gives the A.U. the right to intervene forcibly and unilaterally within the territory of a member state in certain “grave” circumstances.<sup>77</sup> In effect, the A.U. has codified a limited right of humanitarian intervention.<sup>78</sup> As noted above, such a forcible intervention likely counts, at least in form, as an enforcement action that requires UNSC authorization under U.N. Charter Article 53.

Despite the U.N. Charter’s seemingly clear prohibition on unauthorized enforcement actions, unauthorized Article 4(h) intervention could be legal. First, as discussed below in Section III, the UNSC has approved prior regional enforcement actions *ex post* without a trace of disapproval, indicating evolving regional custom. Second, the definition of enforcement action may still hinge on consent. If A.U. member states validly consented to Article 4(h), then any intervention is not a use of force that would be prohibited but for UNSC authorization. If there is consent, Chapter VII powers (and thus enforcement actions) are not implicated, and Article 53 is not implicated.<sup>79</sup> This argument runs into serious conceptual difficulties, as shown below in Section IV.

### a) A.U. Interpretations of Article 4(b)

A.U. interpretations of Article 4(h) have been mixed, and do not provide a clear answer to whether the member states consider unauthorized 4(h)

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<sup>75</sup> Amvane, *supra* note 7, at 283.

<sup>76</sup> Constitutive Act of the African Union, *supra* note 1, art. 4(h). A not-yet-ratified 2003 amendment would add: “as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.” African Union, Protocol on Amendments to the Constitutive Act of the African Union, July 11, 2003, <https://perma.cc/KQX5-HCBB>. According to the A.U. website, only 28 member states have ratified the amendments, short of the two-thirds majority needed. *List of Countries which Have Signed, Ratified/Acceded to the Protocol on the Amendments to the Constitutive Act of the African Union*, AFRICAN UNION (Jun. 15, 2017), <https://perma.cc/VH7X-ZP5V>.

<sup>77</sup> Akonor, *supra* note 72, at 157.

<sup>78</sup> Ntombizozuko Dyani-Mhango, *Reflections on the African Union’s Right to Intervene*, 38 BROOK. J. INT’L L. 1, 12 (2012).

<sup>79</sup> See Hathaway et al., *supra* note 15, at 559.

interventions legal. At the drafting of the A.U. Constitutive Act, African leaders thought they did not need UNSC approval for such interventions.<sup>80</sup>

The A.U.'s later-enacted internal protocol for its Peace and Security Council, which established mechanisms for intervention, did not clarify how the UNSC is viewed.<sup>81</sup> One provision recognizes the primacy of the UNSC in the maintenance of international peace and security,<sup>82</sup> while another states that the A.U. "has the primary responsibility for promoting peace, security and stability in Africa."<sup>83</sup> The Protocol often refers to cooperation with the U.N.<sup>84</sup> Further, the Protocol explicitly discusses appealing to the U.N. for funds for peacekeeping operations.<sup>85</sup> Despite all this, the Protocol never actually states that UNSC approval should be sought prior to intervention. While the Protocol does not paint a picture of conflict with the UNSC, it does conspicuously omit any mention of prior authorization for interventions.

The 2005 A.U. Ezulwini Consensus also provides an ambiguous interpretation of the UNSC's role.<sup>86</sup> While the Ezulwini Consensus is primarily an argument for UNSC reform, the document touched on Article 4(h) interventions. The document explicitly states that interventions "should be with the approval of the Security Council," but in the next sentence notes that such approval could be granted "after the fact" if necessary.<sup>87</sup> While this points to a desire on behalf of the A.U. to submit to the normal procedures of the U.N. Charter, it is worth noting that "after the fact" authorization is insufficient by the terms of U.N. Charter Article 53. Further, in the same section, the A.U. declares that the authorization requirement "should not undermine the responsibility of the international community to protect," and that the A.U. should be "empowered to take actions" when the UNSC may not have a "proper appreciation" of "conflict situations."<sup>88</sup> Lastly, the document notes that it is important to "comply scrupulously" with U.N. Charter Article 51 (the right of self-defense) and A.U. Constitutive Act 4(h).<sup>89</sup> There is no mention of U.N. Charter Article 53 or the primacy of the UNSC.

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<sup>80</sup> Kioko, *supra* note 14, at 811–12.

<sup>81</sup> African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, <https://perma.cc/QW34-BZU9>.

<sup>82</sup> *Id.* at art. 17(1).

<sup>83</sup> *Id.* at art. 16(1).

<sup>84</sup> *See, for example, id.* at art. 4(k), art. 13(4), 13(15), 17(1), 17(3).

<sup>85</sup> *Id.* at art. 17(2).

<sup>86</sup> *See* Ezulwini Consensus, *supra* note 9.

<sup>87</sup> *Id.* at § B(i).

<sup>88</sup> *Id.* at § B(i).

<sup>89</sup> *Id.* at § B(ii).

What then is to be made of the Ezulwini Consensus? On the one hand, the document is primarily a request for UNSC reform. The statements about intervention therein could be regarded as no more than either political maneuvering or a statement of what would be true if the UNSC were actually effective. On the other hand, the document is fairly clear that while UNSC authorization “should” be required, the A.U. reserves for itself the right to intervene without UNSC approval. In either case, the A.U. is not submitting fully to the U.N. Charter’s collective security framework.

*b) The Operational System*

The A.U.’s equivocation on the requirement of authorization is indicative of differences between what Professor Monica Hakimi terms the legal system and the operational system.<sup>90</sup> In this paradigm, Article 53’s requirement of prior UNSC authorization is an unworkable but existing legal system.<sup>91</sup> As the baseline legal requirement, it is still good law, and international actors must still make appeals to it.<sup>92</sup> However, in practice, actors revert to an operational system where interventions are undertaken without prior authorization.<sup>93</sup> The presence of both systems allows actors to deviate from rigid legal rules when either state interest or necessity demands, but still keep the legal system to bind future cases.<sup>94</sup> Basically, it becomes an open secret that the legal system is not operative.

The A.U. Constitutive Act thus can act as a gap-filler between the legal and operational systems.<sup>95</sup> The Constitutive Act is legal, not operational, in nature, but its language tends towards a greater acceptance of unauthorized interventions than the U.N. Charter does. Thus, a reasonable interpretation of Article 4(h) should attend to both operational and legal concerns. On the one hand, Article 4(h) likely does not fit neatly within the U.N. Charter framework—the A.U. is more attentive to operational realities. On the other hand, the legal nature of the A.U. treaty means that it should not deviate too far from the balance constructed in the Charter system.

This paradigm seems to track the equivocating language found in the Ezulwini Consensus and the A.U. Protocol. Neither document explicitly allows unauthorized intervention, but both make room for the possibility. As discussed below in Section III, history mirrors this paradigm as well.

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<sup>90</sup> See generally Hakimi, *supra* note 58.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 647.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 648.

<sup>95</sup> See Harrell, *supra* note 7, at 425–26.

### III. PAST INTERVENTIONS

This Section will provide a brief overview of key unauthorized interventions undertaken both by the A.U. and other bodies. While the history is not at the core of the legal issue, it is helpful to understand past interventions to fully flesh out the A.U.'s purported right. This Section will also highlight areas in which the legally robust international security system of the U.N. Charter has failed, leaving it vulnerable to challenges by a divergent operational system. As of yet, however, the string of unauthorized interventions, themselves of varying character, scope, and duration, have not coalesced into a formal legal norm. Indeed, the UNSC's habit of *ex post* authorization of interventions shows that the U.N. Charter system is still operative in some sense. A.U. interventions have thus far existed in a legal grey zone, and clarity as to the legal scope of Article 4(h) is much needed.

#### A. NATO

NATO's intervention in Kosovo is perhaps the most polarizing case of an unauthorized humanitarian intervention. The military action showed a stark divide between the U.N. Charter framework and the operational system. In 1999, despite the perpetration of human rights abuses in Kosovo by Serbian forces, the UNSC was deadlocked by Russia and China, who were wary of western intervention against Serbia.<sup>96</sup> NATO used force without UNSC authorization in order to stop the humanitarian crisis.<sup>97</sup> The literature has generally come to the conclusion that the NATO intervention was illegal.<sup>98</sup> While an attempt was made to try the matter before the ICJ, the challenge failed due to a lack of jurisdiction.<sup>99</sup> However, some commentators have suggested that the international community's general acquiescence to Kosovo and other interventions signal the emergence of new customary international law abrogating the requirement for United Nations Security Council authorization in certain humanitarian circumstances.<sup>100</sup>

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<sup>96</sup> Hathaway et al., *supra* note 15, at 502–03.

<sup>97</sup> Hakimi, *supra* note 58, at 672.

<sup>98</sup> Hathaway et al., *supra* note 15, at 503 (discussing the literature).

<sup>99</sup> Peter H.F. Bekker & Christopher J. Borgen, *World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia*, AM. SOC. INT'L L. INSIGHTS (June 17, 1999), <https://perma.cc/W9KX-6Q6P>.

<sup>100</sup> Ivo H. Daalder, *NATO, the U.N., and the Use of Force*, BROOKINGS INST. (Mar. 1, 1999), <https://perma.cc/5RFT-NBN3>.

## B. ECOWAS

The Economic Community of West African State (ECOWAS) is a sub-regional African organization that pre-dates the A.U. ECOWAS, made up of various West African states, has undertaken interventions in several member countries to support democratic regime change. The past actions of ECOWAS are similar to those undertaken by the A.U. Thus, the interventions by the two organizations can be seen as a continuing pattern, especially since they operate under similar legal frameworks.<sup>101</sup>

The President of Liberia requested assistance from ECOWAS after a 1989 coup and civil war.<sup>102</sup> In response, ECOWAS established the ECOWAS Monitoring Group (ECOMOG) in 1990 to monitor a ceasefire and provide safe conditions for elections.<sup>103</sup> No UNSC authorization was sought or given for the peacekeeping operation.<sup>104</sup> Despite this, the UNSC “commend[ed]” ECOMOG for its peacekeeping efforts in a November 1992 resolution imposing sanctions on Liberia.<sup>105</sup> Further, in 1993, the UNSC established a joint peacekeeping mission with ECOMOG in Liberia.<sup>106</sup>

In 1997, a similar situation occurred in Sierra Leone. Once again, a president requested ECOWAS assistance after a coup.<sup>107</sup> ECOMOG mounted a military campaign in 1998 that successfully returned the ousted president to power.<sup>108</sup> Again, the UNSC several months later commended ECOMOG efforts and established a joint peacekeeping mission.<sup>109</sup>

The ECOWAS interventions show an interplay between the U.N. Charter framework and the operations of regional bodies. Unlike NATO’s Kosovo unilateral intervention, ECOWAS did work alongside the UNSC. Legal experts at the time found it striking that, while *ex post* UNSC authorization is not allowed under the U.N. Charter, it was given without much controversy.<sup>110</sup> The

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<sup>101</sup> See Economic Community of West African States, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, art. 22, 25, Dec. 10, 1999. As discussed below, this legal framework did not actually come into existence until after several interventions had taken place.

<sup>102</sup> Paliwal, *supra* note 19, at 209–10.

<sup>103</sup> *Id.* The creation of ECOMOG was not supported by the then-active ECOWAS treaty framework.

<sup>104</sup> Kioko, *supra* note 14, at 821.

<sup>105</sup> S.C. Res. 788, ¶ 1 (Nov. 19, 1992).

<sup>106</sup> S.C. Res. 866 (Sep. 22, 1993).

<sup>107</sup> Paliwal, *supra* note 19, at 210.

<sup>108</sup> *Id.*

<sup>109</sup> S.C. Res. 1181 (July 13, 1998).

<sup>110</sup> See ICISS, *supra* note 11, at 6.5.

UNSC still showed that it was not ceding complete control over humanitarian interventions to regional actors. The establishment of a joint peacekeeping mission shows that ECOWAS did not intend to work completely outside the U.N. Charter framework, but to complement it. While the U.N. legal system was still effective, the practice of *ex post* UNSC authorization showed that there was operational play in the joints.

## C. African Union

### 1. Burundi

The long conflict in Burundi was a spillover from the Rwandan genocide.<sup>111</sup> Tensions between Hutus and Tutsis in Burundi resulted in the assassination of a Hutu president in 1993 and twelve years of civil war between government forces and Hutu rebel groups.<sup>112</sup> In 2003, the A.U. approved the African Mission in Burundi (AMIB), a peacekeeping operation that oversaw the implementation of ceasefire agreements, provided safety for a transitional government, and provided safe conditions for internally displaced persons and refugees to return home.<sup>113</sup> The intervention was both commended by the UNSC and transformed into the UNSC-authorized U.N. Operation in Burundi in May 2004.<sup>114</sup> The mission concluded in December 2006.<sup>115</sup>

AMIB was the first A.U. initiated and executed peacekeeping mission, and it was undertaken under Article 4(j).<sup>116</sup> Financial constraints loomed large, and American and British funds were required to fully deploy the mission.<sup>117</sup> Still, AMIB was largely successful in fulfilling its mandate.<sup>118</sup>

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<sup>111</sup> Dyani-Mhango, *supra* note 78, at 34.

<sup>112</sup> *Id.*; see also *Political Crisis in Burundi*, COUNCIL ON FOREIGN REL., <https://perma.cc/VMA9-JTXK> (last updated Apr. 10, 2018).

<sup>113</sup> African Union, Communiqué of the Ninety-First Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, ¶ 5, Central Organ/MEC/AMB/Conn. (XCI) (Apr. 2, 2003).

<sup>114</sup> S.C. Res. 1545 (May 21, 2004).

<sup>115</sup> Dyani-Mhango, *supra* note 78, at 36.

<sup>116</sup> *Id.* at 43.

<sup>117</sup> Emma Svensson, *The African Mission in Burundi: Lessons Learned from the African Union's first Peace Operation*, SWEDISH DEFENSE RESEARCH AGENCY, at 13 (Sept. 2008), <https://perma.cc/S5WS-DJVG>.

<sup>118</sup> Dyani-Mhango, *supra* note 78, at 36.

## 2. Darfur

After over a year of fighting in the Darfur region, the Sudanese government signed a ceasefire agreement with rebel groups on April 8, 2004.<sup>119</sup> The agreement called for A.U. monitoring.<sup>120</sup> The A.U. approved an A.U. Observer Mission (AMIS) on May 28, 2004, with a mandate to protect civilians and observe the implementation of the ceasefire agreement.<sup>121</sup> AMIS was undertaken under Article 4(j) and provisions of the ceasefire agreement.<sup>122</sup> The UNSC authorized the mission *ex post* on July 30, 2004.<sup>123</sup>

AMIS only deployed 360 personnel, and the small size proved insufficient.<sup>124</sup> In 2005, the A.U. and UNSC approved AMIS II with a stronger mandate and resources.<sup>125</sup> The mandate expanded to include providing a safe environment for both the delivery of humanitarian aid and the return of internally displaced persons and refugees. However, a lack of A.U. resources precluded AMIS II from fulfilling that mandate.<sup>126</sup>

Thus, in 2007, an A.U./U.N. hybrid operation in Darfur (UNAMID) assumed AMIS' mandate, with the U.N. assuming financial responsibility.<sup>127</sup> The mission is still ongoing.<sup>128</sup>

## 3. Somalia

Somalia collapsed in 1991, and various international efforts have attempted to resolve the ongoing armed conflict between the transitional government (TFG) and various rebel groups.<sup>129</sup> By invitation of the TFG, and under Article 4(j), the A.U. established the African Union Mission in Somalia (AMISOM) on January 19, 2007, to support the TFG and deliver humanitarian aid.<sup>130</sup> The

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<sup>119</sup> *The Crisis in Darfur*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, <https://perma.cc/7B5E-52SG> (last visited April 12, 2018).

<sup>120</sup> *Id.*

<sup>121</sup> *Sudan: Imperatives for Immediate Change*, HUM. RTS. WATCH, § III.A (Jan. 19, 2006), <https://perma.cc/QMN8-C3RQ>.

<sup>122</sup> Dyani-Mhango, *supra* note 78, at 43.

<sup>123</sup> S.C. Res. 1556, ¶ 2 (July 30, 2004).

<sup>124</sup> Dyani-Mhango, *supra* note 78, at 38.

<sup>125</sup> *Sudan: Imperatives for Immediate Change*, *supra* note 121, § III.B.

<sup>126</sup> Dyani-Mhango, *supra* note 78, at 38.

<sup>127</sup> S.C. Res. 1769 (July 31, 2007).

<sup>128</sup> See African Union—United Nations Mission in Darfur, *UNAMID Mandate*, UNAMID, <https://perma.cc/5R5C-CVDJ> (last visited Apr. 22, 2017).

<sup>129</sup> Dyani-Mhango, *supra* note 78, at 40.

<sup>130</sup> *Id.* at 43.

UNSC *ex post* authorized the mission on February 20, 2007.<sup>131</sup> The mandate is periodically re-authorized by the UNSC, and the mission is still ongoing.<sup>132</sup>

#### 4. Comoros

After the 2007 elections in Comoros, the leader of the island of Anjouan refused to step down.<sup>133</sup> The President of Comoros requested support from the A.U. to provide support and security. The A.U. intervened in March 2008 under Article 4(j).<sup>134</sup> With fewer than 2000 soldiers (and no casualties), A.U. forces retook the island of Anjouan in one day.<sup>135</sup> While the intervention was a success, it was of an incredibly small magnitude and was probably undertaken to earn the A.U. a victory despite unfinished missions in Somalia and Darfur.<sup>136</sup> The operation did not garner any UNSC reaction.

#### D. Looking Forward

While the relationship between the UNSC and A.U. is still largely speculative, some commentators have argued that the A.U. has seemingly taken on the primary role in maintaining security in Africa.<sup>137</sup> This may be correct in a limited sense. A basic pattern has emerged: the A.U. (or ECOWAS) responds first, and is then backed up by the U.N. with authorization, money, and logistical support. The pattern further shows that while the A.U. has attempted regional peacekeeping operations, in practice the missions have not been able to fulfill their mandates without U.N. support. It is difficult to conclude that the UNSC has ceded primary responsibility in Africa when it continues to authorize A.U. missions, conduct joint missions with the A.U., and provide financial support to A.U. missions. Other than the token Comoros intervention, the UNSC has been active in supporting A.U. and ECOWAS missions in Africa.

History does not provide definite answers, despite an argument in the literature that ECOWAS and A.U. interventions show an established custom that these bodies may take primary responsibility until UNSC takes responsibility.<sup>138</sup> While the practice seems accepted, it is not clear that the A.U.

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<sup>131</sup> S.C. Res. 1744, ¶ 4 (Feb. 20, 2007).

<sup>132</sup> See African Union Mission in Somalia, *AMISOM Mandate*, AMISOM, <https://perma.cc/8W4L-BGDN> (last visited Apr. 22, 2017).

<sup>133</sup> Amvane, *supra* note 7, at 290–91.

<sup>134</sup> *Id.*

<sup>135</sup> Ahmed Ali Amir Moroni, *African Union Troops Quell Comoros Rebellion*, *GUARDIAN* (Mar. 25, 2008), <https://perma.cc/42XV-ZQJR>.

<sup>136</sup> *Id.*

<sup>137</sup> Dyani-Mhango, *supra* note 78, at 24; Paliwal, *supra* note 19, at 215.

<sup>138</sup> See Paliwal, *supra* note 19, at 220.



and UNSC have been acting under a changed legal system. Indeed, the A.U. seems to be acting in a legal gray zone. One commentator has called these interventions “actions under risk.”<sup>139</sup> That is, the legality of the intervention is not known until after the fact, when the UNSC decides to authorize, or not authorize, the action. While such risk does not do away with the U.N. Charter legal system, it does illuminate some unspoken flexibility in facially rigid rules.

Further, these interventions show that the operational system does not line up with the U.N. Charter’s assumptive reliance on UNSC action. The UNSC has failed to resolve important humanitarian crises in Africa. Nor has the UNSC enforced Article 53’s requirement for prior authorization. It thus appears that an alternative regional peacekeeping mechanism can coexist with the U.N. Charter framework, despite the U.N. Charter’s prohibition.

The A.U. has also clearly begun to flex its muscle by undertaking interventions both large (Darfur, Sudan) and small (Comoros). *Ex post* UNSC authorization does seem to be an accepted practice. But the boundaries of acceptable A.U. practice have not been observed. First, the A.U. simply does not yet have the resources to undertake a large-scale intervention on its own. Second, the A.U. has never exercised 4(h) intervention powers. Third, there has so far been little disagreement between the A.U. and the UNSC. Fourth, while the UNSC has not been effective in maintaining international security in Africa, neither has the A.U. Given these facts, it is perhaps the case that neither the UNSC nor the A.U. can claim a primary responsibility for peace and security in the region. But if any of these facts change, history suggests that a new operational regime may be formed.

The next two Sections discuss possible resolutions of the legal conflict in the light of a change in the operational regime. Section IV considers and ultimately dismisses the argument that the A.U.’s treaty-based consent can fully displace the U.N. Charter’s rule against unauthorized interventions. The history of African interventions supports this reading, as the UNSC has not completely abdicated responsibility on the continent. Section V posits that unauthorized A.U. interventions could be legal only if they meet the requirements of collective self-defense. Under this reading of Article 4(h), the A.U. and the UNSC share responsibility, as has been the case in most interventions thus far. Further, the clarity that the self-defense rule brings will resolve the unacceptable legal ambiguity of “actions under risk” undertaken in recent years.

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<sup>139</sup> KUWALI, THE RESPONSIBILITY TO PROTECT, *supra* note 23, at 155.

#### IV. CONSENT FAILS AS AN ALTERNATIVE TO ARTICLE 53

The text of the U.N. Charter suggests that the A.U. faces two significant restrictions: the Article 2(4) prohibition on the use of force, and the Article 53 prohibition on unauthorized regional enforcement action. Although the UNSC has itself not scrupulously upheld Article 53's prohibition in African interventions, it has not abandoned it. *Ex post* authorizations are common. Further, given the discussion in Section II, humanitarian interventions are likely enforcement actions insofar as they are coercive military actions that are normally the sole domain of the UNSC. Thus, Article 53 still looms large.

One potential workaround to Article 53, as argued by Professor Oona Hathaway, is that A.U. interventions are based on consent.<sup>140</sup> Under this argument, consent means that Article 2(4) is never implicated. As a consequence, A.U. interventions are neither coercive nor would normally require UNSC authorization. They would then not be enforcement actions subject to Article 53.<sup>141</sup> The A.U. can perhaps wield consent to not only circumvent Article 2(4) but also Article 53.

Two key questions emerge, and will be considered in turn. First, does Article 4(h) represent valid *ex ante* consent to work around Article 2(4)? Second, does Article 4(h) represent valid consent in light of the fact that it is a regional organization, and regional organizations are subject to special rules under Article 53? While the answer to the first question is likely yes, I argue that the answer to the second question is no. What counts in this case is not simply that A.U. member states gave consent, but to *whom* they gave their consent.

##### A. States Probably Can Contract Around Article 2(4)

For many years pre-Charter, states would routinely enter into “treaties of guarantee.”<sup>142</sup> Under these arrangements, powerful states would act as protectors and guarantors of weaker states. If the regime of a weaker state was deposed or threatened, the guarantor state could intervene on its behalf. Such interventions were not seen as violating the political integrity of a state; indeed, they were consented to by the sovereign of the target state.<sup>143</sup> This situation is tracked in Article 2(4), which implicitly allows for the use of military action by consent.

But what if the sovereign of the “guaranteed” state decides to withdraw its consent, or even merely not to renew it at the time of intervention? Presumably,

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<sup>140</sup> See Hathaway et al., *supra* note 15, at 558–59.

<sup>141</sup> See, for example, Hathaway et al., *supra* note 15, at 559; Wippman, *supra* note 16, at 654.

<sup>142</sup> Wippman, *supra* note 16, at 618; Harrell, *supra* note 7, at 426.

<sup>143</sup> Harrell, *supra* note 7, at 427.

under an Article 4(h) intervention, that is exactly what would happen. Otherwise, the A.U. would intervene instead by invitation, under Article 4(j).

By forcing states to bind themselves, treaty-based consent raises fundamental questions of state sovereignty. Thus, the issue can be analyzed under both traditional and R2P theories of sovereignty. Under the traditional view, treaty-based consent is a transfer of some of the bundle of rights of sovereignty. Under R2P, such a treaty is a recognition of the responsibilities of sovereignty and the creation of a mechanism to ensure those responsibilities are upheld. Thus, the treaty would be sovereignty-enhancing. Both of these possibilities will be considered in turn.

### 1. Transfer of Sovereignty

Professor David Wippman describes three possible inquiries under a classical approach. Under the baseline “freedom to contract” model, states can restrict their own sovereignty in more or less whatever way they please.<sup>144</sup> This position is supported by pre-U.N. Charter case law. In *Case of the S.S. “Wimbledon,”* the Permanent Court of International Justice ruled that Germany could validly sign away its right to neutrality under the Treaty of Versailles.<sup>145</sup> Indeed, a state can even agree to be annexed by another state, thus extinguishing its sovereignty.<sup>146</sup> If states have been able to contract away many or even all of their most basic rights, it is possible that use of force protections could also be given away. Under the freedom to contract model, the consent given in Article 4(h) would mean no intervention is coercive.<sup>147</sup> Article 2(4) would never be implicated. However, this assumptive model runs into difficulty whenever *jus cogens* such as Article 2(4) is involved, given the norm’s non-derogable nature.

A competing answer is found under the *jus cogens* approach, which prohibits the signing away of certain rights.<sup>148</sup> The whole point of *jus cogens* is that there are certain rights that states cannot derogate.<sup>149</sup> Thus, some argue, as soon as a state withdraws consent to an intervention, coercion is implicated, and the purported treaty right is an unacceptable derogation.<sup>150</sup> Others argue that the consent cannot be so easily withdrawn.<sup>151</sup>

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<sup>144</sup> Wippman, *supra* note 16, at 610.

<sup>145</sup> *Id.* at 616.

<sup>146</sup> *Id.* at 616–17.

<sup>147</sup> See Harrell, *supra* note 7, at 430.

<sup>148</sup> Wippman, *supra* note 16, at 610–11.

<sup>149</sup> *Id.* at 618.

<sup>150</sup> See Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L.J. 337, 366 (2011).

<sup>151</sup> Harrell, *supra* note 7, at 429 nn. 68–69 (noting academic support for treaty-based consent).

This debate centers on *when* consent can be withdrawn. If consent is unambiguously valid at the time of intervention, there is no conflict. Intervention pursuant to contemporaneous consent is common, expected, and does not violate the prohibition on the use of force.<sup>152</sup> If consent is validly withdrawn, then the intervention would violate Article 2(4).<sup>153</sup> But neither the *jus cogens* model or the freedom to contract model illuminate the conditions under which consent can or cannot be validly withdrawn.

Does advance consent bind states irrevocably, or does a lack of contemporaneous consent simply render the treaty an unacceptable derogation of *jus cogens*? A different way to ask the question is: should the incumbent government or a prior government be prioritized? Either the prior government binds, or is bound by, the incumbent government. In both cases, state sovereignty is in some sense limited.<sup>154</sup>

Professor Wippman proposes a third path, the “concurrent consent” model. Under this model, a state may consent to future intervention as long as that consent may later be lawfully revoked.<sup>155</sup> If the consent meets that condition, it is valid until it is lawfully and affirmatively revoked.<sup>156</sup> According to this theory, a state could revoke consent under the terms of the treaty itself, or perhaps if conditions materially change in a way that otherwise undermines the original consent.<sup>157</sup> For example, if the state was in a civil war, say, all major factions would need to agree to revoke consent.<sup>158</sup> This model thus splits power between prior and incumbent governments: prior consent is harder to give and harder to revoke.

Under the concurrent consent model, Article 4(h) is likely a valid limitation on sovereignty. The consent may be lawfully revoked by withdrawing from the A.U., although such an action requires one year’s notice.<sup>159</sup> Nothing in the Vienna Convention suggests that treaty-based consent must be able to be revoked instantly.<sup>160</sup> Further, a state where the A.U. is contemplating

<sup>152</sup> Wippman, *supra* note 16, at 620–22.

<sup>153</sup> *See generally* Armed Activities on the Territory of the Congo, *supra* note 16. In this case, Ugandan troops entered the Democratic Republic of the Congo on invitation. Later, the invitation was revoked, but Ugandan troops remained. Uganda thus violated the prohibition on the use of force.

<sup>154</sup> Wippman, *supra* note 16, at 623.

<sup>155</sup> *Id.* at 611.

<sup>156</sup> *Id.* at 631; *see also* Harrell, *supra* note 7, at 430.

<sup>157</sup> Wippman, *supra* note 16, at 647. Under the Vienna Convention, a treaty may contain an implicit right of denunciation. Vienna Convention on the Law of Treaties, *supra* note 15, art. 56.

<sup>158</sup> Wippman, *supra* note 16, at 628.

<sup>159</sup> Constitutive Act of the African Union, *supra* note 1, at art. 31.

<sup>160</sup> Hathaway et al., *supra* note 15, at 560–62.

intervention would be free to vote in the Assembly and speak out against such an action. A balance is seemingly struck between the powers of a prior government and the incumbent government. Thus, consenting in advance through Article 4(h) is likely a valid transfer of sovereignty.<sup>161</sup>

## 2. Responsibility to Protect (R2P)

The R2P theory of sovereignty offers another path to validate the consent given in Article 4(h). Under the R2P doctrine, sovereignty is both a bundle of rights and a duty to protect citizens.<sup>162</sup> The A.U. Constitutive Act embraces the spirit of R2P, even though it predates the introduction of R2P as an enumerated doctrine.<sup>163</sup> Under R2P theory, Article 4(h) is not a transfer or limitation of sovereignty. The right of intervention allows the A.U. to help states with the burdens of sovereignty, and it is thus sovereignty-enhancing.<sup>164</sup> Of course, member states still bound themselves to an *interpretation* of sovereignty, which may functionally still be a limitation. An interesting unresolved question beyond the scope of this Comment is whether, under R2P, a state committing human rights abuses would lose sovereignty to the point of losing its right to revoke its consent.<sup>165</sup>

Thus, under the R2P model, Article 4(h) successfully avoids the prohibition on the use of force. Intervention is not coercive force but merely a reinforcement of sovereignty. Just as under the concurrent consent model, there is still an entrustment of sovereignty to the A.U. Under traditional notions of sovereignty, this is of the form of a limit or transfer. Under R2P, Article 4(h) is no such thing, but it does leave sovereign responsibility in the hands of the A.U. Thus, it becomes necessary to ask whether that entrustment of sovereignty—crucially, to a regional organization—is valid under the U.N. Charter.

## B. States Cannot Contract Around Article 53

The problem with Article 4(h) is not that it entrusts sovereignty to another entity *per se*; the problem is *to whom* sovereignty is entrusted. Here, form is important: the non-derogation principle of Article 103 limits treaty-based interventions only to the extent that they do not conflict with the U.N.

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<sup>161</sup> See also Harrell, *supra* note 7, at 429–31.

<sup>162</sup> Hathaway et al., *supra* note 15, at 540.

<sup>163</sup> Kuwali, *End of Humanitarian Intervention*, *supra* note 33, at 47.

<sup>164</sup> Hathaway et al., *supra* note 15, at 540; KUWALI, THE RESPONSIBILITY TO PROTECT, *supra* note 23, at 87–88.

<sup>165</sup> See Hathaway et al., *supra* note 15, at 563; Lieblich, *supra* note 150, at 372–73.

Charter.<sup>166</sup> Even if the consent is valid in an abstract sense, the chosen mechanism cannot conflict with the U.N. Charter.

Article 4(h) intervention does not comply with the formal requirements of Chapter VIII of the U.N. Charter: it is not a pacific settlement of disputes allowed under Article 52, and it is not authorized in advance as required under Article 53. Even though the UNSC has not upheld the advance authorization requirement, no custom has solidified. As the history of A.U. interventions shows, unauthorized A.U. intervention is action under risk: the legality of the intervention is not known until the UNSC either authorizes or condemns the action.<sup>167</sup> In other words, unauthorized A.U. intervention does not comply with the U.N. Charter system.

Valid consent of member states does not change the matter. While states can entrust or transfer part of their sovereignty to the A.U., that consent cannot change the relationship between the A.U. and the UNSC, which is regulated by the non-derogable U.N. Charter. Consent changes the legal rights of states, but not of regional organizations. As discussed in Section II, the U.N. Charter collective security framework explicitly defines a limited role for regional organizations. Such bodies are meant to strengthen the U.N. Charter system by promoting pacific settlement of disputes and assisting the UNSC. They cannot disrupt that balance by becoming an alternative authority for enforcement actions. The A.U. cannot gain rights at the expense of the UNSC simply because certain states so desire—that is exactly what Article 103 prohibits.<sup>168</sup> Insofar as regional organizations actually do gain such power in the operational system, it is in violation of the legal system. The A.U. Constitutive Act, which spans the gap between that operational system and the U.N. legal framework, cannot be read so as to violate the latter.

Thus, while states can limit or entrust their sovereignty without violating Article 2(4) (and thus Article 103), they cannot do so in a manner that enhances the rights of regional bodies in violation of Chapter VIII of the U.N. Charter. States do not have that right. The non-derogation principle dictates that, no matter what the A.U. Constitutive Act states, the A.U. still must follow Article 53.<sup>169</sup>

This does create an odd situation where states could conceivably agree to intervention by other states, but not by regional bodies. In the modern age, this seems anomalous. But it is the compromise struck in the U.N. Charter system.

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<sup>166</sup> See Julie Dube Gagnon, *ECOWAS's Right to Intervene in Cote d'Ivoire to Install Alassane Ouattara as President-Elect*, 3 NOTRE DAME J. INT'L & COMP. L. 51, 68 (2013).

<sup>167</sup> KUWALI, THE RESPONSIBILITY TO PROTECT, *supra* note 23, at 155.

<sup>168</sup> Amvane, *supra* note 6, at 291.

<sup>169</sup> See *id.* at 283, 291; Lieblich, *supra* note 150, at 371–72.

The suppression of regional powers in favor of the UNSC is a key feature of the U.N. collective security framework. However, collective self-defense is not prohibited. The following Section examines whether, in light of an ineffective UNSC, Article 51 could cover some 4(h) interventions.

## V. A.U. INTERVENTION AS COLLECTIVE SELF-DEFENSE

The above Section makes clear that consent alone cannot give the A.U. the power to intervene in contravention of Article 53. However, consent combined with the Article 51 right of collective self-defense may allow the A.U. to intervene under Article 4(h) in some circumstances. This Section will first look at the theoretical support for this reading of Article 51 and then show that the requirements of self-defense align with many of the interventions that the A.U. could take under Article 4(h).

### A. The Context of the U.N. Charter System Supports a Broad Reading of Article 51

While the right to self-defense is protected in the U.N. Charter, it is still subordinate to the powers of the UNSC. By the terms of Article 51, UNSC resolutions trump the right to self-defense. But, if the UNSC does not act, self-defense rights are unimpaired. This stands in stark contrast to other parts of the Charter framework. Neither the prohibition on the use of force in Article 2(4) nor the limited role for regional organizations in Chapter VIII depend on whether the UNSC has seized itself of a matter. As a result, the ineffectiveness of the UNSC places great pressure on Article 51.<sup>170</sup> Because the UNSC is so strong in the Charter system, and self-help rights so weak, self-defense is the only real legal alternative in case of an unhelpful or failed UNSC.<sup>171</sup>

This unique position of Article 51 in the U.N. collective security framework offers support for a broad reading. While the scope of the right of self-defense in the abstract is controversial, its context in the U.N. Charter is illuminating. The U.N. Charter provides that the UNSC is the primary enforcer of international peace and security, but if it does not undertake an enforcement action (or until it does), self-defense is the only other enforcement possibility. Thus, as several commentators argue, the scope of the right of self-defense

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<sup>170</sup> Harrell, *supra* note 7, at 421.

<sup>171</sup> Meyer, *supra* note 40, at 392–93 (arguing that in case of UNSC inaction, self-defense acts as both as security insurance and as a deterrent to aggression).

depends on whether the UNSC can adequately enforce collective security.<sup>172</sup> If the UNSC is ineffective, the right of self-defense should be read broadly in order to maintain the collective security system the U.N. Charter aspires to maintain.<sup>173</sup> And given its structurally-induced paralysis, the UNSC has indeed failed to maintain international peace and security.<sup>174</sup> Thus, Article 51 should be interpreted broadly.

If this contextual view of Article 51 is accepted, the right of self-defense can be viewed as broadly as needed to achieve the U.N.'s purposes despite UNSC failure. Professor Ruth Wedgwood writes:

The United Nations Charter is appropriately read, even now, as an attempt to overcome the failures of Woodrow Wilson's League of Nations and its covenant of inaction. The moniker of the United Nations stemmed from the Allies' wartime promise against making any separate peace with fascism and a contract to take timely action against aberrant state behavior that endangers human security. In a teleological understanding of the Charter, strengthened by commitments to human rights and democracy, defensive force may be necessary to counter the unpredictable violence of state and nonstate actors. This should inform the reading of Article 51 as much as the scope of Chapter VII.<sup>175</sup>

This "teleological understanding" has an attractive property: it complements but does not necessarily usurp the UNSC's power. If the UNSC is ineffective, self-defense can take its place in certain circumstances. If the UNSC becomes effective, it can become seized of particular matters and, per the text of Article 51, trump whatever self-defense claims have been made.<sup>176</sup> Because of this flexibility, Article 51 thus is a uniquely appropriate provision in which to reconcile a differing legal and operational collective security system.

This Comment does not attempt to define the boundaries of this teleological interpretation of Article 51. It is clear that such an interpretive move cannot extend Article 51 indefinitely. After all, Article 51 must be balanced with not only the powers of the UNSC but also the prohibition on the use of force. Thus, there must be some substantive limit to Article 51. Despite the abstract uncertainty, the contextual interpretation of Article 51 can still be applied in certain circumstances. As Professor Wedgwood and others note, if the UNSC

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<sup>172</sup> See Delahunty, *supra* note 36, at 880. See also Glennon, *supra* note 36; Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 584 (2003).

<sup>173</sup> Delahunty, *supra* note 36, at 880; Glennon, *supra* note 36, at 540.

<sup>174</sup> Delahunty, *supra* note 36, at 880. As discussed, the failure of the UNSC to timely intervene in Rwanda was a trigger for the creation of the A.U. itself.

<sup>175</sup> Wedgwood, *supra* note 172, at 584.

<sup>176</sup> U.N. Charter art. 51 ("Nothing . . . shall impair the inherent right [of self-defense] . . . until the Security Council has taken measures necessary to maintain international peace and security.").



cannot maintain international peace and security by protecting human rights, then Article 51 should be interpreted to fill that gap.

While states are not free to empower a regional body to use force generally, they can empower the body to exercise collective self-defense under Article 53. Under a collective self-defense reading, the A.U. is not empowered generally to take action to maintain peace without prior authorization. Rather, A.U. member states are exercising collective self-defense, which does not require prior authorization per Article 51. This reading does not stretch the text of the A.U. Constitutive Act too far. The A.U. is already explicitly involved in collective self-defense: one of the principles of the body is the “establishment of a common defence policy for the African Continent.”<sup>177</sup>

Interpreting Article 4(h) as a collective self-defense provision is appropriate given the context of Article 51. When the UNSC is ineffective, self-defense rights must pick up the slack in order to maintain the balance between nonuse of force and international peace and security. The self-defense reading also addresses several other issues discussed above.

First, self-defense interventions are not legally gray actions under risk. Their legality is determinate regardless of whether the UNSC eventually approves the intervention. Indeed, the benefit of self-defense is that its legality is determined by objective criteria independent of UNSC politics.

Second, self-defense interventions bridge the gap between the legal and operational systems. Interventions undertaken in self-defense reflect an operational reality—the inefficacy of the UNSC. However, they also fit within the legal system by not usurping the body’s powers. The legal system is preserved, even while the operational system remains flexible.

## B. Article 4(h) Interventions Can Be Classified as Collective Self-Defense

Article 4(h) interventions can only reasonably be undertaken in self-defense if they are within the right’s logical limits. First, any intervention taken in collective self-defense would have to be in an A.U. member state, but this is the case under Article 4(h). Second, Article 51 makes clear that if and when the UNSC gets involved, their decisions must be obeyed.<sup>178</sup> This is not contested by the A.U. through their interpretations of Article 4(h), as discussed in Section II.

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<sup>177</sup> Constitutive Act of the African Union, *supra* note 1, at art. 4(d).

<sup>178</sup> U.N. Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

Third, the classic requirements of necessity and proportionality would need to be met.<sup>179</sup>

### 1. Necessity

Under the classic *Caroline* formulation, any resort to self-defense must be necessary; that is, the need for the action must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>180</sup> In other words, either an armed attack or an imminent threat of an armed attack is needed.<sup>181</sup> While Article 51 only notes that a right of self-defense is present after the *occurrence* of an armed attack, both the text of the provision and its *travaux préparatoires* speak of preserving the right to self-defense, not limiting it.<sup>182</sup> Thus, at most only an imminent threat of an armed attack is seen as a necessary condition to activating Article 51.<sup>183</sup>

Some commentators and states (including the U.S.) have at times argued that the right of self-defense extends to preventive attacks that occur before a real threat poses an imminent danger.<sup>184</sup> Practical limits on the A.U.’s capabilities, discussed below, make it unlikely that the regional body would target a threat that is not imminent.

Theoretically, a threat to collective African security could be found by the “grave circumstances” of human rights abuses needed to trigger Article 4(h). Under an R2P framework, the argument is easy. Human rights violations are violations of sovereignty in the same manner that external aggression is. Thus, the A.U. could intervene to protect the sovereignty of one of its member states.

Under a traditional sovereignty framework, the analysis is not necessarily so clean: in a 4(h) intervention, the A.U. would be “defending” against an attack on the sovereignty of a state that does not deem itself under attack. But, as discussed in Section IV, states can limit their ability to revoke treaty-based consent in favor of a regional body. The limit is that they cannot do it in a way that expands the power of the A.U. past the acceptable bounds in the U.N. Charter framework. There, the concern was that the A.U. would overstep its Chapter VIII powers. However, the A.U. can be given expanded powers by member states, as long as those powers fit within Article 51 collective self-

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<sup>179</sup> Reinold, *supra* note 41, at 247.

<sup>180</sup> Moore, *supra* note 41, at 412.

<sup>181</sup> Reinold, *supra* note 41, at 247.

<sup>182</sup> *Id.*; see U.N. Charter art. 51 (“Nothing . . . shall *impair* the *inherent* right of . . . self-defense”) (emphasis added).

<sup>183</sup> See Reinold, *supra* note 41, at 247; Harrell, *supra* note 7, at 421; Meyer, *supra* note 40, at 396.

<sup>184</sup> See Glennon, *supra* note 36, at 540 (arguing that the classical requirement of an imminent threat is dead letter); Reinold, *supra* note 41, at 247.

defense rights. The A.U. was transferred some sovereignty in the form of intervention powers. Thus, the A.U. can defend those sovereign rights for which it has now shared responsibility.

Further, A.U. states voting for intervention could probably show some spillover effect into other states stemming from human rights abuses.<sup>185</sup> When human rights abuses spill over into neighboring countries, there is a clear threat to collective African security. Indeed, as discussed below, the A.U. will likely not approve a costly 4(h) intervention unless there is a significant spillover effect.

## 2. Proportionality

The other classic requirement of self-defense is proportionality: the resort to the right of self-defense must be “proportionate to the unlawful aggression that gave rise to the right.”<sup>186</sup> The requirement is not well-defined.<sup>187</sup> Despite its broad formulation, the proportionality requirement suggests that means should be calibrated to their ends.<sup>188</sup> In theory, Article 4(h) interventions can meet this requirement. A.U. member states agreed that the regional intervention was the correct means to accomplish the end, stopping human rights abuses. As long as the requirements of Article 4(h) and procedural mechanisms of the Peace and Security Protocol are met, military action undertaken to stop those abuses is proportional solely on the basis that it reflects the agreement of the member states.

In practice, the A.U. will likely not overstep the bounds of proportionality. The two major interventions the A.U. has undertaken, in Darfur and Somalia, have still not fulfilled their mandate. Certainly neither of them overreached in the time period before the UNSC authorized the missions. And while there is always the danger of using collective self-defense as pretext, the functional limitations of the A.U. suggest that this concern may be small. These practical realities are discussed in depth below.

Despite these natural practical limitations, the A.U. in theory must ensure that any Article 4(h) intervention is both necessary and proportional to be legal under the U.N. Charter system. If these requirements are met, A.U. interventions fit well into the Charter collective security framework.

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<sup>185</sup> Recall, the Burundi conflict in which the A.U. intervened was itself a spillover from the Rwandan genocide. Dyani-Mhango, *supra* note 78, at 34–36.

<sup>186</sup> Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 391 (1993).

<sup>187</sup> Reinold, *supra* note 41, at 248.

<sup>188</sup> Glennon, *supra* note 36, at 540.

## C. Practical Realities Coincide with Self-Defense Requirements

The A.U.'s attempts to define and actualize Article 4(h) capabilities lag behind the broad scope of the textual right. There is currently no doctrine on when to intervene.<sup>189</sup>

The procedure to invoke Article 4(h) is straightforward. The Peace and Security Council, which is governed by the aforementioned Protocol, investigates and makes recommendations to the Assembly of the African Union on whether to intervene.<sup>190</sup> The Assembly of the African Union (the supreme organ of the A.U.) is the final decision-making body on intervention decisions.<sup>191</sup> The Assembly is composed of the heads of state of member states, and a two-thirds majority is needed to pass.<sup>192</sup>

The African Standby Force has also been created to implement Article 4(h).<sup>193</sup> The African Standby Force is an A.U. peacekeeping force with five regionally based brigades and one central brigade, but most brigades are far from their troop targets.<sup>194</sup>

The A.U. is simply not capable of carrying out far-reaching interventions. While the resource constraints and requirement of broad African consensus are normally considered impediments to a properly functioning A.U., these obstacles likely ensure that any Article 4(h) intervention undertaken will comply with the requirements of self-defense.

### 1. Financial Constraints

Perhaps the greatest constraint on the A.U. is a lack of funding.<sup>195</sup> The financial constraints of the A.U. have caused at least one commentator to claim that the legality issue is moot because the A.U. will always need UNSC funding (and thus approval).<sup>196</sup> While this may be true for past cases, it may not be in the future. The A.U. has already received hundreds of millions of dollars from the

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<sup>189</sup> Akonor, *supra* note 72, at 164–65. Note, however, that the crimes that constitute “grave circumstances” under Article 4(h) are themselves defined by the Rome Statute. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002). See Dyani-Mhango, *supra* note 78, at 13.

<sup>190</sup> Kioko, *supra* note 14, at 822.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Akonor, *supra* note 72, at 163.

<sup>194</sup> *Id.* at 163–64.

<sup>195</sup> See Dyani-Mhango, *supra* note 78, at 46; J. Emeka Wokoro, *Towards a Model for African Humanitarian Intervention*, 6 REGENT J. INT'L L. 1, 2–3 (2008).

<sup>196</sup> See Kioko, *supra* note 14, at 822.

US and China, and that trend may continue.<sup>197</sup> But if either African member states or great powers are willing to contribute large sums of money to stop human rights abuses, those human rights abuses likely have a direct implication for regional security, satisfying the “threat” requirement. Furthermore, money constraints point towards the notion that costly interventions will not be undertaken if they are not necessary, and that interventions will only be funded proportionately to the threat.

## 2. Lack of Will and National Interests

The grand aspirations of Article 4(h) aside, the A.U. is an unreliable enforcer of human rights: the body has distanced itself from the ICC, and it has dragged its feet on human rights abuses occurring in Darfur.<sup>198</sup> Indeed, one commentator suggests that the only reason Sudan agreed to A.U. peacekeepers in Darfur was because of their inability to actually keep peace.<sup>199</sup> As a general matter, it is probably true that humanitarian interventions, wherever in the world they occur, are dictated by national interests.<sup>200</sup> This realist conception does not directly lead to the conclusion that only interventions meeting classic self-defense requirements will be undertaken. National interests can lead to all kinds of illegal uses of force. In the case of the A.U., national interest likely leads to a preference for inaction over action.

In the A.U., national interests mean maintaining the status quo.<sup>201</sup> It is possible that the desire to maintain the status quo will only lead to “cosmetic interventions;” that is, interventions like the one in Comoros that look good, cost little, and achieve almost nothing.<sup>202</sup> And, as much as the A.U. has aspired on paper to move past the shadow of the head of states’ “club” that was the OAU, member states are still loathe to criticize each other.<sup>203</sup> Rather, as history shows, they are willing to intervene against an unconstitutional government but not much else.<sup>204</sup> While this restraint may abet human rights abuses on the continent, it also limits the possibility that unnecessary or far-reaching interventions will be undertaken by the body.

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<sup>197</sup> See, for example, Harrell, *supra* note 7, at 418; Albert, *supra* note 7.

<sup>198</sup> Wokoro, *supra* note 195, at 21.

<sup>199</sup> *Id.* at 22.

<sup>200</sup> See *id.* at 15. Wokoro also argues that the lack of will stopped the UNSC from acting quickly in Rwanda, *id.* at 14, and hampered US efforts in Somalia, *id.* at 16–17.

<sup>201</sup> Akonor, *supra* note 72, at 158.

<sup>202</sup> See *id.*

<sup>203</sup> Dyani-Mhango, *supra* note 78, at 30.

<sup>204</sup> *Id.* at 29.

If an Article 4(h) intervention does occur, it would represent progress in the A.U. over the current situation. But the national interest incentives still apply. We can expect that African leaders would be wary of unleashing a humanitarian intervention on a fellow leader unless the crimes were severe. Indeed, it is difficult to imagine the A.U. authorizing a forcible intervention against a fellow member state without some real threat to the status quo on the continent. This suggests that the necessity requirement of self-defense would likely be met in any Article 4(h) intervention.

### 3. Requirement of Broad Consensus

Lawful Article 4(h) intervention requires the approval of two-thirds of A.U. member states. Further, the intervention would need to escape condemnation by the UNSC. The UNSC could authorize the mission, meaning that all of the permanent members of the UNSC support it. Alternatively, the A.U. could garner the support of one permanent member to block a resolution condemning the intervention. Thus, the intervention will have to seem reasonable to at least one permanent member. Further, for any large intervention, either the UNSC or a powerful nation will likely have to contribute cash and resources to the mission. In sum, an Article 4(h) intervention will need relatively broad support from African nations and world powers. If an intervention can find broad support among the diverse African nations, it can likely find support at the UNSC (or at the very least escape the UNSC's condemnation).<sup>205</sup>

Further, if two-thirds of African states vote for an intervention, it is exceedingly likely that the intervention truly is necessary, proportionate, and in response to a threat to collective self-defense. For the reasons discussed above, many nations are likely to oppose an intervention that is not reasonably bounded and necessary for peace. The voting requirement only increases that probability. Even if a few nations have ulterior motives to intervene, the vast majority of states will likely not. In this manner, the collective decision-making mechanism of the A.U. removes some of the hazards associated with unilateral intervention.

## VI. CONCLUSION

The legal status of an unauthorized Article 4(h) intervention clearly exists in a gray zone on the margins of the U.N. collective security framework. While the U.N. Charter lays out a robust system balanced among the prohibition on the use of force, the right of self-defense, and the powers of the UNSC, it does not contemplate fully the possibility of member states consenting to an

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<sup>205</sup> Kuwali, *End of Humanitarian Intervention*, *supra* note 33.

alternative system. Indeed, fully independent alternative regional security frameworks are prohibited. The prohibitions in Chapter VIII of the U.N. Charter mostly trump the advance consent used to validate the A.U.'s right of intervention. While states can likely consent to intervention in advance, they cannot enlarge the powers of a regional body outside the bounds delimited in the U.N. Charter.

Collective self-defense under Article 51 offers an alternative justification for Article 4(h) interventions. Because of the failure of the UNSC in Africa, and because of the key role self-defense plays in the U.N. Charter framework, it is justified to interpret Article 51 in a manner that validates at least some unauthorized A.U. interventions. The requirements of proportionality and necessity will still need to be met in order for an unauthorized Article 4(h) intervention to be legally classified as an act of collective self-defense. However, practical shortages of money and will, as well as structural features of the A.U., make it so that any Article 4(h) intervention will be limited in scope and thus likely meet the requirements for the use of force in self-defense.

The argument remains largely theoretical. Facts on the ground will shape the relationship between the A.U. and the UNSC for years to come. If state practice continues to evolve, it may be that custom emerges, delimiting the scope of regional use of force. The practical limits of A.U. power will shape what interventions, if any, are undertaken in the future. If the A.U. is able to break free of those limitations, the capability to intervene under Article 4(h) may far exceed what is allowed under collective self-defense.

If African nations continue to grow in size and influence, the world continues to warm to the idea of humanitarian intervention, and the UNSC continues to be mired in vetoes—then the scope of A.U. intervention rights may become significant for the maintenance of peace and security in Africa.