

# Re-assessing the (Continued) Need for UN Security Council Authorisation of Regional Enforcement Action: The African Union Twenty Years On

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## Abstract

This article examines the broad and varying spectrum of literature covering questions concerning the necessity of the United Nations Security Council's authorisation of regional enforcement action. It has been well documented by now that the UNSC may, in fact, authorise the use of force (regional enforcement action) by regional organisations under Article 53 of the UN Charter. At the same time, some regional organisations, most notably the African Union, have developed their own legal regimes governing the use of force. The African Union's constitutive instruments provide for the unilateral use of force without the need for UNSC authorisation. Even so, after twenty years it has yet to rely on its security framework for any unilateral use of force. This article examines these developments within the AU context and questions whether, scholarship and practice in mind, UNSC authorisation of regional enforcement action remains a requirement.

**Keywords:** regional enforcement action; UN Security Council authorisation; use of force; collective security; African Union; UN Charter; international peace and security

## Introduction\*

Under Article 53(1) of the United Nations Charter (UN Charter), the United Nations Security Council (UNSC) may authorise the use of force (enforcement action) by regional organisations. The notion of authorisation of enforcement action is construed within the broader context of the UNSC's maintenance of international peace and security, in line with the UN Charter's system of collective security. On the same level, the UN Charter also limits the use of force: to the extent that it is prohibited under Article 2(4) and regulated in Chapters VII and VIII. Article 53(1) serves as an amalgamation of prohibition and regulation: it regulates authorisation—by the UNSC to regional organisations and prohibits enforcement action without such authorisation.<sup>1</sup>

In the African context, the development of regional organisations' security frameworks suggesting instances of unilateral use of force rightfully invokes uncertainty whether Article 53(1) UNSC authorisation remains a requirement. These uncertainties are more directly placed with organisational developments within the African Union (AU). Since its transformation from the Organisation of African Unity (OAU), its constitutive instruments and security framework have developed significantly, albeit providing for limited circumstances under which force may be used against its member states without UNSC authorisation.

This article examines more recent developments and interpretations of the AU's right of intervention. Nearly two decades after its establishment, the AU has yet to resort to the unilateral use of force, despite broad and intricate arguments claiming it has such a right. More so, debates about its right to do so continue. This article considers whether, based on both the existing understanding of regional enforcement action and more recent developments in this area, UNSC authorisation of regional enforcement action remains a requirement, at least under Article 53(1) of the UN Charter.

The article consists of three parts, each examining a facet of the AU security framework. Part one assesses the AU's Constitutive Act and more specifically Article 4(h), which is considered the principal provision providing for unilateral resort to force. Three main interpretations of Article 4(h) in literature are discussed; its interpretation as a state-consented justification for intervention, its interpretation as a regional manifestation of the Responsibility to Protect (R2P) concept and more recently, its interpretation as a collective self-defence clause. This discussion is also examined in light of the principle of state sovereignty, and to the extent that it may potentially hinder the application of

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1 UN Charter art 53(1) (24 October 1945, San Francisco) 1 UNTS XVI. See also Ntombizozuko Dyani-Mhango, 'Reflections on the African Union's Right to Intervene' (2012) 38(1) *Brooklyn JIL*.

Article 4(h). Part two examines the Protocol on Amendments to the Constitutive Act. Although not yet in force, its conclusion was viewed as a significant expansion under which the AU could intervene militarily in its member states. Part three consists of a holistic examination of the AU's peace and security framework.

As already mentioned, the second sentence of Article 53(1) expressly determines that no enforcement action shall be undertaken by a regional organisation without UNSC authorisation. In 1962 the International Court of Justice (ICJ), in the *Certain Expenses* case, determined that enforcement action was coercive military action in terms of Chapter VII of the UN Charter.<sup>2</sup> Accordingly, where coercive military action (or in this context, regional enforcement action) is undertaken, it is clear from both the wording of the UN Charter as well as the ICJ advisory opinion that the UNSC must authorise such action. Where no authorisation is granted, and if such action would not amount to the recognised exceptions to the use of force, such as that of individual or collective self-defence, or intervention by invitation, then such enforcement action would likely be unlawful. Therefore, it is important to determine, through analysing the AU's security framework as well as its interpretation in scholarship, whether any exceptions to UNSC authorisation of the use of force have arisen.<sup>3</sup>

## The African Union's Security Framework

### The Constitutive Act of the African Union

Since the transformation of the OAU into the AU, peace and security on the African continent have been at the core of institutional change and development.<sup>4</sup> This revamped outlook on conflict prevention, resolution and management resulted in the AU adopting and revising several instruments with far-reaching implications for both continental stability and the maintenance of international peace and security.<sup>5</sup> At the heart of this

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2 UN Advisory Opinion *Certain Expenses of the United Nations* [1962] ICJ Rep 151 (UN Charter Art 17, para 2) 164.

3 Subsequently, although not a focal point under discussion, where these organisations are involved in regional enforcement action without United Nations Security Council (UNSC) authorisation, and particularly the case where they engage in such action prior to (and sometimes without any) UNSC authorisation, a further question arising is whether these organisations have begun to challenge the primacy of the UNSC in matters of international peace and security. On this topic, see specifically, Erika de Wet, 'The Evolving Role of ECOWAS and SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?' (2014) 27 LJIL 353; Suyasha Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: The African Example' (2010) 51(1) VJIL 185; Dyani-Mhango (n 1) 18–20.

4 Kwesi Aning, 'The African Union's Peace and Security Architecture: Defining an Emerging Response Mechanism' (The Nordic Africa Institute Lecture Series on African Security 2008) 3.

5 Following several situations on the continent that constituted massive human rights violations, the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted the AU Constitutive Act, incorporating the right of intervention as one of its core principles. See Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference

pro-active approach to tackling peace and security challenges lies the organisation's Constitutive Act.<sup>6</sup> The establishment of the AU and the adoption of the Constitutive Act have represented a notable shift from the OAU's non-interventionist approach to conflict resolution on the continent.<sup>7</sup> The Preamble to the Constitutive Act acknowledges in particular that 'the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability.'<sup>8</sup> It goes on to state that the AU is determined to take all necessary measures to strengthen its institutions and to provide them with the required powers and resources to discharge their mandates accordingly and effectively.<sup>9</sup> The objectives of the AU, among others, reiterate the importance of sovereignty, the territorial integrity and independence of member states, the encouragement of international co-operation (taking due account of the UN Charter) and the promotion of peace, security and stability on the continent.<sup>10</sup> Yet, any express requirement of UNSC authorisation remains absent.

#### *The African Union and Article 4(h) of the Constitutive Act*

Article 4 of the Constitutive Act specifically lists the principles of the AU, which include the establishment of a common defence policy for the African continent;<sup>11</sup> the prohibition of the threat or use of force among member states;<sup>12</sup> and the right of member states to request intervention by the AU in order to restore peace and security.<sup>13</sup> Most ambitious of these principles, however, are the provisions of Article 4(h), which empower the AU Assembly, the highest decision-making organ of the AU, to decide on intervention in a member state—its inclusion having been considered astounding at the

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to Non-Intervention' (2003) 85 International Review of the Red Cross 810–811. Article 3(f) states the objective of the AU to 'promote peace, security, and stability on the continent.' In contrast to the AU's predecessor, the OAU, the AU Constitutive Act firmly roots the right of intervention as one of its core principles. The OAU, on the other hand was clear in its protection of state sovereignty. The Charter of the Organisation of African Unity Art III explicitly states that in the pursuit of the purposes stated in art II, member states declare among others (1) the sovereign equality of all member states, (2) non-interference in the internal affairs of states and (3) respect for the sovereignty and territorial integrity of each member state.

6 AU Constitutive Act (11 July 2000, Lomé, Togo) 2158 UNTS 3 (entered into force 26 May 2001) (Constitutive Act).

7 See earlier critiques on challenges to the OAU and its Mechanism for Conflict Prevention, Management and Resolution in Jeremy Levitt, 'Conflict Prevention, Management, and Resolution: Africa—Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC, and IGAD' (2001) 11 Duke J of Comp and Intl L 55–58, 60. See also Aning (n 4) 3.

8 Constitutive Act (n 6), preambular para 8.

9 *ibid* para 10.

10 See generally Constitutive Act (n 6) art 3.

11 Article 4(d) Constitutive Act.

12 Article 4(f) Constitutive Act, which is parallel to art 2(4) of the UN Charter.

13 Article 4(j) Constitutive Act.

time.<sup>14</sup> A decision to intervene (militarily) may be taken in three instances: namely, war crimes, genocide, and crimes against humanity. Although a decision to intervene in a member state is ordinarily taken by a two-thirds majority vote by the Assembly,<sup>15</sup> it may delegate any of its powers and functions to any other organ of the AU.<sup>16</sup> The Constitutive Act mentions the UN Charter only twice: first, under its objectives to encourage international co-operation, ‘taking due account of the Charter of the United Nations’<sup>17</sup> and, second, where depositing the Constitutive Act with the Secretariat of the United Nations is concerned.<sup>18</sup>

The Constitutive Act makes no mention of whether UNSC authorisation of regional enforcement action is required. Consequently, it suggests that where the AU relies on Article 4(h), it may intervene in a member state independently from the UNSC.<sup>19</sup> Since the adoption of the Constitutive Act, the incorporation of the AU’s right to intervention has raised serious concerns. Most prominent of these is whether such a right infringes not only on the UN Charter’s prohibition on the use of force, but also the Article 53(1) requirement of UNSC authorisation.<sup>20</sup>

The inclusion of Article 4(h) in the AU’s revised system of collective security was also a repositioning of responsibility in terms of continental peace and security, predominantly stemming from the Rwandan genocide of 1994.<sup>21</sup> Combined with various other regional conflicts in Somalia, Sierra Leone, Liberia and the Democratic Republic of the Congo (DRC), continental instability exposed the ineffectiveness of the OAU’s non-interventionist policy, as well as the UNSC’s inaction in the face of mass atrocities. The introduction of Article 4(h), therefore, served as a mechanism to

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14 Article 4(h) Constitutive Act. In the African context, this right of intervention was the first codification of such a right on a regional position. On a subregional position, such a right has been codified in the ECOWAS security framework, notably, the 1999 ECOWAS Protocol Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (11 December 1999, Lomé, Togo). See Jeremy Levitt, ‘The Evolving Intervention Regime in Africa: From Basket Case to Market Place?’ (2002) 96 *American Society of International Law Proceedings* 142; Jeremy Levitt, ‘The Law on Intervention: Africa’s Pathbreaking Model’ (2005) 7 *Global Dialogue* 57. See also Martin Kunschak, ‘The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorisation?’ (2006) 31(1) *SAYIL* 195.

15 Article 7(1) Constitutive Act. Therefore, in order for the Assembly to decide on intervention, a minimum of 23 member states would have to vote in favour of such an intervention.

16 Article 9(2) Constitutive Act.

17 Article 3(e) Constitutive Act.

18 Article 33(5) Constitutive Act.

19 Paliwal (n 3) 197; Gabriel Amvane, ‘Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union Without United Nations Security Council Authorisation’ (2015) 15 *AHRLJ* 284.

20 Kunschak (n 14) 202; Jean Allain, ‘The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union’ (2004) 8 *Max Planck United Nations YB* 264–265.

21 Sabelo Gumedze, ‘The African Union and the Responsibility to Protect’ (2010) 10 *AHRLJ* 139; Kunschak (n 14) 196.

overcome the OAU's challenge of non-intervention in light of mass human rights violations.<sup>22</sup> This pro-active approach was especially seen against the background of the listed grounds under which the AU could intervene.

In this regard, Article 4(h) provides several aspects of intervention based on the listed conditions. The right of intervention is first and foremost granted solely to the AU; therefore, individual member states are not entitled to intervene.<sup>23</sup> Further, the right of intervention is limited, namely, based on the three listed grounds. Therefore, the AU has no inherent right to intervene in member states unless such grounds arise. Except for the invocation of Article 4(h) during the 2015 Burundi crisis, the AU has yet to realise it in practice. Consequently, whether it could be considered an exception to the Article 53(1) requirement of UNSC authorisation remains uncertain.

Although scholars' interpretation of Article 4(h) has varied over the years, two predominant interpretations are particularly noteworthy: either Article 4(h) represents treaty-based consent to AU intervention, or it is a regional manifestation of the R2P doctrine.<sup>24</sup> The interpretation of Article 4(h) as a consent to the intervention clause suggests that member states of the AU (while also being member states of the UN) have the right to consent to possible future intervention by the AU.<sup>25</sup> Such a case would validate an otherwise illegal intervention as it is generally accepted that the use of force, based on the consent of the state involved can constitute an exception to the prohibition of the use of force in the UN Charter.<sup>26</sup> Support for the state consent interpretation of

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22 Anel Ferreira-Snyman, 'Intervention with Specific Reference to the Relationship between the United Nations Security Council and the African Union' (2010) 43(2) CILSA 154; and as concluded by Amvane (n 19) 298; but see also Kioko (n 5) 817.

23 Kunschak (n 14) 198. Article 4(g) specifically states the principle of 'non-interference by any member state in the internal affairs of another.' Further, as Kunschak points out, the language and arrangement of the Constitutive Act specifically permits the use of force under art 4(h) and distinguishes intervention from political, diplomatic or economic sanctions in art 23(2) of the Constitutive Act. Kunschak also outlines that the PSC Protocol established the African Standby Force, meaning that art 4(h) clearly envisages coercive military action. Amvane (n 19) 283; See also Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002, Durban, South Africa) (entered into force 26 December 2003) (PSC Protocol).

24 See also Amvane (n 19) 297; Gumede (n 21) 148. See also broadly, John-Mark Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer 2016).

25 See Oona Hathaway, Julia Brower, Ryan Liss and Tina Thomas, 'Consent-based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' (2013) 46(3) Cornell Intl LJ 558–559; Kevin Jon Heller, 'Why Art.4(h) of the AU's Constitutive Act does not Support UHI' (23 April 2018) *Opinio Juris*. Christian Wyse, 'The African Union's Right of Humanitarian Intervention as Collective Self-defence' (2018) 19(1) Chicago JIL 323; Kunschak (n 14) 207.

26 See also Solomon Dersso, 'The Legality of Intervention by the African Standby Force in Grave Circumstances' (24 June 2009) Institute for Security Studies <<https://issafrica.org/amp/iss-today/the-legality-of-intervention-by-the-african-standby-force-in-grave-circumstances>> accessed 20 August 2021.

Article 4(h) is further attributed to a lack of reservations entered against it. Upon signature and ratification of the Constitutive Act, no member state entered reservations against Article 4(h), or any other provision of the Constitutive Act.<sup>27</sup>

The state consent justification of Article 4(h) has resulted in a further divergence of its interpretation. Some authors suggest that this article may be interpreted in favour of *ex ante* consent by member states for the AU to intervene under the listed grounds, potentially rendering UNSC authorisation unnecessary.<sup>28</sup> Whether such consent can be given in advance or is contemporaneous is debatable. Some authors argue that consent to future intervention is as valid as it would have been when given on an *ad hoc* basis.<sup>29</sup> They therefore suggest that member states of the AU, upon ratifying the Constitutive Act, gave consent to possible future intervention, should circumstances of genocide, war crimes or crimes against humanity arise.<sup>30</sup> Others, however, maintain that this form of consent, described as forward-looking, is *prima facie* illegal and that *ad hoc* consent is required for each case of intervention.<sup>31</sup>

An alternative to the above suggests that while *ex ante* consent is acceptable, it should be complemented by *ad hoc* consent.<sup>32</sup> The rationale behind this suggestion is based on the argument that the nature of coercive military measures in international law are inherently intrusive, the result of which a state will be allowed to withdraw prior to the

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27 Report on the Status of OAU/AU Treaties (as at 11 July 2012), AU Executive Council 21st Ordinary Session (9–13 July 2012, Addis Ababa, Ethiopia) AU Doc EX.CL/728(XXI) Rev 1 XXIII. See Tiyanjana Maluwa, ‘Ratification of African Union Treaties by Member States: Law, Policy and Practice’ (2012) 13 MJIL.

28 Kunschak (n 14) 207, refers to this as ‘a priori invitation to intervene in extreme cases of “bad governance”.’ See Dan Kuwali, ‘Art 4(h) + R2P: Towards a Doctrine of Persuasive Prevention to End Mass Atrocity Crimes’ (2008) 3 IJHLR 670; Kithure Kindiki, ‘The Normative and Institutional Frameworks of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal’ (2003) 3 AHRLJ 107; Ademola Abass and Mashood Baderin, ‘Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union’ (2002) 49(1) NILR 17, but see their caveat at 18; Girmachew Alemu Aneme, *A Study of the African Union’s Right of Intervention Against Genocide, Crimes against Humanity and War Crimes* (Wolf Legal Publishers 2011) 184 points out that such consent must, however, be valid.

29 Aneme (n 28) argues that consent given to future interventions is as valid as it would be given on an *ad hoc* basis; Gregory Fox ‘Intervention by Invitation’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 832.

30 This view is supported by commentaries to art 20 of the articles on the 2001 Responsibility of States for International Wrongful Acts 2001, which states that consent to an otherwise wrongful act may be given at the time of occurrence of such event or in advance. See International Law Commission, *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session 2001* (United Nations 2007) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 73 para 32 (Part II) Yearbook of the ILC.

31 See Eliav Liebllich, ‘Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements’ (2011) 29 BUILJ 371–73.

32 Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 169–170.

consent of the use of force on its territory at any time and without any formality.<sup>33</sup> This implies a deviation from the general treaty law principle that an incoming government remains bound by treaties entered into by the previous government, as states can withdraw consent to the use of force over their territory.<sup>34</sup> The purpose of providing additional ad hoc consent, therefore, would be two-fold. It would first confirm that the incoming government has not (even tacitly) withdrawn consent, for example in terms of the provisions of the Constitutive Act and, second, it would of course directly consent to the intervention in question.<sup>35</sup>

However, if one accepts that ad hoc consent is necessary (even in cases such as Article 4(h) possibly embodying *ex ante* consent), it would implicitly acknowledge the need to verify *ex ante* consent in every given situation. Notwithstanding the permissibility of states to withdraw consent to the use of force, this becomes highly problematic if, for example, the AU has decided on intervention in a member state committing war crimes.<sup>36</sup> Subsequently, and before intervening, the member state may simply neglect to give ad hoc consent or withdraw it entirely, rendering the AU unable to intervene, even in situations of gross human rights violations. Arguably, such a case would potentially render the AU's right to unilateral military action redundant.

On the one hand, if a state indeed withdraws consent, and should the AU not be able to rely on an Article 4(h)-based intervention, it would have no alternative but to seek UNSC authorisation before it could act. On the other, the AU on many occasions, has reaffirmed itself as willing and able to enforce decisions of the UNSC, especially in matters of peace and security.<sup>37</sup> To this end, Article 4(h) may also be interpreted as a manifestation of the principle of subsidiarity, whereby UNSC authorisation first and

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33 Lieblich (n 31) 371–373. See also Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3(1) JUFIL 104 fn 42; Hathaway and others (n 25) 560.

34 Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) Judgment [2005] ICJ Rep 168 paras 50–51 (*DRC v Uganda* case). The Court particularly noted that no specific formalities are needed to withdraw consent for the presence of troops on a state's territory. See also Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 195.

35 De Wet (n 32) 170.

36 In line with the *DRC v Uganda* case (n 34), states may in any case withdraw consent to the use of force over their territories.

37 See, eg, the declarations made in the Joint United Nations-African Union Framework for Enhanced Partnerships in Peace and Security, United-Nations-African Union Annual Conference, New York, 19 April 2017. More recently, see the envisaged cooperation between the two organisations outlined in the Joint Communiqué of the Third African Union-United Nations Annual Conference, New York, 6 May 2019. See also United Nations Security Council 'Report of the Secretary-General on Strengthening the Partnership Between the United Nations and the African Union on Issues of Peace and Security in Africa, Including the Work of the United Nations Office to the African Union' UN Doc S/2016/780, para 13 ff, and UNSC Res 2320 (18 November 2016) UN Doc S/RES/2320 para 7.



foremost enables the AU to take action within its member states.<sup>38</sup> Having said that, the question arises as to whether the need for ad hoc consent is incompatible with the very principles of the AU making provision for forcible intervention. After all, the provision was at the least intended as a mechanism for the AU to take action should the UNSC fail or be unwilling to act. Interpreting Article 4(h) as *ex ante* consent with the need for ad hoc consent that could be withdrawn would only place the AU in the same position it was in prior to the incorporation of Article 4(h), that is, having to rely on the UNSC before taking action itself. Since the AU has yet to resort to Article 4(h), its practice gives no clearer indications as to how the provision should be interpreted. At most, its invocation of Article 4(h) during the 2015 Burundi crisis, provides some (minimal) clarity on the matter. Particularly, this invocation, combined with an express request that Burundi consent to an AU deployment in the country and even an appeal to the UNSC for authorisation, suggests that it may not yet be willing to interpret Article 4(h) purely based on *ex ante* consent.

However, if Article 4(h) is to be considered a codification of member state consent to AU intervention (at least *ex ante* consent), and the listed grounds for such intervention subsequently arise, then the intervention would arguably fall outside the scope of regional enforcement action defined by the ICJ.<sup>39</sup> This is particularly the case since the intervention would not amount to coercive action as such, as it would not go against the consent of the state.<sup>40</sup> Consequently, where intervention is based on Article 4(h), which in turn is based on state consent, then Article 53(1) may not find application, since it

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38 As Nathan however notes, the primacy of the UNSC trumps the principle of subsidiarity. Laurie Nathan, 'Will the Lowest be First? Subsidiarity in Peacemaking in Africa' (International Studies Association, Annual Convention, Atlanta, 16–19 March 2016) 4. The fact that the UNSC must authorise AU intervention was a conclusion also reached during the 'Pretoria Principles on Ending Mass Atrocities Pursuant to article 4(h) of the Constitutive Act of the African Union' (Centre for Human Rights, University of Pretoria Conference, Pretoria, 6–7 December 2012) para 11 <[https://www.chr.up.ac.za/images/centrenews/2013/files/Pretoria\\_Principles.pdf](https://www.chr.up.ac.za/images/centrenews/2013/files/Pretoria_Principles.pdf)> accessed 28 October 2019. Equally as significant are the commitments embodied in the Secretary-General's high-level report. See UNGA, 'A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change' UN Doc A/59/565.

39 The UNSC already in 1976 declared that states have an inherent right to consent to the use of force on their own territory. See UNSC Res 384 (1976), Preamble. This was again confirmed in the case concerning paramilitary activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 26, and the case concerning armed activities on the territory of the Congo (*Democratic Republic of Congo v Uganda*) (Armed Activities Judgment) [2005] ICJ Rep 168. Further, art 20 of the ILC's articles on Responsibility of States for International Wrongful Acts, 2001 affirm that intervention based on consent by the state involved would preclude wrongfulness. Art 20 states that '[v]alid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of the consent.'

40 *Certain Expenses* case (n 2) 164. See also John-Mark Iyi, 'Humanitarian Intervention and the Responsibility to Protect: Deconstructing Regional Legal and Theoretical Frameworks for Action in Africa' (DPhil thesis, University of the Witwatersrand 2013) 192.

specifically refers to ‘regional enforcement action.’ This would suggest that Article 4(h) indeed poses no challenge to the UN Charter and that, generally, it would fall outside the scope of the application of Article 53(1).<sup>41</sup>

As mentioned above, an alternative interpretation of Article 4(h) suggests that it constitutes a regional codification of the R2P doctrine.<sup>42</sup> The term R2P principle, first formally coined during the 2005 World Summit Outcome, declares the commitment of the world community to the idea that states carry the primary obligation to protect their populations from mass atrocities. It also stresses the international community’s responsibility to assist states in meeting their obligations and, finally, to act upon such obligations should a state not be willing or able to protect its population from mass atrocities. Since the wording of Article 4(h) explicitly permits intervention pursuant to genocide, war crimes and crimes against humanity, it is generally understood to involve enforcement action contemplated by the R2P concept.<sup>43</sup> Therefore, such an intervention as envisaged under Article 4(h), would be a regional manifestation of R2P.

At the same time, even if one considers Article 4(h) a regional manifestation of R2P, it should be borne in mind that neither Article 4(h) nor the Constitutive Act were modelled after the 2005 World Summit Outcome. The incorporation of Article 4(h) (as well as other principles in the Constitutive Act) predate the discussions and adoption of the 2005 World Summit Outcome by some five years.<sup>44</sup> That is, African leaders had already addressed issues of R2P before its conceptualisation and adoption in 2005.<sup>45</sup>

There is robust debate about whether a right to such an intervention exists within the confines of international law. The AU arguably could be entitled to act without UNSC authorisation.<sup>46</sup> A similar debate arose about the justification of the North Atlantic Treaty Organisation’s (NATO) bombing of the Federal Republic of Yugoslavia in

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41 *ibid*; David Wippman, ‘Military Intervention, Regional Organizations, and Host-State Consent’ (1996) 7 *DJIL* 209. Wippman suggests that consent remains valid in relation to intervention regardless of whether states act unilaterally or collectively, whether under UNSC authorisation or under the auspices of a regional organisation.

42 Article 4(h), therefore, embodies the R2P principle that human rights first and foremost are the responsibility of the state, failing which it is placed upon the international community.

43 Jeremy Sarkin, ‘The Responsibility to Protect and Humanitarian Intervention in Africa’ (2010) 2(4) *Global Responsibility to Protect* 378.

44 Jakkie Cilliers, Sabelo Gumede and Thembanani Mbadlanyana, ‘Africa and the “Responsibility to Protect”’: What Role for the ICC?’ (2009) 20 *Irish Studies in International Affairs* 59.

45 *ibid*.

46 Kunschak (n 14) 202. According to Kunschak, humanitarian intervention in such a context is defined as the ‘use of force to stop gross human rights violations without the target state’s consent.’ See Jeff Holzgrefe, ‘The Humanitarian Intervention Debate’ in Jeff Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003) 18.

1999.<sup>47</sup> In 2018 the United Kingdom (UK) again used the R2P concept as justification for its military operations against the Syrian Assad government. Among the arguments raised were that the Assad government had been slaughtering its population for the previous seven years and that the UK was entitled under international law to take measures (use of force) to alleviate human suffering in Syria.<sup>48</sup> The UK's action, along with the military strikes against Syria conducted in alliance with France and the United States, faced criticism and its legality has, on numerous occasions, been questioned.<sup>49</sup> However, the UN Charter does not explicitly provide for the provision of such intervention and, furthermore, such a right seems *prima facie* in conflict with the prohibition of the use of force.<sup>50</sup>

Moreover, the 2005 World Summit Outcome together with the Report of the International Commission on Intervention and State Sovereignty (ICISS) was clear in its wording for the need to obtain UNSC authorisation, even in cases of humanitarian intervention.<sup>51</sup> The ICISS went on to stress the need to obtain UNSC authorisation in all cases, even *ex post facto* authorisation, such as arguments that the interventions by the Economic Community of Western African States in Liberia and Sierra Leone in the 1990s were authorised retroactively.<sup>52</sup> This position was also supported by the AU in the *Ezulwini Consensus*, which acknowledged under R2P reliance, UNSC authorisation should be sought but that in certain situations, 'such approval could be granted "after the fact" in circumstances requiring urgent action.'<sup>53</sup> The ICISS, however, noted that while there were circumstances in which the UNSC failed to discharge its duties under Chapter VII, '[a]s a matter of political reality, it would be impossible to find consensus, in the Commission's view, around any set of proposals for military intervention which

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47 See on this point the UNSC Res 1166, 1199 and 1203 (1998), cited in favour of an implicit authorisation for the NATO aerial campaign.

48 Editorial Staff, 'Syria Air Strikes: US and Allies Attack "Chemical Weapons Sites"' *BBC* (14 April 2018).

49 Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal' *EJIL:Talk!* (15 April 2018). See Monica Hakimi, 'The Attack on Syria and the Contemporary Jus ad Bellum' *EJIL:Talk!* (15 April 2018).

50 Kunschak (n 14) 202.

51 UNGA Res 60/1, '2005 World Summit Outcome' (16 September 2005) UN Doc A/RES/60/1; Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) International Development Research Centre (ICISS R2P Report). See specifically the World Summit Outcome at para 139 which specifically mentions the terms 'genocide, war crimes, ethnic cleansing and crimes against humanity' as crimes concerning mass atrocities, adding further that the action should be taken through the UNSC. Principle 3 specifically indicates that UNSC as the rightful authority to take action and that UNSC authorisation should in all cases be sought when conducting military interventions.

52 ICISS R2P Report (n 51) 50 para 6.15 states that 'Security Council authorisation must in all cases be sought prior to any military intervention action being carried out' and at 54 para 6.35 states that '[t]he UN Charter recognizes legitimate roles for regional organizations and regional arrangements in Chapter VIII.'

53 African Union, 'The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (7–8 March 2005) AU Doc. Ext/EX.CL/2 (VII) para B(i).

acknowledged the validity of any intervention not authorized by the Security Council or General Assembly.<sup>54</sup> Thus, it is important to note that the difference between R2P and Article 4(h) manifests in the fact that the concept of R2P calls on the international community to act (under the—possibly retroactive—authorisation of the UNSC), whereas Article 4(h) calls on the AU to act, seemingly without any reliance on the UNSC.

Nevertheless, if Article 4(h) is to be regarded as an African codification of the R2P concept (predating the World Summit Outcome), reconciling its wording based on state consent may be difficult. The very definition of forcible intervention based on R2P contains elements of the ICJ advisory opinion on the definition of enforcement action, namely, that both are coercive in nature, hence conducted against a state's consent. In this regard, it is difficult to reconcile Article 4(h) embodying forcible intervention with the perspective that it may also embody state consent to intervention based on the listed grounds. Therefore, any interpretation of Article 4(h) must take into consideration that either justification seems irreconcilable with the other. It may be viewed as either *ex ante* intervention at the discretion of the AU, or in the alternative as an African embodiment of the R2P doctrine. Article 4(h) should also not be confused with Article 4(j). The principal difference between the two articles is that under Article 4(h), the AU is given the authority to decide on intervention under particular circumstances, whereas under Article 4(j) a member state may request intervention by the AU.<sup>55</sup>

#### *Article 4(h) as collective self-defence*

Beyond those interpretations of Article 4(h) discussed above, a more recent and equally interesting interpretation is that Article 4(h) interventions may be classified as collective self-defence.<sup>56</sup> The premise of this interpretation suggests the following. Self-defence under the UN Charter remains the only helpful provision when the UNSC fails to act on a given situation<sup>57</sup> and therefore, the right to self-defence should be interpreted as broadly as needed in order to achieve the UN's purpose of collective security—even when the UNSC has failed to act.<sup>58</sup> In order to classify any action under Article 4(h) as collective self-defence, it must accord with the right to self-defence. Should the UNSC address a matter, the AU would have to abide by any decision it may take, and the limits of necessity and proportionality need to be adhered to.<sup>59</sup>

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54 ICISS R2P Report (n 51) 54–55 para 6.37.

55 Article 4(j) in essence is a codification of the well-known international law principle of intervention by invitation. Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force' (2016) 26(4) EJIL 981.

56 Christian Wyse, 'The African Union's Right of Humanitarian Intervention as Collective Self-defence' (2018) 19(1) Chicago JIL 326.

57 *ibid* 324.

58 *ibid* 325.

59 *ibid* 326–327.

Taken further, this interpretation agrees that AU intervention must always be in defence against a threat to collective African security—arising from grave circumstances listed under Article 4(h), and accordingly would be a necessary response.<sup>60</sup> In addition, intervention based on Article 4(h) must be proportionate to the extent that it aims to end human rights violations occurring within a member state.<sup>61</sup>

The proposed interpretation of Article 4(h) as suggested above could be open to an expanded interpretation of the right to self-defence itself. Be that as it may, the ever-expanding interpretation of Article 51 of the UN Charter, following the September 11 terrorist attacks gives it some merit. For example, in March 2021, an Arria-formula meeting of member states discussing their positions on the use of force against non-state actors and the right of self-defence, suggests an ever increasing willingness to hold that non-state actors may indeed launch armed attacks.<sup>62</sup> This position has, for some time found support in scholarship, even though it represents a departure of sorts from the traditional understanding of what constitutes an armed attack and what acts self-defence may be invoked against. While this interpretation of Article 4(h) should nonetheless be strenuously interrogated in light of requirements for the exercise of self-defence as well as the possibility for its abuse, such an interpretation remains feasible, given developments in this field.

However, it is more difficult to reconcile this interpretation with the requirement that an armed attack exists—and more so, that it be an external armed attack.<sup>63</sup> An interpretation of Article 4(h) as collective self-defence would inevitably imply that the grave circumstances listed under the article could give rise to a right of self-defence by the organisation. Even so, an interpretation of Article 4(h) based on collective self-defence would, by implication, suggest that UNSC authorisation is not required should the AU decide on intervention. If such an interpretation is upheld, the need for UNSC authorisation would likely be undisputed, given a number of differences between UNSC-authorised enforcement action and the reliance on self-defence.<sup>64</sup>

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60 *ibid* 327.

61 *ibid* 328.

62 Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council (16 March 2021) S/2021/247. The meeting was open to all member states including permanent observers and non-governmental organisations. See also the analysis of member states' positions on this matter in Adil Ahmad Haque, 'Self-defence Against Non-state Actors: All Over the Map' (Just Security 24 March 2021), <<https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/>> accessed 20 August 2021.

63 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' 2004 Advisory Opinion, *ICJ Reports*, para 139 136, (Wall advisory opinion) confirmed that an armed attack originates from outside the territory of a victim state.

64 On key differences, see Michael Wood, 'Self-Defence and Collective Security' in Weller (n 29) 652.

*The Impact of Sovereignty on the AU's Right of Intervention under Article 4(h)*

The interpretation of Article 4(h) in either manner suggested above also gives rise to issues of sovereignty. As in the case of the UN Charter, the Constitutive Act enshrines the principle of non-intervention in the domestic affairs of a state as an integral part of state sovereignty. The UN Charter addresses this in Article 2(7), stating that nothing in the Charter is meant to authorise the UN to intervene in matters that are ‘essentially within the domestic jurisdiction of any state.’ The parallel to this in the AU Constitutive Act is found in Article 4(g), which states that one of the principles of the AU is ‘non-interference by any member state in the internal affairs of another.’ While both these provisions embody the principle of non-intervention in the domestic affairs of a state, they differ in several ways. First, Article 2(7) of the UN Charter clearly prohibits the UN from intervening. In contrast, Article 4(g) of the AU Constitutive Act does not seem to limit the AU per se, but rather its member states. Second, in the same vein that Article 2(7) indicates it bears no prejudice to Chapter VII enforcement measures by the UNSC, the position is similar if one reads Article 4(g) together with Article 4(h). While the former prohibits only member states from intervening, the latter explicitly grants this right to the AU. Articles 4(h) and 4(g) may be regarded (to some extent) as having an effect within the AU similar to that of Article 2(7) in the UN Charter system.<sup>65</sup> Given this context, the question arises as to what extent the principle of sovereignty impedes the AU’s right of intervention. Phrased differently, does sovereignty and, more specifically, non-interference in the domestic affairs of a state, limit the AU’s right of intervention?

The literature on the matter varies significantly. Arguments primarily favouring a restrictive approach to sovereignty argue that the internationalisation of human rights as a global concern suggests that states can no longer use sovereignty as a barrier against internal interference where gross violations of human rights persist. This argument would, in principle accord greater flexibility to the AU’s right to intervene. The rationale of such an argument may be summarised as follows. First, state sovereignty and the principle of non-intervention pertains to a state’s internal affairs, over which it is generally regarded as having sole discretion. Internal affairs, however, are regarded as a relative concept.<sup>66</sup> The Permanent Court of International Justice, in the *National Decrees* case defined internal matters as those that are not regulated by international law, over which a state has sole discretion.<sup>67</sup> In other words, internal matters are not those that have been removed from the international sphere but, rather, those that are

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65 Kithure Kindiki, ‘Rethinking the Role of the United Nations and the African Union in Darfur: Building the Case for Humanitarian Intervention’ ISS Monograph Series 131/Part IV (May 2007) <<https://issafrica.org/part-four-rethinking-the-role-of-the-united-nations-and-the-african-union-in-darfur-building-the-case-for-forcible-humanitarian-intervention>> accessed 18 June 2019.

66 Ferreira-Snyman (n 22) 148.

67 *Nationality Decrees in Tunis and Morocco* PCIJ, Series B, No 4 (7 February 1923) para 24.

not affected by existing rules of international law.<sup>68</sup> As the court points out, internal matters are dependent on the development of international law and relations. When one considers the development of international law, and in particular the internationalisation of human rights, it is clear that domestic jurisdiction has become limited.<sup>69</sup> This is evidenced not only by the practice of the UNSC but even by the fact that some issues have obtained the status of *jus cogens* and have *erga omnes* effect in international law.<sup>70</sup> The result of this is that states can no longer rely on sovereignty and non-intervention in matters that have essentially become regulated under principles of international law.<sup>71</sup>

This above is evident when one considers the elevation of human rights in international law. In the African context, states have assented not only to the Constitutive Act but to numerous other bilateral and multilateral human rights treaties.<sup>72</sup> By entering into these treaties, many of which concern the protection of human rights, states have, to a certain extent, ceded their sole discretion over these matters.<sup>73</sup> In doing so, they have not only ‘internationalised’ a specific matter which may previously have been considered an internal one, but have also arguably limited their own sovereign powers in relation to such matters. Even if a state, in its capacity as a member of the UN, is able to circumvent the provisions of these treaties, the ICJ has already clarified the enforceability of human rights principles against states in the *Namibia* advisory opinion, considering South Africa’s policy of apartheid as a violation of the UN Charter.<sup>74</sup> Additionally, the World Summit Outcome on the R2P doctrine has attested to the global commitment that the protection of human rights may on occasion outweigh state sovereignty.<sup>75</sup> State parties to the UN Charter, and those that become part of international, regional and sub-regional organisations, constrain their sovereignty at their own discretion.<sup>76</sup> It is therefore suggested that, since Article 4(h) is an intervention based on gross human rights

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68 Ferreira-Snyman (n 22) 148.

69 *ibid* 148–49.

70 *ibid* 149.

71 *ibid*.

72 Examples include the 1981 African Charter on Human and Peoples’ Rights; the 1990 African Charter on the Rights and Welfare of the Child; and the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. See African Charter on Human and Peoples’ Rights, 1 June 1981, Nairobi, Kenya; African Charter on the Rights and Welfare of the Child, 1 July 1990, Addis Ababa, Ethiopia; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 1 July 2003, Maputo, Mozambique.

73 Today an extensive number of human rights instruments and treaty bodies exist. See eg the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of the Child (CRC).

74 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding SC Res 276 [1970] 1971 ICJ Rep 16 at 57.

75 However, see also UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 para 4.

76 Ferreira-Snyman (n 22) 153, 161. See also Timothy Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Routledge 2005) 97–98.

violations, member state sovereignty would not in itself limit the AU from intervening, should such circumstances arise.

From this perspective, it is reasonable to conclude that state sovereignty is no longer the major barrier it once was, especially in preventing action in the face of mass atrocities.<sup>77</sup> Yet at the same time, state sovereignty remains resilient, particularly where non-interference in domestic affairs is concerned and it would therefore be inaccurate to consider it obsolete.<sup>78</sup> While the internationalisation of human rights has become a certainty, this in itself gives neither states nor regional organisations an inherent right to intervene in the domestic affairs of states and especially not in a military capacity. This is particularly notable in the AU context, for example, given the objective of the AU to defend the sovereignty, territorial integrity and independence of its member states. In this regard, even the AU's right to intervene is limited, since only the AU itself may take such a decision.

Additionally, the wording of the AU Constitutive Act explicitly prohibits member states from interfering in the domestic affairs of other states. It also remains highly disputed in the literature whether even the R2P doctrine is at all permissible. The extent to which this right may manifest itself in practice, however, remains a matter of dispute without clear resolution. The more pertinent question concerns the exact authority required to intervene. As has been seen with Article 4(h), concerns are no longer raised as to the extent to which the AU and its PSC would breach its member states' sovereignties, but rather, whether the AU should be the authority to intervene.<sup>79</sup> This in itself ought to suggest that sovereignty remains a concern, to the extent that one interprets Article 4(h) as a regional manifestation of the R2P doctrine.

Despite what has been mentioned above, the consensual nature of Article 4(h) of the Constitutive Act as a consent-based treaty rule must be reconsidered. In ratifying the Constitutive Act, member states consented to possible future intervention by the AU in cases of gross human rights violations. Consenting to a treaty and given the nature of the provision, member states that ratified such treaty, rightfully limited their sovereignty by allowing for possible AU intervention. However, as much as these states limited their

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77 Ferreira-Snyman (n 22) 172; Samuel Makinda, 'Sovereignty and International Security: Challenges for the United Nations' (1996) 2(2) *Global Governance* 151, 157–158.

78 Brad Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 *Florida LR* 1049. See also Oona Hathaway, 'International Delegation and State Sovereignty' (2008) 71(1) *Law and Contemporary Problems* 120–122; Oliver Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2012) 169 and, on the importance of sovereignty in the allocation of natural resources of states, Marco Pertile, 'The Changing Environmental and Emerging Resource Conflict' in Weller (n 29) 1081–1082.

79 The issue of enforcement action without UNSC authorisation of course is of pivotal concern. See Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty' (2002) 6 *IJHR* 91–92; cf also 95–96; Makinda (n 77) 164; Ferreira-Snyman (n 22) 154–156, 163–167.



sovereignty by consenting to the Constitutive Act, it is also arguable that they can withdraw their consent. If one regards Article 4(h) as an *ex ante*-based provision with the need for ad hoc consent for confirmation, then it is clear that the state may choose not to reaffirm its consent. In addition, as has been mentioned, states can also withdraw consent for the use of force over their territory. In summary, it would therefore seem that the impact of sovereignty on the AU's right to intervene would ultimately depend on how Article 4(h) is interpreted.

### **The Protocol on Amendments to the Constitutive Act**

In 2003 the AU adopted the Protocol on Amendments to the Constitutive Act of the AU.<sup>80</sup> Although not yet in force, owing to an insufficient number of ratifications, the Protocol officially inserted the establishment of the PSC in the Constitutive Act, as the standing decision-making organ for the prevention, management and resolution of conflicts.<sup>81</sup> The amendment also included the provision of three new objectives related to the African diaspora, common policies on trade, defence and foreign relations, and the participation of women in decision-making. It also inserted two new principles in the Act aimed at restraining member states from entering into any treaty or alliance incompatible with the principles or objectives of the AU and prohibiting member states from using their territory as a base for subversion against other member states.<sup>82</sup>

Most notable, however, were the provisions expanding Article 4(h) of the Constitutive Act. The amendment specifically aimed at expanding the situations under which the AU could intervene in member states, stated that intervention may occur in cases of 'a serious threat to legitimate order to restore peace and security to the member state of the Union upon the recommendation of the Peace and Security Council.'<sup>83</sup> This amended version of Article 4(h) has been described as a residual clause enabling the AU to act in situations that do not necessarily constitute the three internationally-recognised crimes it currently mentions.<sup>84</sup> The amendment of Article 4(h) in its current form was preceded by an even broader proposed amendment. In January 2002 an ad hoc ministerial group meeting, which took place in South Africa, was given a Libyan-proposed amendment of Article 4(h). In its entirety it stated:

[t]he 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

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80 Protocol on Amendments to the Constitutive Act of the African Union (3 February 2003, Addis Ababa, Ethiopia) (2003 Protocol Amendment).

81 Article 20(bis) 2003 Protocol Amendment. Art 4(q) of the 2003 Protocol Amendment goes further than merely amending art 4(h), restraining member states from entering into any treaty or alliance which is incompatible with both the principles and objectives of the AU.

82 Articles 4(q), (r) 2003 Protocol Amendment.

83 Article 4(h) 2003 Protocol Amendment; Amvane (n 19) 283; Ferreira-Snyman (n 22) 156.

84 Kunschak (n 14) 199; Kioko (n 5) 815.

*against humanity as well as in cases of unrest or external aggression in order to restore peace and stability to the member of the Union.*<sup>85</sup>

However, the proposal was watered down to its current form. Even so, the amendment to include situations that constitute ‘a serious threat to legitimate order’ continues to raise questions about its interpretation. Put differently, what situation could be considered a sufficiently serious threat to the legitimate order of a member state that would warrant the AU’s right of intervention? Unlike the original wording of the article to include war crimes, genocide and crimes against humanity, which have been defined by the International Criminal Court, the terms used in the amendment have never been defined, especially not by the AU.<sup>86</sup> One suggestion for the interpretation of the amended article considers the OAU’s definition of an ‘unconstitutional change of government’ as the closest possible understanding of the current clause.<sup>87</sup> In conjunction with the AU’s Normative Framework on Unconstitutional Changes of Government, five such grounds may be listed,<sup>88</sup> namely: a military coup against a democratically-elected government; the refusal of an incumbent government to relinquish power to their successor following free, fair and regular elections; intervention by mercenaries to replace a democratically-elected government; the refusal of a government to call for general elections; and the replacement of a democratically-elected government by armed dissident groups and rebel movements.<sup>89</sup>

Those arguing that the above-mentioned circumstances may be interpreted as a ‘serious threat’ also propose that such a threat must be directed at legitimate order. According to this viewpoint, legitimate order can only be understood as having arisen from free and fair elections.<sup>90</sup> While this standpoint seems reasonable, the question arises as to what other circumstances could be considered a ‘serious threat.’ It has, for example, been questioned whether peaceful demonstrations demanding political change could be considered a threat under the article and, consequently, whether this would allow

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85 [Emphasis added]. Evarist Baimu and Kathryn Sturman, ‘Amendment to the African Union’s Right to Intervene: A Shift from Human Security to Regime Security?’ (2003) 12(2) *African Security Review* 39.

86 Ferreira-Snyman (n 22) 156.

87 Baimu and Sturman (n 85) 41; Organisation of African Unity (OAU), ‘Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government’ OAU Doc AHG/Decl.5 (XXXVI) (Lomé Declaration) 3.

88 Baimu and Sturman (n 85) 41; on a more recent analysis of the AU’s framework on unconstitutional changes of government, see broadly Oluwaseun Bamidele and Bonnie Ayodele, ‘In the Service of Democratic Governance: The African Union Normative Framework on Unconstitutional Change of Government and ECOWAS Protocol on Good Governance and Democracy in the Post-Arab Spring’ (2018) 53(1) *Journal of Asian and African Studies*.

89 Baimu and Sturman (n 85) 41; Lomé Declaration (n 87) 3; Bamidele and Ayodele (n 88) 135.

90 Baimu and Sturman (n 85) 41. However, it is acknowledged that determining what constitutes a free and fair election in itself is a contentious issue.

intervention by the AU. An interpretation of this kind would seem more in line with the Libyan proposal to allow AU intervention based in ‘cases of unrest’ in a member state.

In the absence of the African Court of Justice, the interpretation of the amendment and particularly the terms ‘a serious threat to legitimate order’, however, will be left to the Assembly.<sup>91</sup> The manner in which the AU determines a serious threat to legitimate order will only be revealed once the amendment enters into force and is invoked and implemented by the AU.<sup>92</sup> Given that the Protocol has yet to enter into force some seventeen years since it was adopted, it would seem that African states are hesitant to consent to possible future intervention by the AU under what may seem to be a significantly broadened basis.<sup>93</sup>

The adoption of the amendment in its current form has therefore done little to clarify the AU’s position on the potential for its unilateral use of force since the adoption of the Constitutive Act. Neither has its adoption brought any further clarity to the AU’s right of intervention under Article 4(h). Questions about whether UNSC authorisation is required have yet to be answered. As such, the adoption of the amendment has served more to blur the possible circumstances under which the AU can intervene militarily rather than to clarify existing conditions of intervention.<sup>94</sup>

### **The AU’s African Peace and Security Architecture**

While Article 4(h) of the Constitutive Act is the dominant provision proposing intervention in AU member states, it does not exist in isolation. The AU’s development of a common defence policy in line with Article 4(d) of the Constitutive Act, and its aims of preventing conflict and a resolution mechanism, first came about through the establishment of the AU Peace and Security Council (PSC).<sup>95</sup> The PSC serves as a

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91 Baimu and Sturman (n 85) 42; Kunschak (n 14) 200; further on this, see also Dyani-Mhango (n 1) 15–17.

92 *ibid*; Ferreira-Snyman (n 22) 157–59. Ferreira-Snyman suggests that the AU PSC provides a clearly-defined mechanism to determine whether a situation constitutes a serious threat to the legitimate order, but notes that under art 53 of the UN Charter, it ultimately is the responsibility of the UNSC to determine a threat to the peace, a breach of the peace or an act of aggression. Ferreira-Snyman is clear in that the UNSC must clearly make such a determination before it may authorise regional enforcement action.

93 Art 13 states that the Protocol shall enter into force thirty days after two-thirds of AU member states have deposited their instruments of ratification. To date, out of a total of fifty-five AU member states, thirty have ratified the 2003 Protocol Amendment, and of these, all thirty have deposited the instrument. Effectively, just over fifty per cent of states have ratified and deposited the instrument, as opposed to the two-thirds majority required for the instrument to enter into force. See AU, ‘List of countries which have signed, ratified/acceded to the Protocol on the Amendments to the Constitutive Act of the African Union’ (16 July 2019).

94 Kunschak (n 14) 200.

95 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002, Durban, South Africa) (entered into force 26 December 2003) (PSC Protocol).

standing decision-making organ tasked with the prevention, management and resolution of conflict.<sup>96</sup> It consists of fifteen member states, elected by the Assembly on an equitable regional representation across Africa.<sup>97</sup> Ten members are elected to serve a two-year term,<sup>98</sup> with the remaining five to a three-year term.<sup>99</sup> While the principles of the PSC include the peaceful settlement of disputes, it reaffirms the right of the AU to intervene in member states pursuant to a decision by the Assembly under Article 4(h) of the Constitutive Act. The functions of the PSC include early warning and preventive diplomacy;<sup>100</sup> humanitarian action; disaster management;<sup>101</sup> peace support operations; and interventions in accordance with Articles 4(h) and 4(j) of the Constitutive Act.<sup>102</sup> Although the PSC Protocol empowers the PSC to promote and develop a partnership for peace and security between the AU and the UN, it falls short of clarifying whether the PSC requires any authorisation by the UNSC when engaging in interventions in member states of the AU.<sup>103</sup>

The adoption of the Constitutive Act, together with the PSC Protocol one year later, paved the way for the realisation of the African Peace and Security Architecture (APSA). Article 2 of the PSC Protocol names the five pillars of APSA: the PSC; the Panel of the Wise; the Continental Early Warning System; the African Standby Force; and the Peace Fund.<sup>104</sup> In addition, several regional economic communities (RECs) as well as regional mechanisms (RMs), form part of APSA.<sup>105</sup> Although initially envisaged

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96 Article 2(1) PSC Protocol. Art 2(1) states that the AU PSC shall be a 'collective security and early warning arrangement' in order to ensure an efficient response to conflict situations across the continent.

97 Article 5(2) PSC Protocol. While the composition of the PSC is structured somewhat after the UNSC, in applying the principle of regional equitable representation, prospective members need to meet several criteria. These include a member's capacity to contribute militarily and financially to the PSC; their respect for constitutional governance in accordance with the Lomé Declaration; and their willingness to take up responsibility for regional and continental conflict. Arts 5(2)(a–j) PSC Protocol; Sarkin (n 40) 382.

98 Article 5(1)(a) PSC Protocol.

99 Article 5(1)(b) PSC Protocol. On 26 January 2018, ten new member states were elected for a two-year term. These were Angola, Djibouti, Equatorial Guinea, Gabon, Liberia, Morocco, Rwanda, Sierra Leone, Togo and Zimbabwe. See 32nd Ordinary Session of the Executive Council, 25–26 January 2018, Addis Ababa, Ethiopia, 'Decision on the Election of Ten (10) Members of the Peace and Security Council' AU Doc EX.CL/107(XXXII) para 2. See also Decisions and Declarations of the 28th Ordinary Session of the Executive Council of the African Union, 23–28 January 2016, Addis Ababa, Ethiopia AU Doc EX.CL/Dec.909(XXVII) Rev.1 para 2.

100 Article 6(b) PSC Protocol.

101 Article 6(f) PSC Protocol.

102 Article 6(d) PSC Protocol; Sarkin (n 40) 381.

103 Article 7(k) PSC Protocol. Some authors note that the PSC Protocol acknowledges the primary responsibility that the UNSC bears in matters of peace and security. See Sarkin (n 40) 375–376.

104 Article 2(2) PSC Protocol.

105 See Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa, June 2008. The Memorandum of

as a mechanism with a broad agenda for peace and security, APSA has yet to be fully realised. Moreover, while the AU has conducted several peace operations under the APSA framework, including the African Union Mission in Somalia (AMISOM) as well as the African-led International Mission in the Central African Republic (AFISM-CAR), technical challenges, such as funding as well as inconsistency in the status of APSA instruments, vary strongly, depending on the instruments and organisations party to these instruments.<sup>106</sup> In effect, these and other deficiencies ultimately question the extent to which the AU could effectively challenge the need for UNSC authorisation where external funding (particularly from the UN), is not forthcoming.

Beyond this, however, when the need for UNSC authorisation arises, the adoption of the Roadmap for the Operationalization of the African Standby Force in 2005 has, at least in part, provided much-needed clarity.<sup>107</sup> The Roadmap was adopted as a means to ensure the establishment and eventual coming into effect of the African Standby Force through the establishment of regional standby brigades in Central, eastern, southern and western Africa. Section IV of the Roadmap pertains to the 'legitimate political capacity to mandate a mission' and states:

At the strategic level, and in terms of provisions of the Protocol establishing the PSC, the AU constitutes a legitimate mandating authority under Chapter VIII of the UN Charter. In this regard, *the AU will seek UN Security Council authorisation of its enforcement actions*. Similarly, the RECs/Regions will seek AU authorisation of their interventions.<sup>108</sup>

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Understanding signed between the AU, the RECs and RM's specifically states that obligations under it are binding (art II). Art XXI (3) further declares that the AU, RECs and RMs (Coordinating Mechanisms) shall ensure that the USNC is kept informed of their activities relating to the promotion and maintenance of peace, security and stability. In terms of art I(vii), eight RECs are recognised by the AU. These are Arab Maghreb Union, Common Market for Easter and Southern Africa, Community of Sahel-Saharan States, East African Community, Economic Community of Central African States, ECOWAS, Intergovernmental Authority on Development, and the Southern African Development Community.

106 Particularly contributions from the European Union (EU) to AMISOM totalled 325 million euro, with a further 50 million euro being given to AFISM-CAR. The EU had in the past also contributed to AU missions in Sudan and the Comoros. To date, the EU has contributed an estimated 2,7 billion euro to APSA since its establishment in 2004. See European Commission International Cooperation and Development, 'African Peace Facility' <[www.ec.europa.eu/europeaid/regions/africa/continental-cooperation/african-peace-facility\\_en](http://www.ec.europa.eu/europeaid/regions/africa/continental-cooperation/african-peace-facility_en) accessed 28 May 2018> accessed 3 February 2019; Ulrich Karock, 'The African Peace and Security Architecture: Still under Construction' Policy Department, Directorate-General for External Policies, European Parliament (March 2014) DG EXPO/B/PolDep/Note/2014\_47 7–8; Sarkin (n 40) 380.

107 AU, Experts meeting on the Relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, 'Roadmap for the Operationalization of the African Standby Force' (22–23 March 2005, Addis Ababa) AU Doc. EXP/AU-RECs/ASF/4(I).

108 [Emphasis added]; *ibid* para 10.

On a policy level, the Roadmap may serve to reflect at least some willingness to seek UNSC authorisation. At the same time, it does not make intervention subject to UNSC authorisation, but rather indicates that the AU will merely ‘seek’ authorisation, and does not necessarily indicate that it is required.<sup>109</sup> Simultaneously, the Roadmap, unlike the provisions of the Constitutive Act and the PSC Protocol, does not have a binding effect. In addition, the adoption of subsequent Roadmaps II and III makes no further mention of whether UNSC authorisation will be sought. In part at least, while there have been some developments in potential clarification from a political perspective, much of the AU’s authority to intervene remains dependent on any potential future reliance on its security framework and its willingness and ability to act on conflict situations.

## Conclusion

That the AU has created mechanisms to ensure its own security is undeniable, yet the extent to which these security mechanisms have resulted in exceptions to the Article 53(1) requirement of UNSC authorisation of regional enforcement, remains ambivalent—nearly two decades since its inception.<sup>110</sup> When the debate surrounding the continued need for UNSC authorisation arises, the following observations made by scholars must be noted: The omission in the AU Constitutive Act, requiring UNSC authorisation seems intentional, creating the impression that the AU decided to act outside the UN system of collective security.<sup>111</sup> This intention by the drafters of the Constitutive Act was based on a history of human rights violations in Africa, combined with a history of poor governance by African states and inaction by the UNSC. Most pertinent under discussion are the provisions of Article 4(h), which has been interpreted in a number of ways: as a regional manifestation of the R2P doctrine, or *ex ante* or as *a priori* state consent, and more recently, as a collective self-defence clause. Although not entirely complementary, Article 4(h), in particular, embodies the core principle subsequently adopted under the R2P concept—that when a state cannot or does not protect the human rights of its population, such responsibility falls on the international community (in this context, on the AU).

A regional right of intervention can also be justified on the consensual nature of the respective provisions, in that African states voluntarily consented to the possibility of intervention by the AU. The fact that no state uttered any reservations when ratifying the Constitutive Act attests to their consent. It seems prudent to note that between the two perspectives on Article 4(h) examined above, more weight seems to be attached to

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109 Paul Williams, ‘The Peace and Security Council of the African Union: Evaluating an Embryonic International Institution’ (2009) 47(4) *Journal of Modern African Studies* 611 suggests that this Roadmap seems to have settled a ‘period of discontent with the international legal framework governing the use of military force’ to the extent that AU members accepted the UNSC’s primacy on the matter.

110 See also Dyani-Mhango (n 1) 24.

111 Kunschak (n 14) 206.

state consent. Any contestation against state consent to possible future intervention by a regional organisation negates the fact that it is exactly that type of consent granted to the UNSC when states ratified the UN Charter. Put differently, all African states party to the AU are also party to the UN. Their consent, in principle, to Article 4(h) of the Constitutive Act does not differ from their consent to the provisions of the UN Charter.<sup>112</sup> The only relevant aspect is the provisions of Article 103 of the UN Charter. Therefore, the type of advanced consent given to the AU may not conflict with any binding decision of the UNSC.<sup>113</sup> In essence, in ratifying both the Constitutive Act and the UN Charter, these states consented to possible future intervention, either by the AU or by the UNSC (or even both), as long as such consent does not contravene decisions of the UNSC.

The extent to which the AU security framework infringes on state sovereignty or, in the alternative, the extent to which state sovereignty and the principle of non-intervention limit the right to intervention, remains equally ambivalent. For the most part, it seems that non-interference in the domestic affairs of states no longer seems as much of a barrier as it once was, in preventing international action against states committing mass atrocities. That, however, does not diminish the continued relevance of state sovereignty in international law today. In the African context, it seems clear that the relationship between sovereignty and the right of military intervention is strongly connected to the interpretation of the provisions allowing for such intervention. If one considers Article 4(h) of the Constitutive Act as providing for forcible intervention, then any proposed intervention would be solely for the purpose of preventing or stopping mass human rights violations. If, however, one considers the nature of sovereignty and its limits, these provisions arguably represent a treaty-based consent to intervention. Therefore, states voluntarily chose to limit their own sovereignties when they ratified the respective security frameworks. As much as they may have consented to possible future interventions, they of course retain the right to withdraw consent to the use of force over their territories.

Equally interesting are the arguments presented in favour of basing Article 4(h) on collective self-defence. This interpretation is the latest in a series of divergent interpretations accorded to Article 4(h). If such an interpretation holds, then the need for UNSC authorisation would clearly fall away. The only requirements evident therein is that the AU would have to report any measures it has undertaken in the exercise of this right to the UNSC. Whether Article 4(h) could, however, be interpreted in such a manner remains questionable—particularly given the requirements and threshold of an armed attack, as well as the requirements of necessity and proportionality. The continual

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112 Specifically, the provisions of ch VII which empower the UNSC to intervene in member states.

113 As suggested by Amvane (n 19) 285.

development of the concept of self-defence, particularly over the last two decades, signifies that such an interpretation cannot be disregarded.

Whenever tension between the AU's security framework and the UN Charter arises, scholars have observed some important and practical considerations. If the AU should rely on Article 4(h) to intervene in a member state without UNSC authorisation, it is politically unlikely that the UNSC would veto such an intervention in cases of gross human rights violations.<sup>114</sup> Such unlikelihood is further strengthened when one considers that any such intervention approved by, for example, the AU (without UNSC authorisation) would be carried out with a supporting (two-thirds) majority of AU members.<sup>115</sup> It is also argued that in case the UNSC should not approve of intervention without its authorisation, it may object to the intervention and declare it a threat to international peace and security.<sup>116</sup> Such an argument, however, could be refuted if the use of the veto power by one of the five permanent members of the UNSC comes into play. Even so, the perceived tension between the AU and the UN arguably only exists when the UNSC should decide on action that differs from that decided upon by the AU.

In any case, such a conflict in action has not yet arisen between the two organisations, and in practice co-operation continues closely especially in matters of peace and security. Considering the above, the inclusion of Article 4(h) may have been the last resort, when human rights violations were perpetrated, and the UNSC remained inactive, that the AU meets such challenge.

It therefore seems evident that some twenty years after its inception, the AU has yet to resort to Article 4(h) as a basis for the use of force. Both its subsequent practice and institutional developments—such as the adoption of the Roadmap for the Operationalisation of the African Standby Force, have suppressed some of the initial controversy surrounding Article 4(h). However, as of yet, they have not expressly provided sufficient clarity on a number of matters. The most notable remaining question is whether UNSC authorisation of an AU intervention is required. The fact that this has been the AU's right for some two decades now, and yet it had not made use of it, despite various conflicts across the continent, suggests at the least that either its right of unilateral intervention is not supported at an institutional level or that in the absence of

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114 Kunschak (n 14) 207.

115 *ibid* 201.

116 *ibid* 207. In line with art 39 of the UN Charter, the UNSC has a wide discretion in what it declares as threats to international peace and security. For example, threats to peace have in the past included terrorism, the proliferation of nuclear weapons and even the overthrow of democratically elected governments. Amvane (n 19) 285 further states that 'the AU may not intervene if the [UNSC] expressly refuses to authorise the [AU] intervention.'



UNSC authorisation and UN funding, its ability to intervene unilaterally remains highly limited, if not entirely non-existent.<sup>117</sup>

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117 For a discussion on AU interventions generally as well as the non-applicability of Art4(h), see Dyani-Mhango (n 1) 34–46 and Marko Svicevic, *Compendium of Documents Relating to Regional and Sub-regional Peace and Security in Africa* (2nd edn, PULP 2021) 58–60.

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