

**THE GLOBAL AND THE REGIONAL IN THE
RESPONSIBILITY TO PROTECT: WHERE DOES AUTHORITY
LIE?**

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Introduction

On 20 May 2011, on their way to Tripoli, delegates of an African Union (AU) ad hoc high-level committee were refused “permission” to land on the Libyan territory, not by the Libyan government nor the then armed wing of the National Transitional Council (NTC), but by a United Nations commission in charge of the implementation of the 1973 UNSC Resolution on Libya. The delegates were carrying a mandate from the African Union with respect to the conflict that was going on in Libya.¹ Observers saw the incident as a humiliation of Africa and of its continental organization. However, by placing the incident into its broader context, we can see the complex relationships between the World Organization and regional organizations when it comes to the implementation of the Responsibility to Protect (R2P). The AU is taken as an example, not because the incident happened in Africa but because Africa is the Continent counting by far the biggest number of regional peace and security mechanisms and missions.²

Both the Charter of the United Nations and the evolving doctrine of the Responsibility to Protect (R2P) recognize the role of regional actors in building peace and security. Indeed, the United Nations alone cannot achieve peace and security, underscoring the importance of regional organizations. The relationship between the UN and regional organizations becomes all the more complex when enforcement action is involved, i. e. when military, political or economic measures are to be applied against the will of the state concerned. A simple – perhaps overly simplistic approach –

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¹ William Davison and Oudaa Marouf, ‘African Union Panel is Denied Permission to Land in Libya’, <http://www.bloomberg.com/news/2011-03-21/african-union-negotiating-committee-is-denied-permission-to-land-in-libya.html> at 20 August 2012.

² The logical explanation might be that Africa also counts the biggest number of conflicts. According to one non-profit organization, there were ten active armed conflicts in Africa during 2011 alone. ‘Conflict Descriptions’, Project Ploughshares, <http://www.ploughshares.ca/content/conflict-descriptions> at 20 August 2012.

would be to vigorously and literally enforce Chapters VII³ and VIII⁴ of the UN Charter, which give primacy to the organ of the United Nations in charge of peace and security: the Security Council. Taken together, they *subordinate* regional organizations to the Security Council.

Some authors argue that the Charter regime does not apply anymore and that the Security Council has *delegated* its power to use force to regional organizations, and that the latter can take and implement enforcement measures *autonomously*. There is even a theory that sees the UN and regional organizations as coexisting under two parallel regimes: the *charter system* establishing the supremacy of the Security Council and the *operational system* recognizing that, depending on the issues at stake, enforcement action without the Security Council authorization may be lawful.⁵

The point of this paper is not to declare what the law definitely is. It is not to ‘adjudicate’ and say which of the above theories is the right one. On contrary, it is to highlight the legal uncertainty characterizing the issue. While still acknowledging the supremacy of the UN Charter in affairs under Article 103,⁶ this paper argues that a valid interpretation of the Charter must take into account evolutions that took place after the 1945 and 1945 constitutive conference. The article demonstrates how the most official document establishing the Responsibility to Protect so far, the World Summit Outcome Document,⁷ missed the point by simply and literally

³ United Nations Charter, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, United Nations, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

⁴ United Nations Charter, Chapter VIII: Regional Organizations, United Nations, <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

⁵ M. Hakimi, ‘To Condone or Condemn-Regional Enforcement Action in the Absence of the Security Council Authorization’, *Vand Journal of Transnational and International Law* (2007).

⁶ ‘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.’ Charter of the United Nations, Art. 103, <http://www.un.org/en/documents/charter/chapter16.shtml> at 20 August 2012.

⁷ 2005 World Summit Outcome, United Nations, paras. 138-140 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> 20 August 2012. (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”)

stating the charter rule as the exclusive legal reference for the issue enforcement action. An opportunity to contribute to the progressive development of international law was lost in a way likely to undermine the R2P agenda.

The author of this paper is aware that, contrary to a widely shared belief, Responsibility to Protect is not synonymous to enforcement action. Use of force against a sovereign state remains a difficult proposition even under modern international law. Theoretically, it is a measure of last resort under both the Charter and R2P. Understandably, it is the most controversial form of intervention. In this paper, enforcement action is discussed from the perspective of the AU-UN relationship. Other aspects of that complex relationship, like possible disharmonies in approaches to conflict management, will be shortly addressed. These disharmonies center on the United Nations' preference for military action as opposed to the African Union's preference for political solutions to a conflict. Theoretically, the reverse situation is possible for other regional organizations working with the UN.

This article begins by looking at the pre-R2P state of affairs, with particular reference to the Charter rule. That part of the paper will underscore that the literal interpretation of the relevant provisions, especially Article 53,⁸ has always been challenged in law as well as in practice. Part II of the article will analyze whether the R2P doctrine has had any impact on the relationship between the UN and the AY. Part III, the shortest, will briefly look at the issue of contradicting strategies between the UN and the regional organizations. A conclusion will end the paper.

I. Enforcement action and the relationship between the UN and regional organizations under the Charter.

1. The letter of the Charter

The framers of the United Nations Charter had foreseen the necessity to involve what they called regional “agencies” or “arrangements”⁹ in the

⁸ United Nations Charter, Art. 53, <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

⁹ See e.g., United Nations Charter, Art. 33(1), <http://www.un.org/en/documents/charter/chapter6.shtml> at 20 August 2012 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”)

maintenance and restoration of international peace. They dedicated the whole chapter VIII of the Charter to that issue. The latter makes a clear distinction between political and military approaches to conflict management or resolution. For political and diplomatic intervention, The UN and regional organisations do have equal power. Priority is even recognized to regional actors. When the action doesn't involve use of force, priority is recognized to regional arrangements or agencies. Article 52, paragraph 2 of that instrument states that:

The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve *pacific settlement* of local disputes through such regional arrangements or by such regional agencies *before referring them to the Security Council* (emphasis added).¹⁰

However, when force is to be used, the Security Council seems to be the supreme and unique power holder. Therefore, interventions by regional organizations need, at least, to be authorized. Paragraph 3 of the article 53 of the Charter clearly states that:

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* (emphasis added).¹¹

The delegates at the 1945 San Francisco conference focused closely on the use of force. Abuses of military power were still fresh in the collective memory of the delegates, who aspired to prevent history from repeating itself. That is why one of the key principles of United Nations membership is to refrain “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”.¹²

The issue was taken so seriously that even the two admitted exceptions, self-defense and enforcement action, are strictly submitted to the Security Council's control: self-defense is legal only as long until the Security Council has had the opportunity to take action itself.¹³ Entities undertaking self-

¹⁰ <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

¹¹ Ibid.

¹² United Nations Charter, Art. 2(4), <http://www.un.org/en/documents/charter/chapter1.shtml> at 20 August 2012.

¹³ See e.g. United Nations Charter, Art. 51, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

defense measures are also obliged to report to the Security Council. As for enforcement action, it up to the Security Council to place its imprimatur on its use, which will open happen when other measures 'would be inadequate or have proved to be inadequate'.¹⁴

It is commonly accepted that the Charter's prohibition to use force, except in the two above mentioned cases, applies not only to nation-states but also to regional arrangements.¹⁵ The question is what those organizations can legally do without bypassing the Charter. Like states acting individually, regional arrangements do have some legal powers but their action is strictly controlled by the Security Council. The primacy that Chapter VIII gives the Security Council reflects the compromise made at the San Francisco Conference, where there were heated debates concerning the proper relationship between, on the one hand, the bodies of the United Nations and, on the other hand, regional arrangements created separately from the United Nations. The delegates in San Francisco ultimately agreed to allow regional arrangements to act in self-defense without obtaining Security Council authorization but to require such authorization for enforcement actions.¹⁶ Security Council control in this area was considered necessary to prevent isolated regional arrangements from acting without global accountability and without regard for the global interest in international peace and security.¹⁷

According to a certain doctrine, when the Security Council authorizes a regional organization to use force in cases other than self-defense, the latter is just given the permission to act on the behalf of the former.¹⁸ This does not, however, mean that the Security Council could also delegate the ultimate control of the military operations to the organization engaged in it. It is argued that this would amount to a complete abdication of powers and it would undermine the centralized nature and institutional structure of the charter in the context of international peace and security.¹⁹ Furthermore, the Security Council cannot legally delegate that power, being itself a delegate of the UN member states: *delegatus non potest delegare*.²⁰ It is therefore a duty for

¹⁴ United Nations Charter, Art/ 42, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

¹⁵ Above n 5.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ De Wet, E., 'The relationship between the Security and regional Organizations during enforcement action under chap VII of the United Nations Charter', *Nordic Journal of International Law* (2012) 71, 1-37.

¹⁹ Ibid.

²⁰ Ibid. at 11.

the Security Council to keep controlling regional organizations it has authorized to act militarily.

De Wet argues that the prohibition of open-ended mandates to regional organizations in matters of international peace and security is dictated by the fact that centralization of the use of force is the cornerstone of the Charter.²¹ Thus with the exception of those undertaken for self-defense, military interventions by regional organizations have to be authorized by the Security Council. They are otherwise illegal, even in cases of gross and systematic human rights violations.

Politically speaking, challenging the exclusive authority of the Security Council has been viewed as a challenge to the United Nations, and even worse, as weakening international law:

Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms.²²

Does this orthodox view prevail unquestioned? Does literal interpretation of the charter tell the whole story? A review of state practice and its recognition by the international community suggests that it does not.

2. Pre-R2P challenge to the literal interpretation of the Charter

Long before the emergence of the Responsibility to Protect doctrine and the questioning of the exclusive authority of the Security Council by regional organizations, the challenge from within the United Nations was a reality. In 1950 and 1956, the General Assembly took the “United For Peace Resolutions” and sent military missions respectively in Korea and Egypt.²³ The Security Council was in deadlock following the decision of the former USSR to walk out after Taiwan was admitted to the United Nations. Interestingly enough, the General Assembly never claimed to have legally taken over the Security Council’s power. Officially, its support to the mission was a kind of political and moral substitute to the legal blessing that would have come from the Security Council. The message conveyed was that, even in the absence of Security Council endorsement and with the

²¹ Above n 18.

²² Garth Evans, ‘The Responsibility to Protect’, NATO Review, <http://www.nato.int/docu/review/2002/issue4/english/analysis.html> at 21 August 2012.

²³ United Nations, <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html> at 21 August 2012.

General Assembly's power only recommendatory, an intervention which takes place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support. However, most of the challenges are found in the practice of regional organizations like the the Economic Community of West African States (ECOWAS), the Organisation of American States (OAS), and the North Atlantic Treaty Organisation (NATO).

In 1990, the ECOWAS undertook an enforcement action to establish peace in Liberia. The Organisation did not obtain Security Council authorization and did not attempt to justify the action in terms of the Charter system. Literally speaking, this could have been looked at as a brutal violation of the Charter. Nevertheless, the international community reacted positively. Hakimi notices that, for months, the Security Council simply ignored the conflict in Liberia, as well as the fact that ECOWAS had taken an unauthorized enforcement action. He further observes that, when the Council finally considered the issue, first in January 1991 and later in its Chapter VII Resolutions, it commended ECOWAS for its efforts to establish peace in Liberia without mentioning the authorization requirement of Article 53.²⁴

Some scholars have interpreted the Security Council's commendations to constitute retroactive authorization for purposes of Article 53. This interpretation is just convenient because it places the international response to the Liberian conflict within the legal framework of the U.N. Charter. But it is not completely accurate. The Security Council did not, in fact, authorize any enforcement action. The Resolution 788 frequently cited by scholars holding those views invoked the Council's Chapter VII authority, but it did so only to impose the arms embargo and not also to authorize the use of military force. Moreover, there is some evidence that the failure to authorize the use of force was deliberate. Western diplomats at the U.N. were prepared to authorize only political and not military action in Liberia. Thus, the fact that the Security Council commended ECOWAS for its multifaceted efforts to establish peace in Liberia does not translate into Security Council authorization for the enforcement action per se. And even if it did, the Security Council's "authorization" in November 1992 would not explain the failure of the international community to enforce the Charter system up to that point, i.e. for two years.²⁵ The military intervention in Liberia by ECOWAS took place without any authorization

²⁴ Above n 5.

²⁵ *Ibid.*

by the Security Council but no one, not even the Security Council, regarded it as unlawful. On the contrary, it was praised by almost the entire international community. ECOWAS in Liberia is not an isolated case.

In 1962, that is thirty but two years before ECOWAS intervention in Liberia, the United States and other members of the OAS had imposed quarantine on Cuba to stop it from receiving missiles from the Soviet Union. The quarantine was an enforcement action taken without Security Council authorization, but most other states tolerated or even supported the action. The states that openly supported the quarantine acted as if it raised no questions under the Charter system.²⁶

There is no question that the quarantine constituted the threat or use of force under international law. Notably, neither the United States nor the OAS attempted to justify the quarantine in terms of self-defense.²⁷ Some scholars argued that the quarantine was not prohibited under Article 2(4). Others argued that the quarantine was a lawful act of self-defense, on the understanding that the deployment of nuclear weapons in Cuba constituted either an effective “armed attack” for purposes of Article 51 or an imminent threat of armed attack for purposes of the doctrine of anticipatory self-defense. These arguments are not absurd, but they require interpreting the Charter in a way that is inconsistent with the security framework it originally established. As Professor Riesman and Andrea Armstrong explain:

The United Nations Charter’s prescription with respect to the use of force is essentially binary: either a use of military force is in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful. As for the right to resort to military measures in self-defense, it materializes only when the state invoking it has suffered an “armed attack,” a stricture that does not even extend to the *Caroline* doctrine of anticipatory self-defense.²⁸

What is interesting to note in both interventions is *not* that the involved organizations (OAS and ECOWAS) did not request authorization from the Security Council prior to their military operations. This is just a fact. The most interesting legal lesson from those cases is that the interventions have been welcome and praised, even by the UN organ in charge of peace and security. This is more than a political statement. It is a legal seal of approval. It means that a customary rule is developing. ECOWAS in Liberia and the

²⁶ Ibid.

²⁷ Ibid. at 17.

²⁸ Ibid.

OAS in Cuba are just cases.²⁹ How this custom can coexist with the Charter rule is another issue.

Hakimi argues that two different legal systems govern enforcement action taken by regional arrangements. One system is reflected in the Charter text and publicly endorsed by major international actors. The second, more nebulous system is based on expectations and demands in the absence of Security Council authorization. Under this second system, the international community may discreetly tolerate a deviation from the Charter rule depending on the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting regional arrangement.

What should we understand by the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting regional arrangement?

According to Hakimi, what the international community deems sufficient enough an interest to warrant 'unauthorized' use of force largely depends on context. The international community is notoriously fickle in protecting international norms. Major actors sometimes but not always believe action is appropriate to cease a humanitarian crisis, to prevent an incident of nuclear proliferation, or to eliminate terrorist havens. The international response in any particular case thus turns on the context in which these norms are implicated and the extent to which they conflict with other interests.

As a general matter, however, the international community is more likely to acquiesce in an unauthorized enforcement action where the interests being satisfied relate (in some way) to the maintenance of international peace and security. The use of force to maintain international peace and security is an established component of the international legal process and is provided for in the U.N. Charter. Of course, the Charter also requires that such actions be authorized by the Security Council, but the failure to obtain Security Council authorization does not eliminate the weight of the substantive interest.³⁰

With respect to the circumstances surrounding the lack of authorization, the author first of all observes that regional arrangements presumably forgo the authorization requirement of Article 53 because they expect not to obtain

²⁹ Above n 5.

³⁰ Ibid.

authorization. However, the circumstances in which such authorization is forgone will vary widely and will influence the international response. It matters, for example, whether and in what way the Security Council is seized of the matter when the regional arrangement acts. It also matters whether the regional arrangement takes steps to involve the Security Council or attempts to circumvent the Council altogether. It finally matters why Security Council authorization would not be forthcoming. This means that international actors will analyze the situation differently if they view a permanent member as being intransigent based on motives unrelated to the issue at hand than if they believe there are legitimate reasons for the Council not to authorize the use of force.³¹

As for the characteristics of the regional arrangement, the international community will consider, for instance, whether that arrangement has any connection to the target of the action and whether it is subject to any controls. First, the international community is more likely to tolerate a deviation from Article 53 where the regional arrangement has a unique connection usually based on geography to the subject of the action. Regional arrangements are understood to have a strong interest in addressing threats that originate within their own regions, and they often have the tools necessary to respond quickly and effectively. Therefore, it is acknowledged that regional arrangements may be better suited than the universal organs of the United Nations to address local threats to peace and security. This is particularly the case where the regional arrangement acts against one of its own member states. In that event, the targeted member state may be deemed to have “bought into” the regional regime within which the regional arrangement acts.³²

It might look obvious that regional organizations can only act against their own members. The truth is that this is not always the case. The NATO campaigns in Kosovo and Libya suggest caution. The scope of this article doesn't allow going further in the distinction between the ‘regional arrangements or agencies’ that the Charter talks about in chap. VIII and the regional defense organizations like NATO or the former Warsaw Pact. It suffices mentioning that the latter are formed mainly for self-defense purposes against external aggressions.

The debates that preceded the adoption of the doctrine of the Responsibility To Protect showed that more flexibility was to be expected in the law of use of force. But predictably, the controversial nature of the issue

³¹ Above, n. 29.

³² Ibid.

obliged the promoters of R2P to make some steps back. To gain consensus, the document of the new framework choose to reassure the most conservative states to have them on board. The exclusive authority of the Security Council was reaffirmed, despite that it had been repetitively and consistently challenged, as above mentioned.

II. The Responsibility to Protect and the Security Council's exclusive power to authorize enforcement action

1. The 2004 World Summit Outcome Document: A restatement of a fallacy.

In the year 2004, in the debates about the United Nations Reform, the concept of Responsibility to Protect was officially taken up by the World Summit. Its definition, justification, pillars and implementation policies are part of the Outcome Document of the Summit.³³ The legal value of that report and thus of the R2P is beyond the scope of this article.

Much like the Charter did with respect to international peace and security more than sixty years ago, the R2P framework recognizes that the collaboration between the Security Council and regional organizations is necessary and even inevitable. On the issue at discussion here, i.e. military intervention, the report of the Summit provides that:

We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by- case basis and *in cooperation with relevant regional organizations as appropriate*, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (emphasis added).³⁴

The report avoided, in very clear terms, any possible ambiguity about the meaning of the word 'collaboration' between the Security Council and Regional Organisations as far as enforcement action is concerned. It literally cited the report of the International Commission on Intervention and State Sovereignty (ICISS), as completed and submitted to the General Assembly three years before. It states that:

³³ Above n 7.

³⁴ A. Ademola, 'The African Union and the Responsibility to Protect', in J. Hoffmann & A. Nollkamper (eds) *The Responsibility to Protect: From Principle to Practice* (2011) 119.

The Commission is in absolutely no doubt that *there is no better or more appropriate* body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decision in the hard cases about overriding state sovereignty (emphasis added).³⁵

Although the Commission took that standpoint, reflecting, as it states itself, the international consensus at that time, it was aware of the shortcomings of the Security Council. It even recognised that there was a legitimacy issue to be dealt with. The conservative position it took was apparently the only way to assure states afraid of possible imperialist agendas, hidden behind the noble concept of the Responsibility to Protect. It thus stated that:

If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that *the central role of the Security Council will have to be at the heart of that consensus*. The task is *not to find alternatives to the Security Council as a source of authority*, but to make the Security Council work much better than it has.³⁶

The World Summit ignored entirely the *contra legem* customary rule which was developing at that time. Worse, no stock was taken of the law developed by regional organisations. Nor did the final report take into consideration strong reactions to the ICISS proposals on that issue, submitted to the General Assembly by those organisations before the Summit, like the one from the African Union.³⁷

2. African Union Law and the centralization of use of force

a. The Constitutive Act of the African Union and its additional protocols

In 2002, a ‘revolution’ took place in the law and politics of the African Continental Organization. The context was the creation of the African Union. The defunct Organization of African Unity (OAU) had been created in 1963 with the main aim of preserving the independence of the new states and to politically support the African peoples that were still under colonization or apartheid. Therefore, it is not surprising that the organisation established in its charter and based its policies on the two principles of *sovereign equality of all member states* and *non-interference in the internal*

³⁵ Ibid at 222.

³⁶ Ibid.

³⁷ Above n 7.

affairs of states.³⁸ The two principles were strongly reaffirmed not only out of fear of European imperialism but also partly out of the desire of larger members of the OAU to allay the fears of smaller ones concerned that they would be overwhelmed by greater force in frontier disputes.

As respectable and relevant as they might have sounded at their time, the above principles prevented the OAU from acting in the prevention and management of intra-state conflicts. In the twenty-first century, strong claims of democracy and human rights made it necessary to rethink state sovereignty in Africa. As far as security is concerned, tragedies like the Rwandan genocide made it impossible to go on admitting that states could do whatever pleases them inside their borders. It is in this context that Article 4(h) of the Constitutive Act³⁹ establishes the “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”, as one of the key principles in accordance with which the Union has to function. This was saluted as a shift from *non-interference to non-indifference*.⁴⁰ From a legal perspective, the shift is significant because it happened even before the adoption of the concept of ‘Responsibility To Protect’ (R2P) by the 2005 World Summit. That is the reason why the African Union is usually referred to as a pioneer of the R2P.⁴¹ According to Ademola, no single international organisation had ever legally provided for humanitarian intervention in its treaty prior to the advent of the AU.⁴²

The other reason explaining the relevance of the African Union Law in the R2P discussion is the broadness of the triggering events it admits. In fact, the initial list made by the Constitutive Act—genocide, war crimes and crimes against humanity—has been expanded by the 2003 Maputo Amending Protocol to include ‘serious threats to legitimate order’. The phrase is believed to mean military coups or other attempts at overthrowing a legitimate government.⁴³ Attempts to mitigate absolute sovereignty in democracy-related matters have also materialized in the adoption of the

³⁸ Moller, B. ‘The African Union as a security actor: African solutions to African problems?’ Working Paper, Crisis States Research Center, LSE DESTIN (2009), www.eprints.lse.ac.uk at 20 August 2012.

³⁹ Constitutive Act of the African Union, Government of South Africa, http://www.au2002.gov.za/docs/key_oau/au_act.pdf at 21 August 2012.

⁴⁰ P. Williams, ‘From non-intervention to non-indifference: The Origins and development of the African Union’s security Culture’ *African Affairs* (2007).

⁴¹ E. Luck, ‘The United Nations and the Responsibility To Protect’, *Policy analysis brief* (2008).

⁴² Above n 34.

⁴³ Above n 40.

2007 African Charter on Democracy, Elections and Governance, which explicitly referred to the causal link between unconstitutional changes of government and insecurity, instability and violent conflict in Africa.⁴⁴

Including the fight against unconstitutional change in the R2P agenda is characteristic of the breadth of the new framework of the AU. It is worth mentioning that the AU is not actually (re)inventing the wheel in Africa. In 1990, the ECOWAS sent a force (ECOMOG) in Liberia with the mandate to restore law and order and create the necessary conditions for free and fair elections.⁴⁵ Involvement in obviously domestic politics is not anathema in African regional law and politics any longer. When compared with the heated debate about regime change as part of the 'global' R2P agenda, one can simply conclude that visionaries (or imperialists, as the case may be) are not always the ones usually labelled as such.

Although the letter of Article 4(4) clearly highlights that the AU has recognised the right to intervene in the above mentioned situations, the actual extent of that 'right' has been debated. The question is how much autonomy the Union has in the exercise of that 'right'. In other words, can the Union decide to use force without the authorisation of the Security Council? Or can it act and wait for an ex-post facto authorisation? Scholars like Ademola argue that the Union has just got the power to use political means.⁴⁶ This would perfectly fall in the peaceful mechanisms recognised by article 52 of the UN Charter. The author believes that the African Union founders did not actually want to grant the Union the power to autonomously use force. The argument is based, according to the author, on an analysis not only of Charter provisions but also on the history and political context of the reform. This view can be criticised in many respects. Its main weakness is its lack of realism. Stating that the 'revolution' wanted by the drafters of the Constitutive Act was limited to political and diplomatic interventions is to forget the aim of the R2P intervention: preventing or stopping war crimes, genocide, crimes against humanity and ethnic cleansing. It seems that a strategy totally excluding military action is not likely to achieve that goal. Whether military action without authorisation by the Security Council would still be lawful is another question. The African Union thoroughly looked at this issue during the Ezulwini conference.

⁴⁴ African Union, African Charter on Democracy, Elections and Governance at 21 August 2012.

⁴⁵ Above n 18.

⁴⁶ Above n 34.

b. The Ezulwini consensus: A “declaration of independence” from the Security Council?

In 2005, at Ezulwini in Swaziland, African states discussed about how to deal with the Security Council authorization in the implementation of R2P. They adopted a document that is still referred to as the ‘Ezulwini Consensus’.⁴⁷ The consensus states that the authorization for the use of force by the SC should be in line with the conditions and criteria proposed by the High Panel on Threats, Challenges and Change created by the UN Secretary at that time, Kofi Annan. The high-level panel had in fact identified five criteria or conditions which should guide the SC’s decision as to whether to authorise a military intervention or not. These are: seriousness of threat, proper purposes, last resort, proportionality, and balance of convenience. The Ezulwini Consensus agrees with those criteria but strongly states that their interpretation by the Security Council should not undermine the responsibility of the international community to protect civilian people at risk of the above mentioned crimes.⁴⁸ It can therefore be concluded that the African Union accepts the primacy of the Security Council for military operations, but only insofar as the Council behaves responsibly, which means, as stated above, in a way that doesn’t undermine the ability of the international community to discharge R2P.

However, the African Union has never had, even at Ezulwini, the illusion that the Security Council would ever apply these conditions in a manner that would guarantee that African lives would not be lost to the shenanigans of SC politics. Precedents of the SC’s extremely costly inaction in African conflicts, particularly during the 1994 Rwanda genocide, have left many Africans understandably disillusioned about leaving the implementation of R2P to the exclusive charge of the Security Council, especially with respect to the use of force to halt or avert humanitarian disasters. That is the reason why, as a precaution, the African Union decided at Ezulwini that, although it recognizes that the authorization from the Security Council is required for a military intervention to be legally valid, such approval could be granted *after the fact* in circumstances requiring urgent action.⁴⁹ The Union thus reserved for itself the right to act first and then seek retroactive approval as the situation might warrant. The signal given at Ezulwini is that the African Union does not regard Article 53(1) of the UN Charter, under which

⁴⁷ Document available at Responsibility to Protect, http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=34 at 21 August 2012.

⁴⁸ Above n 34.

⁴⁹ Ibid.

regional organisations are obligated to seek SC authorisation for their enforcement actions, to be always applicable. The legal and political question of Ezulwini was a kind of dilemma that the African Union decided to solve. According to Ademola, the choice was between leaving everything to the Security Council and risking doing nothing, and taking steps towards protecting human lives prior to worrying about compliance with legal obligations.⁵⁰ The African Union choose the latter.

Though the document of the Ezulwini Consensus does not mention it literally, it can be assumed that the decision was based on the hope that the Security Council would retrospectively validate the interventions. However, from the perspective of an intervener, there is a kind of contradiction in recognising that the authorisation of the Security Council is required for the legality of the intervention while simultaneously stating that the authorisation can be granted afterwards, *après coup*. Does it not put the Security Council in front of a *fait accompli*? What if the authorisation is refused afterwards? In sum, for a regional organisation rooted in the good faith of its members, there is no practical difference between stating that authorisation can come afterwards and arguing that it is not required at all.

Article 4(h) of the Constitutive Act of the African Union and the Ezulwini Consensus, are clearly at odds with the letter of the article 53 of the UN Charter. A rigorous interpretation of the latter suggests in fact that the authorisation must be given prior to intervention. The question is whether they can still be lawful. Article 103 of the UN Charter stipulates that:

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.⁵¹

Hakimi would give an affirmative answer to the above question.⁵² As previously highlighted, that author thinks that legality does not any more mean consistency with the Charter.

Levitt claims that Article 4(h) of the AU Constitutive Act and its interpretation by the Ezulwini Consensus do not actually violate article 103 UN Charter. That author bases his point on the fact that, acting under

⁵⁰ Ibid.

⁵¹ UN Charter, United Nations, <http://www.un.org/en/documents/charter/chapter16.shtml> at 21 August 2012.

⁵² Above n 5.

Chapter VII of the UN Charter, the UN Security Council has retrospectively authorized African Regional interventions taken under the authority of hardened regional customary law that has been modified into treaty. He specifically refers to operations undertaken by the ECOWAS in Sierra Leone. He therefore concludes that article 103 of the UN Charter seems to create an exception for African intervention treaties. According to him, it cannot be argued otherwise unless one accepts that the Security Council violated Article 103 in retrospectively authorizing the interventions he refers to – a difficult claim to make given the discretionary power of the Security Council in that matter.

Levitt's argument is fantastical from a formal point of view.⁵³ The problem with the reasoning is that the author does not take into consideration the fact that for the Security Council to grant an *ex post facto* authorization to an intervention, the 'regional law' in accordance to which the intervention was decided is indifferent. It is an 'internal affair' for the organization. Rather, what matters is whether, according to the provisions of the Charter and with regard to the facts of the situation, the Security Council would have allowed the intervention *ex ante*. If the Council deems it should have but did not do it because of its own shortcomings, then the *ex post facto* authorization is granted. The function of that authorization is then to validate an already legal intervention, as far as the substantial motives are concerned. On the contrary, if the Council deems that it would not have given the authorization, for instance because the grounds for intervention are missing, the fact that the intervention has already taken place in accordance to 'regional law' does not change anything. The intervention is declared illegal. This is the weakness of Levitt's argument. When the Security Council grants *ex post facto* authorisation to a military intervention undertaken by a regional organization, the authorization is not to be seen as declaring that the 'regional law' according to which the intervention was first decided is in conformity with the Charter. Neither does it guarantee that future similar interventions will be authorized. The power of the Security Council is discretionary and the discretion is exercised on a case by case basis.

Furthermore, a doctrinal trend suggest that since Article 103 is addressed to states and not to international organisations, and since the latter are not signatories to the UN Charter, their use of force without SC authorization

⁵³ Levitt, J. (2003). The Peace and Security Council of the African Union: The known unknowns. *Transnational Law and Contemporary problems*, 109, pp.109-137.

to implement R2P does not contravene Article 103.⁵⁴ The argument might look a bit hypocritical. It sounds as if it were possible for states to escape collectively from obligations that they individually assume under the UN Charter. As far as use of force is concerned, this cannot happen because the relevant provision here (Article 53) directly targets regional ‘arrangements or agencies’ and not individual states. The argument does however have some relevance. It recalls that there is no such a thing as a rigid hierarchy within the sources of international law. It therefore opens the door to customs that might contradict, at least slightly, the letter of the UN Charter.

The claim that regional organisations do have an independent power to use force is supported by political realities. One of them is the inaction of the Security Council. Kofi Annan, the former UN Secretary General once warned:

If the collective conscience of humanity ... cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice. If the Council – and the five permanent members in particular – fail to make the Council relevant to the critical issues of the day then they can only expect that the Council will diminish in significance, stature and authority.⁵⁵

The logic of the argument is that if the Security Council does not want regional organizations to use force, it can prevent them from doing so just by acting itself, taking Chapter VII measures. Ironically, the EZULWINI Consensus viewed the Security Council’s exclusive authority in exactly the same as the Responsibility to Protect doctrine looks at state sovereignty. For a state, sovereignty implies responsibility and, in this case, the willingness and ability to protect its citizens and inhabitants against genocide, crimes against humanity, war crimes and ethnic cleansing. Applying the same rule to the Security Council begs the following question: why should the Council always claim exclusive authority to authorize enforcement action even though it does not necessarily comply with its responsibility-to-protect duties? Just as a state that does not comply with its R2P duties forfeits all or part of its sovereignty, so should an exceedingly passive Security Council be obliged to bear other actors who intervene to protect individuals in danger.

⁵⁴ Above n 34.

⁵⁵ Press Release: Secretary-General Presents his Annual Report to the General Assembly, United Nations, <http://www.un.org/News/Press/docs/errors/99999999.sgs7136.html> at 21 August 2012.

A conservative counter-argument is that this contravenes spirit of the Charter with respect to the functioning of the Security Council. De Wet argues that we cannot demand the Council to justify why it is not adopting military measures. According to that author, in the case of enforcement action, the Charter system is based on an ‘opt in’ procedure, rather an ‘opt out’ one. This means that the Security Council only has to justify why it is engaging in military action and may not be forced into a situation where it has to justify its inaction. This is reflected by the five permanent members’ veto power.⁵⁶ That counter-argument is not convincing precisely because the doctrine introduces the notion of ‘Responsibility’. It is wrong to look at the Security Council only as a power holder. It is also a responsibility-bearer.

The misuse or abuse of the veto power by permanent members offers another source of legitimacy to attempts to override the exclusive authority of the Security Council. It is today deemed unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern. Of particular concern is the possibility that needed action will be held hostage to unrelated political interests of one or more of the permanent members.

During the consultations that led to the adoption of the R2P framework, a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis was suggested. The idea essentially was that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The concept would have been similar to ‘constructive abstention’, an expression used in that context in the past. This was deemed to be the most pragmatic way to prevent the veto power from sabotaging entire R2P project.⁵⁷ The promoters of the idea knew that it was unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution were concerned. The adoption by the permanent members of a more formal, mutually agreed practice to govern the R2P situations in the future would have been a very salutary development. During the 2005 Summit that led to the adoption of the World Summit Outcome Document which defined the R2P, it was suggested to include

⁵⁶ Above n 18.

⁵⁷ Andy W. Knight and Frazer Egerton, *Routledge Handbook of the Responsibility to Protect* (2012) 99-100.

that agreement in the final document, but the United States of America rejected the proposal.⁵⁸

Apart from its inaction, the Security Council is criticised for its unprincipled implementation of the global security system. This has a particular significance for Africa. The indignation of African States with entrusting the exclusive responsibility to protect peoples in the Security Council derives from a history of costly disappointments and betrayal at the hands of the notoriously selective priorities of the United Nations. Unprincipled application of collective security has prompted African states to openly defy some Security Council decisions. For instance, the Organisation of African Unity's Assembly of Heads of State and Government adopted the Ouagadougou decision, which mandated its members to disregard the SC sanctions imposed on Libya pursuant to the Lockerbie Affair.⁵⁹

It is also argued that the regional organisations' proximity to conflict areas adds to their legitimacy to intervene. At Ezulwini, the African heads of States and Governments thought it was imperative that Regional Organisations in areas close to conflicts, be empowered to take action since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to appreciate fully the nature and development of conflict situations.⁶⁰

c. Smartly circumventing the Charter: Extending the definition of self-defense

Depending on the level of integration, states cede parts of their sovereignty and give relatively important powers to the regional organisations of which they are members. Ceding part of one's sovereignty is in itself a sovereign act. The Charter cannot forbid it, even if it concerns military action. In fact, the ECOWAS member states did it in 1999. To avoid possible controversy that might result from interventions similar to the one undertaken in Liberia a decade before; they adopted a protocol authorizing the ECOWAS to take enforcement actions in any member states without their consent. Since then, ECOWAS has applied the protocol on several occasions, including repelling Faure Eyadema's unconstitutional ascendancy to the Togolese presidency

⁵⁸ Above n 34.

⁵⁹ Ibid.

⁶⁰ Ibid.

after the death of his father, and imposing arms embargoes on Guinea and Niger in 2009.⁶¹

It can be argued that since consent is given in a treaty, the intervention cannot qualify as enforcement action. The argument does not survive scrutiny, though. It is worth keeping in mind the difference between consent given to a specific intervention and the one given once for all in a treaty. The latter does not alter the enforcement character of the operation.

As the above developments clearly show, the conflict between the United Nations Security Council and regional organizations turns mostly on the power to use force. However, conflict may also arise regarding the means of the intervention. In other words, the regional organization's approach might be peacefully to look for political solutions to the conflict while the Security Council thinks force is the only option. This is what happened in Libya between the African Union and the United Nations Security Council.

III. Conflicting approaches to protection

At the very beginning of the insurrection in Libya, before the incendiary declarations of Muhamar Kaddafi promising hell to the rebels, the African Union had established a high-level ad hoc committee on Libya. On March, 10, 2011, the Committee received a mandate articulated in mainly three points:

1. To engage with all the parties in Libya and continuously assess the evolution of the situation on the ground;
2. To facilitate an all inclusive dialogue between the Libyan parties on the appropriate reforms to be carried out; and
3. To engage AU's partners, in particular the League of Arab States (LAS), the Organisation of the Islamic Conference (OIC), the European Union (EU) and the United Nations, to facilitate Coordination of efforts and seek their support for the early resolution of the crisis.⁶²

The Committee immediately recognized the Libyan people's aspiration to democracy, political reform, justice, peace and security, as well as socio-economic development, and the need to ensure that these aspirations

⁶¹ Ibid.

⁶² Communique of the 265th Meeting of the Peace and Security Council (10 March 2011), Mathaba, <http://www.mathaba.net/news/?x=626177> at 21 August 2012.

are fulfilled in a peaceful and democratic manner.⁶³ It never supported any side openly. The African action it was calling for revolved around the following elements:

- i. the immediate cessation of all hostilities;
- ii. the cooperation of the concerned Libyan authorities to facilitate the diligent delivery of humanitarian assistance to the needy populations;
- iii. the protection of foreign nationals, including African migrant workers living in Libya; and
- iv. dialogue between the Libyan parties and the establishment of an inclusive transition period, with the view to adopting and implementing the political reforms necessary for the elimination of the causes of the current crisis, with due consideration for the legitimate aspirations of the Libyan people for democracy, political reform, justice, peace and security, as well as socio-economic development.⁶⁴

However, that agenda survived only on paper. The AU Committee flying to Tripoli to start contacts in view of the implementation of that roadmap was refused access to the Libyan territory by the NATO applying the UNSC Resolution 1973. Why did this happen? The ‘*no fly zone*’ component of the resolution cannot justify the decision because its logical targets were the Libyan military’s aircrafts and their possible supporters. The real reason is that the African Union’s political approach was in open conflict with the NATO and UN military strategy. When the Committee was allowed to go to Libya, it was too late. The NATO bombing had created a military context such that one side of the belligerents was no longer interested in negotiations.⁶⁵

The Libyan case exemplifies the fact that the statement according to which use of force is the last option is merely a theoretical one. It does not mean the same thing in practice for the UN as for the African Union. According

⁶³ Looking at the Libyan political landscape and practices of that time, it is not clear that peaceful political voices calling for change would have ever been heard. However, in calling for a peaceful political process, the African Union was simply and faithfully applying the Charter on Democracy and Good Governance to which Libya is a party. Above n 44.

⁶⁴ Press Release: Visit of the African Union High-Level ad hoc Committee on the situation in Libya to Tripoli, African Union (10 April 2011), http://www.au.int/en/sites/default/files/Communique%20Libya%20_eng_%2010.4.pdf at 21 August 2012.

⁶⁵ K. Apuuli, The Principle of ‘African solutions to African Problems’ under the spotlight: The African Union (AU) and the Libya Crisis.

to Thakur, the UN's eagerness to use force should not surprise. Basing his judgment on history, the author states that the United Nations was neither designed as nor expected to be a pacifist organisation. In fact, the origins of the World Organization lie in the anti-Nazi wartime military alliance among Britain, the United States and the Soviet Union.⁶⁶

Proud of its Kenyan experience with Kofi Annan during the 2008 post-elections violence (an episode still believed to be the first application of the Responsibility to Protect), the African Union had dreamed of achieving the same success in Libya: preventing the worst without using force. It did not happen like that. Whether the AU's proposed approach would have been the most effective one is another question. What the case simply highlights is that the conflict between approaches in the implementation of the Responsibility to Protect is likely to happen again. In such a situation, determining the organization whose word is the last requires much more than a literal reading of the Charter rule.

Conclusion

This article has looked at the relationship between the United Nations and regional organisations in the implementation of their Responsibility to Protect duties. Although it also discussed possible conflicts between the approaches to protection by the regional organisations and the United Nations, most of the focus was on power distribution with respect to enforcement actions. The article has highlighted that recent state practice has challenged the Charter rule that regional organisations can only get involved in enforcement action with Security Council authorisation. Based on an analysis of the practice of the Organisation of American States but also and mainly on the law and practice of the African Union and some other African sub-regional organisations like the ECOWAS, the article argued that the challenge to the exclusive power of the Security Council to authorise enforcement action started long before the emergence of the Responsibility To Protect as a policy or norm. The article has also highlighted that those challenges cannot be seen as violations of international law because they seem to be accepted, even by the Security Council itself. However, the paper refused to look at Charter rules as mere legal niceties. Instead, it has argued that the letter of the Charter no longer tells the whole story about the law of use of force. Then what?

⁶⁶ R. Thakur, 'Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism', (2011) *Security Challenges* 13-25.

Though the United Nations Charter keeps its relevance, neglecting the internationally accepted practice of regional organisations is shortsighted. The former UN Secretary General characterised the Responsibility to Protect as ‘an evolving norm of International Law’.⁶⁷ Can the same not be said of the authority of regional organisations to *autonomously* conduct all their R2P duties, enforcement action included?

⁶⁷ Public Conference in the University of Ottawa on the tenth anniversary of the adoption of the Responsibility To Protect.