

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

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I. Introduction

Since the end of the Cold War, much international attention has been focused on the use of force outside the parameters of the United Nations Charter. While attempts have been made to justify actions in Kosovo and Iraq based on evolving – customary – norms of international law, little consensus has emerged regarding state practice or *opinio juris* which would allow for an expansion of legal recourse to the use of force beyond self-defence or actions undertaken by the UN Security Council to ensure international peace and security.

Yet, quietly, a much more fundamental challenge to the United Nations system has materialized which institutionalizes exceptions to the use of force which go beyond both the scope of self-defence and actions undertaken by the UN Security Council. Fundamental, this is due to the fact that these exceptions are not based on the ill-defined vagaries of customary law but are constituted by international treaties which override the provisions of Chapter VII of the UN Charter. Thus, the coming into force of the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, which operationalizes the provisions of the Constitutive Act of the African Union, is the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council.

The implosion of the Soviet Union in 1989 marked an end to the Cold War and ushered in a decade of uncertainty which was manifest in the label which was given to it. Unable to establish a coherent meta-narrative which could encapsulate the geopolitics of the 1990s, the international system was considered as an appendage of what had come before it, and thus the term “post-Cold War” became common currency. Though lacking a distinct identity, the 1990s was, most evidentially, a decade which differed from that which preceded it. Where previously, at the apex of the struggle between East and West – within the United Nations Security Council – the Soviet Union and the United States of America had their actions frozen by their reciprocal veto power, the post-Cold War era allowed the United States to gain sway. Having emerged from a deep thaw, the UN Security Council was able to assert itself in ways that it previously had not been able. The ability of the UN Security Council to act was a manifestation of what appeared to be the emergence of a multilateral system predicated on the dominance of the United States. This new found vigour of the UN Security Council and the lead role of the United States was made most

evident in 1990 Declaration of the then US President George Bush of a “New World Order”. By comparison, the events of 11 September 2001, marked the emergence of a new international framework. This framework has as its meta-narrative the “War on Terror” and is manifest in the growing assertiveness of American unilateralism beyond the parameters of the accepted norms regarding the use of force.

Since the end of the Cold War, therefore, the United States has increasingly sought to assert its dominant position internationally, acting with the consent of the UN Security Council where it could manage its support; but progressively choosing to act beyond the UN Charter where it lacked the co-operation of the Security Council. In the wake of the United States’ use of force outside the parameters of the UN Charter, has followed a number of jurists who have sought to justify American actions as being legal, by recourse to either a widening of the notion of self-defence or by developing new exceptions to permissible use of force, most notably that of “humanitarian intervention”. Short of having established a treaty which incorporates this expanded notion of the use of force, what would be required to establish the normative value of such an expansion would be the creation of customary law which is based on state practice and *opinio juris*. While debates have raged as to the legality of various actions led by the United States, the newly established African Union, having learnt the lesson of UN inaction in Rwanda and witnessed effective interventions without UN Security Council authorization by West African states in Sierra Leone and Liberia, decided to forego the need to seek approval of the Council to act on the African continent. Furthermore, with the coming into force in December 2003, of the Protocol establishing an African Peace and Security Council, African states have introduced the use of four new justifications allowing for the invocation of the use of force, thus widening the parameters of what is to be considered as legal projection of military might on the continent.

Before considering attempts to justify evolving customary exceptions to the use of force or the new conventional exceptions laid down by the African Union, a review of the established parameters of the use of force is required to expose the limits of what is currently accepted by states as the established law.

II. Established Parameters of the Use of Force

As conceived in 1945, the United Nations Charter allows for three situations in which the use of force is permissible. Of these three exceptions, the provisions regarding ‘enemy states’ no longer holds, as they are dead-letter law. Articles 53 and 107 of the Charter allowed for the recourse, by the UN Security Council, to the use of force against a state “which during the Second World War has been an enemy of any signatory of the present Charter”, whereby that enemy state would rear its head with a “renewal of [an] aggressive policy”¹. As Georg Ress notes in Bruno Simma’s commentary on the United Nations Charter, since “all former enemy states have become members of the UN there are no cases where Art. 53 [...] might be applied. It was conceived as a transitional provision and has become obsolete”². Putting aside the provisions regarding “enemy states”, the United Nations Charter thus allows for only two exceptions to an overall prohibition against the use of force as manifest in Article 2 (4) of the Charter which establishes, as a Principle of the United Nations Organization, that:

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

These exceptions are self-defence, as noted in Article 51, and action, under Article 42, taken by the UN Security Council so as to ensure international peace under Chapter VII of the UN Charter.

1. Self-Defence (Article 51)

The first exception to the use of force is Article 51 of the Charter which provides for an inherent right to self-defence, either individually or col-

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¹ See primarily Article 53 UN Charter.

² B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1995, 751. Note that Dailler and Pellet speak of the provisions being *caduques*, that is: null and void. See P. Dailler/ A. Pellet, *Droit International Public*, 1994, 887.

lectively, but does so under the ultimate control of the United Nations Security Council. Article 51 reads:

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

As a result, even in situations where a state is acting in self-defence, it must ultimately yield to the international order as established by the United Nations Charter, and the dictates of the UN Security Council. Though one must emphasize that such dictates do not vitiate a state’s “inherent right” of self-defence if the Council does not act effectively.

As the obsolete nature of the provisions of Articles 53 and 107 regarding “enemy states” indicate, the United Nations Charter is not necessarily a static document, instead its provisions may evolve over time. Beyond provisions falling into abeyance such as those regarding the Military Staff Committee under Chapter VII of the Charter, other provisions are understood to have been modified so as to be interpreted in a manner which is not obvious from an ordinary reading of the Charter. Consider two examples: first, that Russia now sits in the seat of the United Nations Security Council which by virtue of Article 23 belongs to the Union of Soviet Socialist Republics³; and second, that contrary to the wording of Article 27 para. 3 Security Council Resolutions do not require an “affirmative vote [...] including the concurring votes of the permanent members”, but as the ICJ stated “[...] a permanent member has only to cast a negative vote”⁴. Despite the fact that the UN Charter

³ Y. Blum, “Russia Takes Over the Soviet Union’s Seat at the United Nations”, *EJIL* 3 (1992), 354 et seq. (360-361). It must be noted, however, that according to widely held opinion among legal scholars, the Russian Federation was entitled to the USSR’s seat in the Security Council due to its legal identity with the former USSR, see A. Zimmermann, *Staatenachfolge in völkerrechtliche Verträge*, 2000, 85.

⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. (22, para. 22).

is a living document that has been modified in notable ways, by subsequent practice of states, the interpretation of the provisions of Article 51 have remained static. The legal parameters of self-defence remain those outlined in Article 51, primarily that self-defence can only legally take place when an armed attack takes place against a state. Short of that, call it what one may, states have been unwilling to accept it as self-defence under international law. As Christine Grey notes in her *International Law and the Use of Force*, “the right of self-defence arises only if an armed attack (French: *aggression armée*) occurs. This right is an exception to the prohibition of the use of force in Article 2 (4) and therefore should be narrowly construed”⁵. As Malcolm Shaw notes in his text *International Law*, “[D]espite controversy and disagreement over the scope of the right of self-defence, there is an indisputable core and that is the competence of states to resort to force in order to repel an attack”⁶.

To further expose out the parameters of self-defence, consideration should be given to both what constitutes an “armed attack” and what would be the legal response to such an act. In the *Nicaragua* case which revolved around the issue of the use of force by the United States and paramilitaries as against this Central American State during the 1980s, the ICJ stated plainly that: “In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack”. The Court then goes on to say:

“There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law⁷”.

⁵ C. Grey, *International Law and the Use of Force*, 2000, 86-87.

⁶ M. Shaw, *International Law*, 2003, 1034-1035.

⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14 et seq. (103, para. 195).

Christine Grey, for her part, notes that “the Court’s description of the scope of armed attack is consistent with state practice and with the practice of the Security Council”⁸.

Beyond this accepted understanding of what constitutes an “armed attack”, some authors have sought to subsume the notion of protecting nationals abroad as falling within the parameters of Article 51. While some leading scholars have vacillated, it is clear that state practice and *opinio juris* do not support such a claim and thus that no basis for such a justification exists in international law⁹. Having surveyed the response of states to a limited number of interventions to protection of nationals abroad during the UN era, Christine Grey writes that the “international response to these interventions shows a clear division between states”, though she notes later that there is a “rejection by a majority of states of such a doctrine”¹⁰. The unwillingness of states to allow it to enter into the corpus of international law is best expressed by Ian Brownlie when he wrote, in 1963, that the denial of such a right “must be weighed against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in the pursuit of national rather than humanitarian interest”. As Brownlie makes clear: “it is considered that it is very doubtful if the present form of intervention [i.e.: protecting nationals abroad] has any basis in modern law”¹¹.

Finally, two further items should be mentioned so as to delineate the parameters of Article 51. First, as noted by the ICJ in the *Nicaragua* case and affirmed later in its 1996 Advisory Opinion in the *Nuclear Weapons* case, “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”¹². In considering the limitations on the right of self-defence, Bruno Simma’s Commentary on the UN Charter concludes by stating: “Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack; in particular, the means employed for the defence

⁸ Grey, see note 5, 97.

⁹ For instance see A. Cassese, *International Law*, 2001, 315.

¹⁰ Grey, see note 5, 109 and 110.

¹¹ I. Brownlie, *International Law and the Use of Force by States*, 1963, 301.

¹² *Nicaragua case*, see note 7, (94, para. 176); and *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq. (245, para. 41).

have to be strictly necessary for repelling the attack”¹³. Second, that self-defence may transpire individually but also, as noted in Article 51, as a collective response. In the *Nicaragua* case the Court dealt with the issue, making plain that recourse to such collective self-defence was only possible if a state requested assistance, and that there “is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation”¹⁴.

2. Security Council Mandate (Article 42)

Beyond the recourse to self-defence as an exception to the use of force, the UN Charter allows for the sanctioning of the use of force. However, recourse to pre-emptive use of force is vested with a collectivity of states which have a mandate to provide collective security to the Member States of the United Nations, by seeking to thwart possible threats to or breaches of the peace or acts of aggression. By virtue of Chapter VII, the UN Security Council may sanction the use of force, though this is meant to be in an attempt to “maintain or restore international peace and security”. To invoke the use of force, the requirements of Article 39 have to be fulfilled and the Security Council has to decide which measures it will take in order to establish international peace and security. Having thus made a determination, the Council may by virtue of Article 41 take any measure, – such as sanctions – short of the use of force; or the Council can invoke Article 42, which reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

As originally conceived the UN Charter called for states, under Article 43 to make available to the United Nations armed forces and other items necessary to maintain the peace. It further called on a Military Staff Committee to assist the Security Council in the employment of these forces. However, such forces were never made available to the

¹³ Simma, see note 2, 677.

¹⁴ *Nicaragua case*, see note 7, 104, para. 195.

Council on a permanent basis, instead the practice which has developed within the Security Council is for states to provide fighting forces on an ad hoc basis, thus making the Council dependent on the will of individual Member States to act by way of Article 42.

It should be made clear here that the system established by the United Nations Charter is not a “pure” collective security arrangement, as not all threats to or breaches of the peace or acts of aggression necessitate the activating of Chapter VII. The Charter’s collective security system is restricted by the fact that the Council must first make a determination that situations which affect international peace and security do, in fact, exist. Further it must do so by majority vote. Making such a determination, however, is limited by the requirement of receiving both a majority vote of the fifteen members and no negative votes of the five permanent members, thus effectively providing those five members with the ability to veto the passage of any Security Council resolution¹⁵.

Since the end of the Cold War, it is obvious that the UN Security Council has used its powers under Chapter VII in ways it was unable to use prior to the disintegration of the Soviet Union. Nevertheless the Council has been consistent in authorizing force only in situations where it considers there exists a “threat to” or “breach of” the peace, and not where an “act of aggression” may be at issue. Although the Council may act when it considers that an act of aggression has occurred, it has never chosen to do so. Primarily, the Council has been unwilling to take sides in a dispute by branding a state as the aggressor, as this would thwart its attempts to re-establish the peace by diplomatic means¹⁶. But just as important is the fact that “aggression” entails not only state responsibility, but also individual criminal responsibility and, as such, the Council has deemed it prudent typically to describe events as either a threat to or a breach of the peace.

¹⁵ Article 27 (2) and (3) of the Charter of the United Nations reads:
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

¹⁶ Dailler/ Pellet, see note 2, 929.

At a 1992 Workshop of the Hague Academy of International Law, Benedetto Conforti noted that when one considers the wording of Article 39 of the UN Charter in conjunction with the *travaux préparatoires*, it becomes clear that the Security Council has large discretionary powers as regards the interpretation of the term “threat to the peace”. Conforti explained that as opposed to breaches of the peace or acts of aggression, which will inevitably have a military element to them, “threat to the peace”, in theory, can be a quite “vague and elastic” concept, and thus allow the Council much leeway in making such a determination¹⁷. Despite this, during the forty-five year period of the Cold War, the UN Security Council invoked Chapter VII fewer than a dozen times, and considered that threats to the peace transpired only when actual military force was being used. Yet, in the wake of the demise of the Soviet Union and the evolution of a “New World Order”, the UN Security Council sought to assert itself in ways it had not previously been able to. The Council made plain that “there are new favourable international circumstances under which the Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security”. This was made evident in its willingness to face “new challenges in the search for peace.” In a Note delivered by the President of the Security Council in 1992, the Heads of State, sitting as members of the Security Council, went on to say that beyond the traditional threats, others had emerged:

“The absence of war and military conflicts amongst States does not in itself ensure international peace and security. *The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.* The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.”¹⁸

Thus, it was made clear that the Council would henceforth enlarge the definition of what it would consider to be a threat to international peace and security.

¹⁷ B. Conforti, “Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d’une menace contre la paix, d’une rupture de la paix ou d’un acte d’agression”, in: R.J. Dupuy (ed.), *The Development of the Role of the Security Council*, Workshop of the Hague Academy of International Law, 1993, 14 et seq. (52-53). Translated from the French.

¹⁸ United Nations Security Council, *Note by the President of the Security Council*, Doc. S/23500 of 31 January 1992. Emphasis added.

True to its word, the United Nations Security Council used its prerogative to invoke Article 39 of the Charter in a more expansive manner thereby constituting new situations as threats to the peace. While the Council considered the Iraqi invasion of Kuwait and the early fighting which ultimately led to the dissolution of Yugoslavia as a threat to international peace and security, the Council was acting well within the traditional understanding of what constituted a threat or breach of the peace: a situation in which military force was being utilized¹⁹. However, on 5 April 1991, in the aftermath of the Kuwait/Iraq War, the Security Council, by way of Resolution 688, determined that the refugee flow brought on by Iraqi repression of the Kurds constituted a threat to the peace²⁰:

“[...] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region.”

Although the UN Security Council would continue to make determinations regarding “traditional” threats to the peace such as regards armed conflict and the proliferation of various weapons and their use²¹, the Council went further. Among the issues which have been declared to constitute a threat to the peace by the Council have been humanitarian crises, such as those in Somalia in 1992, Rwanda in 1994, and Eastern Zaire in 1996²²; the overthrow of a democratically elected President in Haiti²³; and the situation brought on by the financial crisis in Albania

¹⁹ For Iraq-Kuwait, see S/RES/660 (1990) of 2 August 1990; for Yugoslavia, S/RES/713 (1991) of 25 September 1991.

²⁰ See S/RES/688 (1991) of 5 April 1991.

²¹ Consider for instance, the aftermath of nuclear tests of India and Pakistan in May 1998, where the Council reiterated the statement made at the level of the Heads of State within the Security Council in 1992: “that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security”, see S/RES/1172 (1998) of 6 June 1998. In March 2003, the Council accepted a Declaration regarding “the proliferation of small arms and light weapons and mercenary activities” as it considered that such propagation constituted a “threat to peace and security in West Africa”, see S/RES/1467 (2003) of 18 March 2003.

²² See S/RES/794 (1992) of 3 December 1992; S/RES/929 (1994) of 22 June 1994; and S/RES/1078 (1996) of 9 November 1996.

²³ See S/RES/940 (1994) of 31 July 1994.

in 1997²⁴. Beyond these new situations which were considered threats to the peace, the UN Security Council has been most concerned, especially since September 2001, with threats to the international peace which have been brought on by acts of terrorism.

Since the UN Security Council first invoked the notion of terrorism regarding Libya in 1992 over the downing of a civilian airliner over Lockerbie, Scotland, clear practice has emerged within the UN Security Council as to “terrorism” constituting a threat to international peace and security²⁵. The failure of first Libya, then Sudan, and Afghanistan to hand - over individuals implicated in terrorist acts was seen, in part, as a threat to international peace and security. By 1999, the Council was willing to consider that acts of terrorism, while not in and of themselves threats to the peace, “could threaten international peace and security”²⁶. If there still remained any doubt as to the possibility of terrorism constituting a threat to the peace, it vanished in the aftermath of the events of 11 September 2001. During the two year interval after September 2001, a fundamental reshaping of international relations has transpired whereby the UN Security Council considered that such acts are, *ipso facto*, threats to international peace and security. Further, the centrality of issues of terrorism to the mandate of the UN Security Council has been made plain by its willingness to upgrade terrorism to “one of the most serious threats to international peace and security in the twenty-first century”²⁷ – thus using nomenclature not previously seen regarding threats to the peace.

3. Chapter VIII of the United Nations Charter

The established parameters for the use of force as manifest in Articles 42 and 51 of the UN Charter are predicated on the ultimate control by the UN Security Council. Central to this study also, is the fact that so-

²⁴ See S/RES/1101 (1997) of 28 March 1997; and S/RES/1114 (1997) of 19 June 1997.

²⁵ See J. Allain, “The Legacies of Lockerbie: Judicial Review of Security Council Action or First Manifestation of ‘Terrorism’ as a Threat to the Peace?”, *EJIL* 15 (2004), (Forthcoming).

²⁶ See S/RES/1269 (1999) of 19 October 1999.

²⁷ See Declaration on the Global Effort to Combat Terrorism, attached to United Nations Security Council Resolution 1377, S/RES/1377 (2001) of 12 November 2001.

called “Regional Arrangements” such as the African Union, which fall under Chapter VIII, do not escape that control. Though much regionalist political pressure was exerted at San Francisco in 1945, Inis Claude notes that the final draft of the UN Charter reflects “the premise that the United Nations should be supreme, and accepted regionalism conditionally”. Claude writes: “The finished Charter conferred general approval upon existing and anticipated regional organizations, but contained provisions indicating the purpose of making them serve as adjuncts to the United Nations and subjecting them in considerable measure to the direction and control of the central organization”²⁸. With respect to the use of force, political pressure at the San Francisco Conference came from Latin American states which sought to have regional organizations exempt from subordination to the Security Council; yet this failed as “the majority of delegations considered prior authorization by the [Security Council] to be necessary”²⁹.

Chapter VIII thus provides, at Article 52, the possibility of the “existence of regional arrangements or agencies” as long as they are consistent with the purposes and principles of the United Nations. Article 53 states that such regional organizations are to act subordinate to the UN Security Council and only when authorized by it.³⁰

The Final provision of Chapter VIII, Article 54, mandates that regional organizations keep the UN Security Council “fully informed of activities undertaken or in contemplation [...] for the maintenance of international peace and security”. It is thus clear that regional organizations are required, under the United Nations framework, to act under the umbrella of the UN Security Council. As Georg Ress notes, the “legally possible enforcement measures must remain with the powers”

²⁸ I. Claude, *Swords into Plowshares: The Problems and Progress of International Organization*, 1965, 106.

²⁹ G. Ress, “Article 53”, in: Simma, see note 2, 687.

³⁰ Note that Article 53 does provide for an exception in regard to so-called enemy States; See discussion above. Article 53 thus continues:

[...] with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

of the Security Council as Article 53 does not confer any additional powers for enforcement measures; “instead these provisions broaden the modalities for the execution of the enforcement measures available” to the Security Council by allowing for “access to regional organizations”³¹.

The primacy of the Security Council over Chapter VIII is manifest, for instance, in the North Atlantic Treaty Organization whereby NATO states pledge, “to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations”, and makes plain that the Treaty does not affect “the primary responsibility of the Security Council for the maintenance of international peace and security”³². Further emphasis as to the centrality of the UN Security Council is found at article 5 of the Treaty, which sets out the collective security arrangement (i.e.: an attack against one will be considered an attack against all) of these North Atlantic states and notes:

“Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”

Likewise, the Organization of American States, by a 1975 Protocol to the 1947 Inter-American Treaty of Reciprocal Assistance, brought states of the Americas clearly within the framework of the United Nations System. Much in the same way as NATO states, states of the Americas “undertake, [...], not to resort to the threat or the use of force in any manner inconsistent with the provisions of [...] the Charter of the United Nations [...]”. As the Inter-American Treaty is also meant to establish a collective security system, the State Parties “undertake to assist in meeting any such attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations”. However, such action will come under the control of the UN Security Council as article 3 (6) reads:

³¹ Ress, see note 29, 730.

³² See arts 1 and 7, North Atlantic Treaty of 4 April 1949.

“Measures of self-defense provided for in this article may be applied until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.³³”

The framework of both these regimes of collective security demonstrate the manner in which regional organizations are clearly to subordinate themselves to the dictates of the United Nations System wherein the ultimate control of the use of force must give way if the UN Security Council moves to exercise its primacy.

III. *Ad Hoc* Use of Force beyond the United Nations System

Since the end of the Cold War, attempts have been made to justify large scale interventions using force beyond the parameters of Article 2 (4) and the United Nations systems as developed through Article 51 and Chapter VII of the Charter. In seeking to justify their actions, states have sought either to develop new justifications as exceptions to the use of force or to expand the notion of self-defence to include their recourse to force. To consider whether these interventions are legal, one must consider both the acts themselves and the response to them by the international community as – short of establishing a conventional norm – such developments must transpire through the emergence of customary law. Consideration will first turn to the Federal Republic of Yugoslavia (i.e. Serbia), where the NATO sought to justify its bombing campaign as a “humanitarian intervention” to protect civilians in Kosovo. Then consideration turns to the 2003 United States-led invasion and occupation of Iraq wherein the justification of “pre-emptive” self-defence was used, in part, to validate its actions.

1. Kosovo – Humanitarian Intervention

In March 1999, NATO commenced an aerial bombing campaign against the Republic of Yugoslavia in an attempt to halt the Serbian “ethnic cleansing” of Kosovo Albanians. Although the Security Council had dealt with the situation in Kosovo, having acted under Chapter VII and

³³ See arts 1 and 3, Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance of 26 July 1975.

imposed an arms embargo in March 1998³⁴, within a year it would be sidelined as NATO ultimately resorted to force without the authorization of the UN Security Council and thus in violation of established international law. During the 1999 bombing campaign, which lasted approximately two and a half months, the spokespersons for both NATO and its Member States did not overtly justify their actions against the Yugoslav Republic as being a case of humanitarian intervention. However, in the lead up to the use of force, the NATO Secretary-General Javis Solana did make plain that the intervention envisioned was warranted on the grounds of “the danger of a humanitarian disaster in Kosovo”. On the basis of a meeting between himself and the Permanent Representatives of NATO in October 1998, Solana noted that there was a “continuation of a humanitarian catastrophe”; the “fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future”; and that the “deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region”. As such, the NATO Secretary-General concluded that “the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo [...] there are legitimate grounds for the Alliance to threaten, and if necessary, to use force”³⁵.

The general tenure of legal scholars to the NATO intervention in Kosovo has been that the actions were illegal; but while there exists no international legal norm which allows for the use of force on the pretext of “humanitarian intervention”, many writers were willing to concede that there existed a moral imperative to act³⁶. As the non-governmental

³⁴ In the lead up to the NATO action the UN Security Council passed the following resolutions: S/RES/1160 (1998) of 31 March 1998; S/RES/1199 (1998) of 23 September 1998; and S/RES/1203 (1998) of 24 October 1998.

³⁵ As quoted in B. Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *EJIL* 10 (1999), 1 et seq. (7). Note also that Belgium has sought to justify its actions as part of NATO against Yugoslavia in their case before the ICJ as being legal, as a case of humanitarian intervention. See A. Schwabach, “Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention”, *Syracuse Journal of International Law and Commerce* 27 (2000), 77 et seq. (91).

³⁶ See, for instance, M. Reisman, “Kosovo’s Antinomies”, *AJIL* 93 (1999), 860 et seq. (862); while Pellet considers the issue directly in A. Pelet, “Brief Remarks on the Unilateral Use of Force”, *EJIL* 11 (2000), 385 et seq. Note also that NATO acted *ultra vires* the North Atlantic Treaty which, as mentioned earlier, is a defensive pact.

Independent International Commission on Kosovo concluded succinctly: “the NATO military intervention was illegal but legitimate”³⁷. Most of the writing which emerged in the wake of the NATO campaign against Yugoslavia sought to bridge this gap by pushing law closer to morality by suggesting criteria which states would have to meet to have future actions under the rubric of “humanitarian intervention” become acceptable. Cassese was mindful of this train of thought when he wrote: “from an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*”³⁸. Be that as it may, most scholars have also recognized the need to place strict controls on the use of force, so as to ensure that the justification of “humanitarian intervention” does not become a pretext for actions taken with other objectives in mind. It was left to Louis Henkin, to give lucidity to this fundamental dynamic – in international law – regarding an emergence of a norm of “humanitarian intervention” as an exception to the use of force. Henkin writes:

“In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect a conclusion that the ‘sovereignty’ of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity. The law that prohibits unilateral humanitarian intervention rather reflects the judgment of the community that the justification for humanitarian intervention is often ambiguous, involving uncertainties of fact and motive, and difficult questions of degree and ‘balancing’ of need and costs. The law against unilateral intervention may reflect, above all, the

³⁷ Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned*, 2000. 4. When considering the issue in more detail, the Commission “puts forward the interpretation of the emerging doctrine of humanitarian intervention. This interpretation is situated in a grey zone of ambiguity between an extension of international law and a proposal for an international moral consensus. In essence, this grey zone goes beyond strict ideas of *legality* to incorporate more flexible views of *legitimacy*.” Emphasis in the original, see 164.

³⁸ A. Cassese, “*Ex iniuria ius oritur*: We are Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, *EJIL* 10 (1999), 23 et seq. (25). Emphasis added.

moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely.”³⁹

It is within the parameters of this dynamic that a proper understanding of the established law regarding humanitarian intervention should be considered, as it is this dynamic which has been at play in determining the attitude of states *vis-à-vis* the issue of NATO’s intervention in Yugoslavia. Considering state practice and *opinio juris*, it may be said that an evolution of a possible legal norm of “humanitarian intervention” has remained, for the most part, academic, as no consensus has emerged as a result of the Kosovo episode⁴⁰. A number of authors have undertaken a thorough study of the issue of “humanitarian interventions” from a legal perspective. For the most part, they are in agreement that during the Cold War era, no true case of “humanitarian intervention” was established, as few interventions were solely for humanitarian reasons, and none were justified on such grounds. So, while possible leading cases such as the 1978 Tanzanian intervention in Uganda to oust Idi Amin, and the 1978 Vietnamese invasion of Kampuchea (i.e.: Cambodia) meant to, in part, overthrow Pol Pot’s Khmer Rouge may, *prima facie*, appear to be legitimate cases of humanitarian intervention, neither state justified its actions on this basis⁴¹. In his 2001 published *Just War*

³⁹ L. Henkin, “Editorial Comments: NATO’s Kosovo Intervention: Kosovo and the Law of ‘Humanitarian Intervention’”, *AJIL* 93 (1999), 824 et seq. (824-825).

⁴⁰ I say, for the most part, because there has been a movement by the UN Secretary-General, Kofi Annan, to endorse a paradigm shift which has been put forward by the quasi-governmental, 2001 International Commission on Intervention and State Sovereignty, which seeks to speak in terms of a “responsibility to protect” rather than a “right of humanitarian intervention”; See International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, 2001, 11-12 and 16-17; wherein the justification is given regarding the shifting of the parameters of the discourse. For the endorsement by the UN Secretary-General see Secretary-General, “Genocide is a Threat to Peace Requiring Strong, United Action: Secretary-General Tells Stockholm International Forum”, *Press Release*, Doc. SG/SM/91226/Rev.1 (2004) of 11 February 2004.

⁴¹ See A. C. Arend/ R. Beck, *International Law and the Use of Force: Beyond the UN Paradigm*, 1993, 122-123 and 124-125. Peter Hilpold makes the interesting argument that while the justification of “humanitarian intervention” would have been available in both these cases, the states instead justified their military interventions on the very weak basis of claiming self-defence. Hilpold writes; “The fact that both Vietnam and Tanzania have tried to justify their actions by allegations that do not withstand an even

or *Just Peace?: Humanitarian Intervention and International Law*, Simon Chesterman, having examined eleven possible Cold War instances of “humanitarian intervention” both from the perspective of *la doctrine*, and the pronouncements of states, concludes: “it seems clear that writers who claim that state practice provides evidence of a customary international right of humanitarian intervention grossly overstate their case”⁴².

Since the end of the Cold War, it remains true that the majority of states do not accept that a norm regarding “humanitarian intervention” has been established. This was made most evident by the Declaration by the Non-Aligned Movement and China in April 2000 where they “reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law”⁴³. This pronouncement was reaffirmed in the final declaration of the conference of the 114 Member States of the Movement, held in February 2003, wherein “The Heads of State or Government reiterated the rejection by the Non-Aligned Movement of the so-called ‘right’ of humanitarian intervention, which has no basis either in United Nations Charter or in international law”⁴⁴.

rudimentary scrutiny [i.e.: recourse to self-defence] while the humanitarian argument would have been at hand speaks volumes for the legal quality both states have attributed to this concept: it seems that neither of the two states attributed much reputation to this concept”. See P. Hilpold, “Humanitarian Intervention: Is There a Need for a Legal Reappraisal?”, *EJIL* 12 (2001), 437 et seq. (444-445).

⁴² S. Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law*, 2001, 84. This assessment seems to hold: See Arend/Beck, see note 41, 128 where they state that; “[...] since the Second World War there may well have been no authentic example of a ‘humanitarian intervention’”. Such a view is also held in S. Murphy, *Humanitarian Intervention; The United Nations in an Evolving World Order*, 1996, 142-143. For those examining, *grosso modo*, the same cases but coming to different conclusions see: F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 1988, 155-200; and F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 1999, 102-135.

⁴³ Non-Aligned Movement, “Declaration of the Group of 77 South Summit”, 10-14 April 2000, para. 54. Available at <<http://www.nam.gov.za/documentation/southdecl.htm>>.

⁴⁴ Non-Aligned Movement, “Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur”, 24-25 February 2003, para. 16. Available at <<http://www.nam.gov.za/media/030227e.htm>>.

2. Iraq – Pre-emptive Self-Defence

On 20 March 2003, the United States led “The Coalition of the Willing” in an invasion and subsequent occupation of Iraq. Its failure to gain a Security Council mandate for its action against Iraq meant that, void of Chapter VII authorization, the United States sought to justify its actions beyond the parameters of the United Nations System. A good example for this justification given can be found in the July 2003 edition of the *AJIL*. Such a justification was presented, as “the fullest statement yet to be published of the US government’s legal position” in regard to its military intervention in Iraq⁴⁵. In an article co-written by William Taft, the Legal Advisor to the US Department of State, and Todd Buchwald, the Assistant Legal Advisor for Political-Military Affairs also at the State Department, the authors justified the use of force, in part, on the basis of UN Security Council Resolutions, but also on the basis of the so-called “Bush Doctrine”, that is, the Bush Administration’s “pre-emptive self-defence” strategy.

Taft and Buchwald, citing the 2002 *National Security Strategy of the United States of America*, put forward the following as the “legal basis for the doctrine of pre-emption” used to justify the United States position regarding its invasion of Iraq:

“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.”⁴⁶

Taft and Buchwald argue that pre-emptive self-defence, in and of itself, cannot be considered legal or illegal; instead it will depend on the circumstances of each invocation. They note that: “‘Operation Iraqi Freedom’ has been criticized as unlawful because it constitutes pre-emption”, yet they say that this “criticism is unfounded. Operation Iraqi Freedom was and is lawful”⁴⁷. While Taft and Buchwald put forward the position that the “United States and the international commu-

⁴⁵ See L. Damrosch/ B. Oxman, “Editor’s Introduction – Agora: Future Implications of the Iraq Conflict”, *AJIL* 97 (2003), 553 et seq. (555).

⁴⁶ W. Taft/ T. Buchwald, “Preemption, Iraq, and International Law”, *AJIL* 97 (2003), 557 et seq. (559).

⁴⁷ *Ibid.*

nity had a firm basis for using pre-emptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time⁴⁸, they do not base their argument on the notion of pre-emptive self-defence *per se*. Instead, they claim that one must contextualize one's analysis; and thus include "the naked aggression by Iraq against its neighbors, its efforts to obtain weapons of mass destruction, its record of having used weapons, Security Council actions under Chapter VII of the United Nations Charter, and continuing Iraqi defiance of the Council's requirements"⁴⁹.

They contend that because of Iraq's past behaviour, coupled with its failure to respect the obligations imposed on it by the UN Security Council, this opened the door for action. Resolution 1441, which declared Iraq in "material breach" of previous Security Council resolutions, was seen by the United States as allowing states to unilaterally determine further such breaches as "an objective fact"⁵⁰. If such a material breach was determined, Taft and Buchwald state, Resolution 1441 would "authorize the use of force to secure Iraqi compliance with its disarmament obligations"⁵¹. Despite this line of reasoning, which apparently provides a justification within the purview of Chapter VII of the Charter, Taft and Buchwald stick to their guns regarding pre-emptive self-defence as the United States' justification for using force. In essence, the legal advisors sought to make the military intervention of 2003 "fit" the Bush Doctrine. Taft and Buchwald understood as much, stating: "Was Operation Iraqi Freedom an example of pre-emptive use of force? Viewed as a final episode in a conflict initiated more than a dozen years earlier by Iraq's invasion of Kuwait, it may not seem so". Yet they go on to say:

"However, in the context of the Security Council's resolutions, pre-emption of Iraq's possession and use of weapons of mass destruction was a principle objective of the coalition forces. A central consideration, at least from the US point of view, was the risk embodied in allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction. But do US actions show a disregard for international law? The answer here is clearly no. Both the United States and the international community had a firm basis for using preemptive force in the face of the past action of Iraq and

⁴⁸ Ibid., 563.

⁴⁹ Ibid., 557-558.

⁵⁰ Ibid., 560.

⁵¹ Ibid., 562.

the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated – without question – by the opponent and where, as here, it is consistent with the resolutions of the Security Council”⁵².

While the United States has sought to justify its invasion and occupation of Iraq as being legal, its recourse to the doctrine of pre-emptive self-defence has no standing in international law. As Cassese for example has noted, states consider that “pre-emptive strikes should be banned, since they may easily lead to abuse, being based on subjective and arbitrary appraisals by individual States”. He then goes on to say: “In the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited*, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation”⁵³. That being said, it remains true that states, through their practice and *opinio juris*, have made plain that pre-emptive or anticipatory self-defence is legally prohibited. Christine Gray echoes this, having considered a number of instances of attempts by states to use such a justification, by stating that “the majority of states reject anticipatory self-defence”⁵⁴.

To sum up: in both the cases of Kosovo and Iraq, states have sought to justify their use of force on novel interpretations of international law beyond the confines of the United Nations System. Such attempts, if accepted, would challenge the normative framework of the United Nations System, as the multilateral control of the use of force by the UN Security Council would come into question. However, in both in-

⁵² Ibid., 563.

⁵³ Cassese, see note 9, 310-311. Emphasis in the original.

⁵⁴ Grey, see note 5, 112. See also Simma, see note 2, 675-676, where it is stated “that recourse to traditional customary law does not lead to a broadening of the narrow right of self-defence laid down in Art. 51. An anticipatory right of self-defence would be contrary to the wording of Art. 51 (‘if an armed attack occurs’) as well as its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. [...] This interpretation corresponds to the predominant state practice, as a general right to anticipatory self-defence has been invoked under the UN Charter”. Or Cassese who, having examination of the manner in which countries have reacted to claims of pre-emptive self-defence, notes: “it is apparent that such practice does not evince agreement among States [...] with regard to anticipatory self-defence”, see note 9, 309.

stances, there has been a failure for customary international law to evolve which would take into consideration the exceptions sought by those justifying their actions against Yugoslavia or Iraq. Instead, following the rationale of the ICJ, the failure of these “exceptional” instances to garner support of the international community means that the normative framework emerges not weaker but stronger – because there is recognition by the international community that these actions fall outside what is considered as “normal” behaviour by states⁵⁵.

Having dismissed the events regarding Kosovo and Iraq as being a challenge to the normative order of the United Nations System, it is now time to examine the evolution of the African Union which has, by way of regional instruments, overridden the multilateral control over the use of force which has been vested in the United Nations Security Council since 1945. In so doing, African States have decided that they will, henceforth, not require Security Council authorization to act on the Continent, and that, in fact, they have given themselves the prerogative to intervene militarily, not only beyond the authority of the UN Security Council, but by widening the scope of permissible use of force in Africa, by acting in “respect to grave circumstances” such as war crimes, genocide, and crimes against humanity. This, it may be said, is the true challenge to the United Nations System.

IV. Decisive Factors in the African move away from the United Nations System

Since the end of the 1990s, the African continent has been marginalized in ways it had not been during the height of the Cold War. This remains true in the area of international peace and security, where African states have come to realize that they can not depend on the Members States of the UN Security Council to ensure stability on the Continent. As a result, African leaders have decided to depart radically from the normative framework established by the United Nations in 1945. No longer do they accept that the limitations on the use of force established by

⁵⁵ Consider the following from the *Nicaragua* case, see note 7, 98: “If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.

Article 2 (4) hold, or that recourse to the use of force other than in self-defence can only take place by sanction of the UN Security Council. How has this come to pass? Of great importance has been the fact that African states witnessed the precedent-setting intervention of West African troops in both Liberia and Sierra Leone without a Security Council mandate; but just as crucial was the manifest failure of the UN Security Council to act to prevent the 1994 Rwandan Genocide. These factors led African States to come to the conclusion that they should take control over their own destiny regarding regional peace and security and turn their backs on the normative framework of the United Nations System.

1. ECOWAS in Liberia and Sierra Leone

During the 1990s, a precedent was established whereby West African states undertook military interventions without the authorization of the UN Security Council. As a result of these instances, it became clear that not only could African states not depend on the Council to assist them in situations which might threaten the peace, but also that if they themselves did not seek to become the primary actors in ensuring the peace, then nobody else would. The genesis of this move, which ultimately had all African states opting out of the normative framework of the United Nations system, is to be found in the 1990 intervention by the Economic Community of West African States (ECOWAS) in Liberia. This regional organization, responding to the Liberian civil war, established the ECOWAS Ceasefire Monitoring Group or ECOMOG which sent five thousand troops to seek to keep the peace, restore order and ensure that the ceasefire between the Government and the rebels held⁵⁶. Although it took until 1996 to ensure a ceasefire, the break allowed elections to take place with the result that the former rebel leader, Charles Taylor, became the Liberian President in 1997. Although the Liberian Ambassador to the United Nations had sought to bring the conflict to the attention of the Security Council in June 1990, the Council failed to consider the issue until January 1991, that is, some five months after the ECOWAS intervention⁵⁷.

⁵⁶ See D. Wippman, "Enforcing the Peace; ECOWAS and the Liberian Civil War", in: L. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 1993, 167 et seq.

⁵⁷ H. Howe, *Ambiguous Order: Military Forces in African States*, 2001, 136.

In undertaking this military intervention, ECOWAS was in violation of the normative order as established by the United Nations Charter. Without the consent of the Security Council, ECOWAS states were in breach of their obligations regarding the use of force as Members States of the United Nations; while the organization itself was in violation of Article 53 UN Charter which makes clear that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council [...]”. That having been said, although “there was no legal basis for the ECOWAS intervention under the UN Charter, it was supported by the United Nations and the whole of the international community”⁵⁸. While the Council tacitly accepted the role of West African States in Liberia for more than two years, it declared its support openly for ECOWAS in November 1992 when, by virtue of Resolution 788, it commended “ECOWAS for its efforts to restore peace, security and stability in Liberia”⁵⁹. In so doing, and later by establishing the UN Observer Mission in Liberia (UNOMIL) to work side-by-side with ECOMOG⁶⁰, the Council created a dangerous precedent whereby a regional organization could intervene militarily without its prior authorization.

Having found its feet with respect to Liberia, ECOWAS once again intervened without the authorization of the UN Security Council, this time, in 1998, in Sierra Leone. As a result of a coup d'état in May 1997, the elected President of Sierra Leone was deposed. While the Organization of African Unity was to call for the restoration of the elected President, the UN Security Council invoked Chapter VII in October 1997, demanding “that the military junta take immediate steps to relinquish power in Sierra Leone” and imposed travel restrictions on its members as well as a petroleum and arms embargo⁶¹. The Council, while not giving ECOWAS a green light to intervene, did authorize it “to ensure strict implementation of the provisions” regarding the embargo⁶². With the international community firmly against those who had taken power, the parties agreed to the October 1997 Conakry Peace Agreement which had attached to it a six-month time frame. However,

⁵⁸ J. Levitt, “Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone”, *Tem. Int'l & Comp. L. J.* 12 (1998), 333 et seq. (347).

⁵⁹ S/RES/788 (1992) of 19 November 1992.

⁶⁰ S/RES/866 (1993) of 22 September 1993.

⁶¹ S/RES/1132 (1997) of 8 October 1997.

⁶² *Ibid.*, para. 8.

when it became clear that the peace was not holding, ECOMOG troops intervened – without UN Security Council authorization – in February 1998, reinstalling the elected President to power. As with Liberia, the UN Security Council was not critical of the ECOWAS intervention; instead it once again commended it for its role in “the restoration of peace and security”⁶³. As Ben Kioko, the Legal Counsel of the African Union has written – in his personal capacity: “It would appear that the UN Security Council has never complained about its powers being usurped because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at the time”⁶⁴.

With tacit consent having been given to the ECOWAS interventions in both Liberia and Sierra Leone, it should not come as a surprise that this West African organization moved to institutionalize the power it had appropriated from the UN Security Council in the domain of peace and security. By its 1999 Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, ECOWAS decided that its newly established Mediation and Security Council could “authorise all forms of intervention and decide particularly on the deployment of political and military missions”⁶⁵. That this regime, having been established to deal with issues of peace and security in West Africa, would be promoted to hold for all the African Continent in a period of less than five years was in large part the result of the manifest failure of the UN Security Council to act in the face of genocide.

2. Rwanda and the Failure of the UN Security Council

Although precedents had been set allowing African states to opt out of the normative United Nations System and that possibility had been institutionalized in the ECOWAS Protocol, a far more important issue had fundamentally changed the outlook of African leaders regarding

⁶³ S/RES/1162 (1998) of 17 April 1998.

⁶⁴ See B. Kioko, “The Right of Intervention under the African Union’s Constitutive Act: From Non-Interference to Non-Intervention”, *Int’l Rev. of the Red Cross* 85 (2003), 807 et seq. (821).

⁶⁵ Article 10 (c), Economic Community of West Africa States, Protocol relating to the Mechanism for Conflict Prevention, Management Resolution, Peace-Keeping and Security of 10 December 1999.

the Continent's position within the international framework. One cannot over emphasize the traumatic effects the 1994 Rwanda Genocide had in moving African states to establish a mechanism to ensure that such mass killing would not happen again. The memory of African leaders and the Continent as a whole remains scared by the mass slaughter which transpired in its midst and the indifference to it manifest by the international community as demonstrated by the United Nations own acknowledgement of its "failure [...] to prevent, and subsequently, to stop the genocide"⁶⁶. A Panel of eminent personalities brought together by the Organization of African Unity (OAU) stated that members of the UN Security Council – specifically France and the United States – "consciously chose to abdicate their responsibility for Rwanda"⁶⁷. Two weeks after the genocide had commenced, the United Nations Security Council decided to reduce its peacekeeping forces in Rwanda; and a month into the murder spree, which saw approximately 800.000 Tutsi and moderate Hutus killed, Council members were still – though well informed of what was transpiring on the ground – unwilling to use the term "genocide" and, as a result, delayed action which could have mitigated some of the atrocity⁶⁸.

The reputation of the UN Security Council was further tarnished in the eyes of African leaders for its authorization of *Operation Turquoise*, a French peacekeeping mission which, in essence provided assistance to the *génocidaires* allowing them to escape to create, in Eastern Zaire, a "rump genocidal state on the very border of Rwanda"⁶⁹. The OAU Panel noted that the genocide had repercussions which went far beyond the border of Rwanda, as it noted that the "1994 genocide in one small country ultimately triggered a conflict in the heart of Africa that has directly or indirectly touched at least one-third of all the nations on the continent"⁷⁰. In laying the blame in large part on the UN Security Council for allowing the genocide to happen and for failing to act to

⁶⁶ United Nations Secretariat, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, Doc. S/1999/1257(1999) of 16 December 1999, 3.

⁶⁷ Organization of African Unity, *The International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, 2000, para. 13.1.

⁶⁸ United Nations Secretariat, see note 66, 38; see also L. Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide*, 2000, 180.

⁶⁹ The quotation is from OAU, see note 67, para. 19.28.

⁷⁰ Organization of African Unity, *ibid.*, Introductory Chapter, para. 3.

ensure peace in the Great Lakes region, the OAU Panel called upon the OAU “to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations”⁷¹. That call was heeded by the OAU, as it sought to reinvent itself and move towards taking command over its own destiny with regard to issues of the use of force. It would, however, take Libya to act as a catalyst, as it demonstrated leadership and provided the financial backing required to move to end the ineffective Organization of African Unity⁷² and to replace it with the African Union which incorporates powers which go beyond what had earlier been appropriated by ECOWAS.

V. The African Union Regime for Peace and Security

The African Union (AU) was officially launched in Durban, South Africa in July 2002, to replace the OAU. It has been noted that this development is surprising for two reasons; the speed with which the AU came into existence, and also the lack of attention given to this new inter-governmental organization⁷³. While the AU follows its predecessor in seeking, as an objective, to “defend the sovereignty, territorial integrity and independence of its Member States”, it also allows for the use of force against its members, without sanction of the UN Security Council. This apparent contradiction is manifest in article 4 of the Constitutive Act of the African Union, adopted in 2000, which sets out, *inter alia*, the following Principles:

- “(a) Sovereign equality and interdependence among Member States of the Union; [...]
- (e) Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- (f) Prohibition of the use of force or threat to use force among Member States of the Union;
- (g) Non-interference by any Member State in the internal affairs of another; [...]

⁷¹ Ibid., see Conclusions at Chapter 24.

⁷² See T. Butcher, “Gaddafi casts a shadow over African Union”, *The Daily Telegraph* of 8 July 2002, 12.

⁷³ See C. Packer/ D. Rukare, “The New African Union and Its Constitutive Act”, *AJIL* 96 (2002), 365 et seq. (365).

- (i) Peaceful co-existence of Member States and their right to live in peace and security.

These principles are set against the following:

- (h) 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; [...]
- (j) The right of Member States to request intervention from the Union in order to restore peace and security; [...]⁷⁴.

Thus, by recourse to a treaty, the African Union has appropriated for itself the role which the UN Security Council is meant to play on a universal basis; in essence denying the Council, its “primary responsibility for the maintenance of international peace and security” in relation to the African continent⁷⁵. Before examining the manner in which the African Union has institutionalized this recourse to the use of force beyond the United Nations System, consideration will first turn to the regime which has been put in place by African leaders to seek to ensure peace on the continent.

1. The Peace and Security Council

To give effect to the provisions of the AU’s Constitutive Act, the Assembly of Heads of State and Government meeting in Durban, South Africa, in July 2002, adopted a Protocol Relating to the Establishment of the Peace and Security Council of the African Union. The Protocol, while making mention of the primary responsibility of the United Nations Security Council regarding issues of peace and security, does not subordinate its actions to those of the Council. The Constitutive Act of the AU, adopted in Lomé, Togo, on 11 July 2000, does not mention the Peace and Security Council as one of its organs⁷⁶. As a result, when the

⁷⁴ See Constitutive Act of the Africa Union of 11 July 2000.

⁷⁵ See Article 24, Charter of the United Nations.

⁷⁶ Article 5 of the Constitutive Act, see note 74, entitled Organs of the Union:
1. The organs of the Union shall be:
(a) The Assembly of the Union;
(b) The Executive Council;
(c) The Pan-African Parliament;
(d) The Court of Justice;
(e) The Commission;

Protocol establishing the Peace and Security Council was adopted in July 2002 it was by authority of article 5 (2) of the Constitutive Act which provides for the creation of “Other organs that the Assembly [of Heads of State and Government of the Union] may decide to establish”⁷⁷. Yet, since that time – as a result of the 2003 Protocol on Amendments to the Constitutive Act of the African Union – the Peace and Security Council has now been constituted as a named organ of the AU by way of article 5 (1)(f)⁷⁸. Having thus established a Peace and Security Council, African Heads of State and Government incorporated into an amended Constitutive Act a provision regarding its role as an organ of the African Union by way of article 9 of the Protocol on Amendments to the Constitutive Act of the African Union, which reads:

“The insertion in the Act of a new Article 20(bis):

1. There is hereby established, a Peace and Security Council (PSC) of the Union, which shall be the standing decision-making organ for the prevention, management and resolution of conflict.
2. The function, powers, composition and organization of the PSC shall be determined by the Assembly and set out in a protocol relating thereto.”

The 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union which came into force on 26 December 2003, notes that beyond its role as the “standing decision-making organ for the prevention, management and resolution of conflicts”, the Council shall also be “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa”⁷⁹. Among the objectives in mind in establish-

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- (f) The Permanent Representatives Committee;
 - (g) The Specialized Technical Committees;
 - (h) The Economic, Social and Cultural Council;
 - (i) The Financial Institutions;
2. Other organs that the Assembly may decide to establish.

⁷⁷ Ibid.

⁷⁸ See article 5, Protocol on Amendments to the Constitutive Act of the African Union of 3 February and 11 July 2003, which reads:
“In Article 5 of the Act (Organs of the Union), the insertion of a new subparagraph (f) with consequential renumbering of subsequent subparagraphs: (f) The Peace and Security Council [...]”.

⁷⁹ Article 2, Protocol Relating to the Establishment the Peace and Security Council of the African Union of 9 July 2002.

ing the Peace and Security Council were: to “promote peace, security and stability in Africa”, and “anticipate and prevent conflicts”. With this in mind, the Protocol states that the Peace and Security Council will be “guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights”. The Protocol then highlights those Principles which the Peace and Security Council “shall be guided by”. Among these principles are the “peaceful settlement of disputes and conflicts”, “respect for the sovereignty and territorial integrity of Member States”, “and non interference by any Member State in the internal affairs of another”; as well as noting the right to intervene⁸⁰.

On the basis of the principles articulated in article 4, the Protocol sets out, in article 6, the following areas in which the newly established Peace and Security Council will function:

- “(a) promotion of peace, security and stability in Africa;
- (b) early warning and preventive diplomacy;
- (c) peace-making, including the use of good offices, mediation, conciliation and enquiry;
- (d) peace support operations and intervention, pursuant to article 4 (h) and (j) of the Constitutive Act;
- (e) peace-building and post-conflict reconstruction;
- (f) humanitarian action and disaster management;
- (g) any other function as may be decided by the Assembly.”

With these functions in mind, the Protocol lays down, in article 7, the wide-ranging powers of the Peace and Security Council. These powers bind African states as Members States to “agree to accept and implement the decisions of the Peace and Security Council”⁸¹. Further, it is acknowledged that the powers vested in the Council are to be carried out on behalf of the Members States which “shall extend full cooperation to, and facilitate action by the Peace and Security Council”⁸². Under Article 7, the Council is vested with eighteen separate powers including, *inter alia*, the anticipation and prevention of conflicts; the undertaking of peace-making and peace-building functions; the deployment of peace support missions; the instituting of sanctions “whenever an unconstitutional change of Government takes place in a

⁸⁰ Ibid., article 4.

⁸¹ Ibid., article 7 (3).

⁸² Ibid., article 7 (2 and 4).

Member State”; the taking of action where Members are threatened by acts of aggression; and the supporting and facilitating of “humanitarian action in situations of armed conflicts or major natural disasters”. Beyond these powers, and others related to the overall framework of African peace and security, the Protocol has two specific provisions regarding the use of force which will be considered in detail below. At this point, it suffices to note that the Council has the ability to make recommendations regarding intervention in respect of grave circumstances, and to approve the modalities of intervention regarding restoration of peace and security.

Article 9 of the Protocol establishing the Council determines the “Entry Points and Modalities For Action” of the Peace and Security Council. While noting that the Council “shall take initiatives and action it deems appropriate with regard to situations of potential conflict [and] full-blown conflicts”, it also mandates the Council to “take all measures that are required in order to prevent a conflict for which a settlement has already been reached from escalating”. Nevertheless, the Protocol calls on the Council to act, but to do so through various means: “whether through the collective intervention of the Council itself, or through its Chairperson [...]”, but also through other actors including the Chairperson of the Commission; the Panel of the Wise; or/and regional mechanisms. As a result of the coming into force of the Protocol the regime regarding peace and security on the African continent has been operationalized⁸³. On 15 March 2004, the Ministers of Foreign Affairs acting in their capacity as the Executive Council of the AU⁸⁴ elected the 15 members to serve on the Peace and Security Council according to article 5 of the Protocol. Since then the Council has been meeting on a regular basis and held a Solemn Launching Ceremony at the level of Heads of State on 25 May 2004.

The Protocol does not allow for the same distinction found within the United Nations Security Council as between permanent and non-permanent members, instead members of the Peace and Security are elected “on the basis of equal rights”, though ten members are elected for two years, and five for three years “in order to ensure continuity”⁸⁵. While the Protocol mandates that the “principle of equitable regional

⁸³ See African Union, “The Protocol of the Peace and Security Council enters into Force”, Press Release, No. 117/2003 of 26 December 2003. Available at <<http://www.africa-union.org>>.

⁸⁴ See article 10, Constitutive Act, see note 74.

⁸⁵ Article 5 (1), Protocol Relating to the Establishment, see note 79.

representation and rotation” should be applied in electing members, it also spells out a number of criteria which should be used in considering prospective members. These include, according to article 5, a commitment towards the principles of the AU including the upholding of its principles, the honouring of financial commitments towards it, and maintaining “sufficiently staffed and equipped Permanent Missions at the Headquarters of the Union”. Beyond these criteria *vis-à-vis* the AU, further election criteria touch upon issues of peace and security including: “contribution to the promotion and maintenance of peace and security in Africa”, participation in conflict resolution, peace-making and peace-building at regional and continental levels, as well as a willingness to “take up responsibility for regional and continental conflict resolution initiatives”⁸⁶. On the basis of these and other criteria, the following states were elected for the inaugural three-year period: Gabon (representing Central Africa), Ethiopia (East), Algeria (North), South Africa (South), and Nigeria (West). As for the states elected for a two-year term, these are: Cameroon and Congo (Central); Kenya and Sudan (East); Libya (North); Lesotho and Mozambique (South); and Ghana, Senegal, and Togo (West)⁸⁷.

The Peace and Security Council is established so as to function continuously. It is meant to convene at the level of the Permanent Representatives to the AU at least twice a month and at the level of Foreign Ministers or Heads of State and Government at least once a year. The Council is meant to function at the AU Headquarters in Addis Ababa, Ethiopia⁸⁸; it is chaired on a rotational basis by the various members of the Council by alphabetical order, and requires a quorum of ten members. In closed meetings, members of the Peace and Security Council which are “party to a conflict or a situation under consideration” are not allowed to “participate either in the discussion or in the decision making process relating to the conflict or situation”. The Council may

⁸⁶ Ibid., article 5 (2)

⁸⁷ African Union, “African Union Elects Members of the Peace and Security Council and Two New Commissioners”, Press Release No. 18/2004 of 16 March 2004. Available at <<http://www.africa-union.org>>. Note that the African region they represent is stated in parenthesis.

⁸⁸ Though the Peace and Security Council may meet elsewhere upon invitation of a state, provided that two-thirds of the members agree. See article 8 (4), Protocol Relating to the Establishment, see note 79. Such a session did take place in Cape Town, South Africa on 3 May 2004. See Peace and Security Council, *Communiqué of the Peace and Security Council*, PSC/PR/Comm. (VII) of 3 May 2004.

decide to hold an open meeting; in this regard it shall invite any Member State which is not a member of the Council, if it is “a party to a conflict or a situation” to present its case, and may invite any other Member State, which is not a member of the Council whenever that member considers that its “interests are especially affected”. Finally, any “Regional Mechanism, international organization or civil society organization involved and/or interested in a conflict or a situation [...] may be invited to participate [...] in discussions” before the Council. Beyond participation in deliberations, the Protocol provides that the Council should be guided by the principle of consensus in seeking resolutions. However, each member of the Council has one vote, with decisions on procedural matters being settled by simple majority, and all other matters by a two-thirds majority⁸⁹.

2. The Peace and Security Council in Conjunction with ...

The Peace and Security Council is mandated under article 2 (1) of the Protocol to be assisted in undertaking its various activities. The provision reads as follows: “The Peace and Security Council shall be supported by the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund”. Article 9 (2), for its part, notes as already mentioned above that beyond actions undertaken by the Peace and Security Council itself, further entry points into dealing with a conflict may transpire through the “Chairperson of the Commission; the Panel of the Wise, and/or in collaboration with the Regional Mechanisms”. While these last three players are to support the activities of the Peace and Security Council, in the decentralized regime established by the African Union, each may act independent of the Council in seeking to prevent or resolve conflict. The following is a brief description of these separate organs which work in conjunction with the Peace and Security Council.

a. The Chairperson of the Commission

The Commission of the African Union is its secretariat, thus the Chairperson is the head of the bureaucratic wing of the AU. On 16 September 2003, that role was taken up by the former President of the Repub-

⁸⁹ Article 8, of the Protocol, see note 79.

lic of Mali, Alpha Omar Konare.⁹⁰ Where issues of peace and security are at stake, the AU has established a department – the Peace and Security Directorate – which is headed by a Commissioner for Peace and Security. By virtue of the Protocol establishing the Peace and Security Council, the Chairperson of the Commission shall, under the authority of the Peace and Security Council undertake various tasks. He shall bring to the attention of the Council or the Panel of the Wise any matter which may threaten peace, security and stability in the Continent or which deserves attention. Further may at his “own initiatives or when so requested by the Peace and Security Council” use his good offices “either personally or through special envoys, special representatives, the Panel of the Wise or the Regional Mechanisms, to prevent potential conflicts, resolve actual conflicts and promote peace building and post-conflict reconstruction”.⁹¹ This the Chairperson has done, through, for instance, the “Special Representative of the Chairperson of the Commission” to Côte D’Ivoire and to the Democratic Republic of the Congo⁹². Beyond these initiatives, the Chairperson is meant to ensure implementation of decisions of the Council, including a specific mandate regarding issues of intervention, that is to:

“ensure the implementation and follow-up of the decisions taken by the Assembly in conformity with Article 4 (h) and (j) of the Constitutive Act.”⁹³

The Chairperson of the Commission is also required to “prepare comprehensive and periodic reports and documents” as required by the Peace and Security Council⁹⁴.

⁹⁰ African Union, “Alpha Omar Konare Assumes Office as Chairperson of the Commission of the African Union”, Press Release No. 075 A/2003 of 16 September 2003. Available at <<http://www.africa-union.org>>.

⁹¹ Article 10 (2)(c), Protocol Relating to the Establishment, see note 79.

⁹² Peace and Security Council, Communiqué of the Peace and Security Council, PSC/PR/Comm. (V) of 13 April 2004, paras D(7) and E(4).

⁹³ Article 10 (3)(b), Protocol Relating to the Establishment, see note 79.

⁹⁴ *Ibid.*, article 10 (3)(c). If the first handful of sessions of the Peace and Security Council are to set a precedent, it is clear that the Chairperson will be active in preparing such reports and documents. Consider the reports prepared for the fifth and sixth sessions of the Peace and Security Council by the Chairperson on situations in Comoros, Côte D’Ivoire, Democratic Republic of the Congo, Somalia, and Sudan. Available on the website of the Institute of Security Studies, South Africa, at <<http://www.iss.co.za>>.

aa. Assisted by Continental Early Warning System

Beyond these functions, the Chairperson of the Commission receives information from the Continental Early Warning System established under article 12 of the Protocol. The Early Warning System consists of an observation and monitoring centre - the so called - "Situation Room" - located within the Conflict Management Directorate. It is responsible for "data collection and analysis" and for establishing liaisons with the various African sub-regional mechanisms, such as ECOWAS, which deal with the issue of peace and security. The Early Warning System is meant to consider a number of indicators, be they economic, humanitarian, military, political, or social to "analyze developments within the continent and recommend the best course of action"⁹⁵. The Early Warning System along with the established Conflict Management and Resolution and Post Conflict Unit of the Peace and Security Directorate are manifestations of the demise of the former system of the Organization of African Unity: the OAU Mechanism for Conflict Prevention, Management and Resolution in Africa which had been carrying out these functions⁹⁶. The sending into oblivion of the OAU mechanism is made plain in the Final Provisions of the Protocol in which it states that the Protocol replaces the constitutive document establishing the mechanism and that its provisions "supercede the resolutions and decisions of the OAU relating to the Mechanism for Conflict Prevention, Management and Resolution in Africa, which are in conflict with the present Protocol"⁹⁷.

bb. Commander and Chief of the African Standby Force

In order to enable the Council to perform its responsibilities with respect to the deployment of peace support missions and interventions "pursuant to article 4 (h) and (j) of the Constitutive Act"⁹⁸ an African Standby Force has been established. The Chairperson of the Commis-

⁹⁵ See article 12 (2 through 4), Protocol Relating to the Establishment, see note 79.

⁹⁶ For consideration of the African dispute settlement regime and the development of the OAU Mechanism consider J. Allain, "The Evolution of Dispute Settlement in Africa: From Pacifism to Militarism", *South African Yearbook of International Law* 23 (1998), 65 et seq.

⁹⁷ Article 22 (2), Protocol Relating to the Establishment, see note 79.

⁹⁸ *Ibid.*, article 13 (1).

sion is head of the chain of command of that Force. The Force is meant to consist of a contingency of both military and civilian personnel within various African states which would be ready to deploy on short notice. Its mandate, beyond being used for peace support and interventions missions, is to be ready as observation and monitoring missions, to act as a deterrent force, to be used in post-conflict situations, and to provide humanitarian assistance to civilian populations in conflict areas or natural disasters⁹⁹. In conjunction with the establishment of an African Standby Force, the Protocol mandates the establishment of a Military Staff Committee "to advise and assist the Peace and Security Council". It is to be made up of senior military officers of the members of the Council¹⁰⁰. While the African Standby Force has yet to be established, its basic framework is starting to emerge as a result of discussions which have transpired at both the level of African Chiefs of Defence Staff and African Ministers of Defence¹⁰¹. That framework was adopted as part of a Common African Defence and Security Policy in Sitre, Libya, on 28 February 2004. The Declaration establishing the common policy notes that the Standby Force will be "based on brigades [i.e. 2000-5000 persons] to be provided by the five African regions". It is envisaged that these forces will be available by 2010 and will consist of "military, police and civilian components and will operate on the basis of the various scenarios under African Union mandates".¹⁰²

cc. Chief Fund Raiser for the Peace Fund

The Chairperson of the Commission is also responsible for raising and accepting voluntary contributions from "sources outside Africa" which go towards a Special Fund established by article 21 of the Protocol. The fund which is known as the "Peace Fund" is meant to provide the costs

⁹⁹ Ibid., article 13 (3). Note that the modalities of the dealing with post-conflict and humanitarian situations are addressed in the Protocol in arts 14 (Peace Building) and 15 (Humanitarian Action).

¹⁰⁰ Ibid., article 13 (8) and (9).

¹⁰¹ See African Union, "First Meeting of the African Ministers of Defence and Security on the Establishment of the African Standby Force and the Common African Defence and Security Policy", EXP/Def.& Sec.Rpt.(IV) Rev.1 of 17-18 January 2004. Available on the website of the Institute of Security Studies, South Africa, at <<http://www.iss.co.za>>.

¹⁰² African Union, *Solemn Declaration on a Common African Defence and Security Policy*, Second Extra-Ordinary Assembly of the Union of 28 February 2004, 19, Section A(1)(iii).

of “peace support missions and other operational activities related to peace and security”. While it is left to the limited discretion of Chairperson (“in conformity with the objectives and principles of the Union”) to accept voluntary contributions from outside Africa, the Fund may receive money from any source within Africa, be it the Members States or “the private sector, civil society and individuals, as well as through appropriate fund raising activities”¹⁰³. It may be noted that while this Special Fund has been established by the Protocol, a so-called “Peace Fund” has existed since 1993 and served the same purpose under the auspices of the now-defunct OAU Mechanism for Conflict Prevention, Management and Resolution¹⁰⁴. Non-African states have regularly contributed to this Fund and have, on occasion, earmarked their donations for specific items. Norway e.g. provided money in November 2003 to assist in “upgrading facilities for the establishment of the envisaged Continental Early Warning System”¹⁰⁵.

b. The Panel of the Wise

The Protocol establishes a “Panel of the Wise” “in order to support the efforts” of the Council and those of the Chairperson of the Commission. The Panel of the Wise is to be “composed of five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent”¹⁰⁶. The Panel shall advise the Peace and Security Council and the Chairperson of the Commission on “all issues pertaining to the promotion, and maintenance of peace, security, and stability in Africa”. While the Panel of the Wise – which has yet to be constituted – has to report to the Peace and Security Council and through it to the Assembly of Heads of State and Government, it may, at the request of the Chairperson or the Council, or “at its own initiative [...] undertake such action deemed appropriate to support the efforts” of the Council or the Chairperson “for the prevention of conflicts, and to

¹⁰³ Article 21 (2 and 3), Protocol Relating to the Establishment, see note 79.

¹⁰⁴ See African Union, “The Government of Finland Donates 750.000 Euros to the AU Peace Fund”, Press Release No. 122/2003 of 31 December 2003. Available at <<http://www.africa-union.org>>.

¹⁰⁵ African Union, “The Government of the Kingdom of Norway and the African Union sign an Agreement for the Grant of US\$ 424.000 to the AU Peace Fund”, Press Release No. 95/2003 of 17 November 2003. Available at <<http://www.africa-union.org>>.

¹⁰⁶ Protocol Relating to the Establishment, see note 79, article 11 (2).

pronounce itself on issues relating to the promotion and maintenance of peace, security, and stability in Africa”¹⁰⁷.

c. The Relationship with Regional Mechanisms

According to article 16 “The Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace and security and stability in Africa”¹⁰⁸. By this, article 16 of the Protocol makes plain the dislodging of the United Nations Security Council from its primary responsibility for the maintenance of international peace and security on the African continent. While it is true that the UN Security Council mandate of “maintenance” is a stronger one than that of a framework of “promoting” peace and security, the AU means to act in both situations. Consider article 16 (1)(b), which states that the Peace and Security Council and the Chairperson of the Commission shall:

“work closely with Regional Mechanisms, to ensure effective partnership between them and the Peace and Security Council in the promotion and maintenance of peace, security and stability. The modalities of such partnership shall be determined by the comparative advantage of each and the prevailing circumstances.”

Article 16 (2) further notes that:

“The Peace and Security Council shall, in consultation with Regional Mechanisms, promote initiatives aimed at anticipating and preventing conflicts and, in circumstances where conflicts have occurred, peacemaking and peace-building functions.”

The basis for the provisions of the Protocol dealing with regional mechanisms is to ensure a co-ordinated effort between these sub-regional agencies and the Peace and Security Council; thus mention is made of keeping each other “continuously informed”, of seeking to “ensure close harmonization and coordination”, and of inviting each other to deliberations within their respective bodies¹⁰⁹. The cooperation between the Peace and Security Council and the Regional Mechanism is made most evident in regard to the above - mentioned

¹⁰⁷ *Ibid.*, article 11 (4).

¹⁰⁸ *Ibid.*, article 16 (1).

¹⁰⁹ *Ibid.*, see article 16 (2 through 9).

early warning system, as they are “linked directly through appropriate means of communications” to the so-called “Situation Room”¹¹⁰.

As has been noted in the Common African Defence and Security Policy, a number of sub-regional organizations which are “essentially economic-orientated” have established instruments and mechanisms to coordinate “regional defence and security policies”. Mention is made of eight such African regional organizations which, by acting in the domain of peace and security, and being consistent with the objectives and principles of the Union constitute Regional Mechanisms under the Protocol. They are the Arab-Maghreb Union, (AMU), Community of Sahelo-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC)¹¹¹. With respect to such Regional Mechanisms, the Peace and Security Council has mentioned only one during its early sessions. The Council lent its support to the efforts of ECOWAS in Côte D’Ivoire and called on the “Chairman of the African Union [a sitting Head of State or Government elected by the AU Assembly – Joaquim Chissano, President of Mozambique] and the Chairperson of the AU Commission, in liaison with the ECOWAS [...] to take the most appropriate measures to help overcome the current problems and facilitate the implementation of the reconciliation process in Côte D’Ivoire”¹¹². In a more robust manner, the Council, sitting at the level of Heads of State in May 2004, “mandate[d] ECOWAS to take necessary action to ensure full restoration of operations of state in Côte D’Ivoire immediately and to report progress to the Assembly of the Union” at its next session¹¹³.

¹¹⁰ Ibid., article 12 (2)(b).

¹¹¹ African Union, *Solemn Declaration on a Common African Defence and Security Policy*, Second Extra-Ordinary Assembly of the Union of 28 February 2004, 26, para. 25. Note that each of the sub-regional organizations gives an indication as to its geographic reach except for IGAD; its membership includes: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda.

¹¹² Peace and Security Council, Communiqué of the Peace and Security Council, PSC/PR/Comm. (III) of 27 March 2004, para. 6.

¹¹³ Ibid., article 10 (3)(b).

¹¹⁴ Peace and Security Council, Communiqué, PSC/AHG/Comm. (X) of 25 May 2004, para. C (7).

Finally, before going on to consider the manner in which the African Union has institutionalized the use of force beyond the United Nations System, reference should be made to further relationships which have been established under the Protocol. Article 17 – which will be considered in more detail below – establishes the relationship with the United Nations and other international organizations. Article 18 calls for a close working relationship with the Pan-African Parliament including the preparation of reports and the submission of annual reports “on the state of peace and security in the continent”¹¹⁴; article 19 mandates the Council to seek cooperation with the African Commission on Human and Peoples’ Rights¹¹⁵; while, finally, article 20 calls the Council to “encourage non-governmental organizations, community-based and other civil society organizations, particularly women’s organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa.”

VI. Institutionalized Use of Force beyond the United Nations System

Since it came into operation in December 2003, the Peace and Security Council has been the focal point of the regime established by the AU to deal with issues of peace and security. At the heart of that framework lies the possible use of force beyond that allowed by the United Nations Charter. While this regime of peace and security is decentralized, in that the power to act is delegated to various actors, they act in conjunction with the Peace and Security Council which is the pivot of the system. Yet, the actual power of decision in situations of recourse to the use of force does not lie with the Council specifically, but has been withheld by, and remains with, the Assembly of Heads of State and Government – the “supreme organ” of the AU.

As has been noted, on the basis of the Constitutive Act, the AU has the “right”, pursuant to article 4 (h), “to intervene in a Member State

¹¹⁴ For discussion of the Pan-African Parliament, see K. Magliveras/ G. Naldi, “The Pan-African Parliament of the African Union: An Overview”, *African Human Rights Law Journal* 3 (2003), 222 et seq.

¹¹⁵ For consideration of the African Commission on Human and Peoples’ Rights, see Nsongurua Udombana, “Can the Leopard Change its Spots? The African Union Treaty and Human Rights”, *Am. U. Int’l L. Rev.* 17 (2002), 1177 et seq.

pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity". Further, by way of article 4 (j), Member States of the Union have "the right [...] to request intervention from the Union in order to restore peace and security". Before considering each of these provisions in turn, consideration should be given to the manner in which the Assembly of Heads of State and Government of the AU goes about making – what ultimately may be – decisions regarding the use of force. The Constitutive Act notes that the Assembly, which is composed of all African Heads of State and Government, or their representatives (with the exception of Morocco which withdrew from the Organization in 1985 as a result of the admission of Western Sahara to the OAU), are to meet at least once a year. Decisions are made by "consensus or, failing which, by a two-thirds majority of the Member States."¹¹⁶

The powers of the Assembly regarding recourse to the use of force are to be found in article 9 of the Constitutive Act, though they are not noted explicitly. Article 9 (1) states that the "functions of the Assembly shall be to: "(b) Receive, consider and take decisions on reports and recommendations from the other organs of the Union". It is only when one considers the secondary legislation of the Assembly, its Rules of Procedure, that a manifestation of power regarding the use of force, in the guise of intervention, reveals itself. Rule 4 states that the Assembly of Heads of State and Government of the AU shall, *inter alia*:

"e) decide on intervention in a Member State in respect of grave circumstances namely, war crimes, genocide and crimes against humanity;

f) decide on intervention in a Member State at the request of that Member State in order to restore peace and security"¹¹⁷.

It is from these provisions that the Assembly has the specific power to decide to use force within the framework of the AU. Yet, as result of the 2003 Protocol on Amendments to the Constitutive Act of the AU, the basis upon which the Assembly may decide to project force against one of its members has been further widened. This comes as a result of the amendment of article 4 (h) of the Constitutive Act, which allows a further (fourth) justification for the Union to use military force beyond those established by the United Nations System.

¹¹⁶ Article 7 (1), Constitutive Act of the Africa Union, see note 78.

¹¹⁷ African Union, Rules of Procedure of the Assembly of the Union, ASS/AU/2(I), 9–10 July 2002.

1. Article 4 (h) – Interventions in Respect of Grave Circumstances

The first session of the Assembly of Heads of State and Government held in Durban, South Africa, in July 2002 was caught off guard by a far-reaching proposal made by Libya to amend the Constitutive Act of the AU¹¹⁸. Though, for procedural reasons, the amendments were not considered at Durban, they were taken up at an Extraordinary Session held in Addis Ababa, Ethiopia, on 3 February 2003. These proposals included “a single army for Africa, an AU Chairman with presidential status and greater power of intervention in Member States – in other words, for an institution that came closer to a ‘United States of Africa’”¹¹⁹. Beyond article 4 (h) of the Constitutive Act which reads:

“[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 against humanity;

Libya proposed the following addition:

[...] as well as in cases of unrest or external aggression in order to restore peace and stability to the Member of the Union.”

While this amendment was not accepted, a different, “watered down” amendment was; one which avoided conceding too “controversial or regressive” an amendment to the Constitutive Act while keeping Libya, “an influential and potentially troublesome Member State”, placated¹²⁰. The amendment which was incorporated in the Protocol amending the Constitutive Act adds to article 4 (h) in the following manner:

“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 well as a serious threat to legitimate order to restore peace and stability in*

¹¹⁸ The proposal was meant to move towards a collective security arrangement to defend African states from outside aggression such as had been visited upon Libya in 1986 by the United States of America.

¹¹⁹ E. Baimu/ K. Sturman, “Amendment to the African Union’s Right to Intervene: A Shift from Human Security to Regime Security?”, *African Security Review* 12 (2003), 37 et seq. (38).

¹²⁰ *Ibid.*, 39.

the Member State of the Union upon the recommendation of the Peace and Security Council"¹²¹.

While it is uncontroversial what is meant by circumstances which constitute war crimes, genocide, or crimes against humanity, questions may be raised regarding the meaning of the 2003 amendment of the provisions of article 4 (h). As subsection (h) was originally conceived, the right to intervene by the Union was predicated on violations of international law which not only incurred state responsibility, but also are considered international crimes entailing individual responsibility. War crimes, genocide, and crimes against humanity fall under the jurisdiction *ratione materiae* of the Rwanda and Yugoslavia Criminal Tribunals established by the UN Security Council, and make up the current basis for prosecution under the Rome Statute of the International Criminal Court¹²². As such, international courts have been, and will continue to, establish the parameters of what is meant by these provisions. By contrast, the phrase "serious threat to legitimate order" does not appear in any previous manifestation, either internationally, or within the AU, or its predecessor the OAU. According to Ben Kioko, the amendment is meant to act as a residual clause. The Legal Advisor to the AU writes that the phrase allows for the Assembly to "decide on intervention in situations where the provision relating to genocide, war crimes and crimes against humanity is not applicable, but where the situation nevertheless warrants the intervention"¹²³.

As the phrase introduced by the Protocol amending the Constitutive Act allows for the use of force to restore peace and security in situations of "serious threat to legitimate order" has not as yet been considered, there is little to go by in seeking to determine the legal parameters of this newly established pretext for recourse to the use of force. While some have argued that the provision "is likely to facilitate the interventions aimed at protecting regimes rather than the people", Kioko disagrees, stating that an intervention would only take place

¹²¹ See article 4, Protocol on Amendments to the Constitutive Act of the African Union of 3 February and 11 July 2003. Emphasis added.

¹²² For the development of jurisprudence regarding these crimes before the ICTY and ICTR see J. Ackerman/ E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia: with Selected Materials from the International Criminal Tribunal for Rwanda*, 2000. For the International Criminal Court, consider W. Schabas, *An Introduction to the International Criminal Court*, 2001.

¹²³ Kioko, see note 64, 815.

where it “would conform to the hopes and aspirations of the African peoples”¹²⁴. He goes on:

“Clearly, intervening to keep in power a regime that practices bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the values and standards that the Union has set for itself”¹²⁵.

As Baimu and Sturman, however, have rightly pointed out in their study of the amendment: “[i]n the absence of the African Court of Justice, the issue of interpretation of what would constitute a serious threat to legitimate order will fall upon the Assembly of the Union”¹²⁶. Clearly, as a political issue, the way is clear to interpret this residual clause as the Assembly deems fit; in essence, expanding the recourse to the use of force within the AU to, at the very minimum, what two-thirds of African leaders decide upon.

Where the Assembly of Heads of State and Government is limited is by the final phrase of the amendment of article 4 (h) of the Constitutive Act, which introduces the need for the Peace and Security Council to make a recommendation to intervene. This power is confirmed in the 2002 Protocol establishing the Peace and Security Council, which notes, in article 7 (1)(e), that the Council shall – in conjunction with the Chairperson of the Commission:

“recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances [...]”.

As this provision, however, was adopted before the 2003 amendment to the Constitutive Act, it only cites the first three circumstances and thus does not give the Council the power to make recommendations with regard to a “serious threat to legitimate order”. The provision continues:

“in respect of grave circumstances [...] namely: war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments”.

This anomaly, which manifests itself elsewhere in the Protocol establishing the Peace and Security Council, raises constitutional questions regarding situations in which the Union has appropriated for itself

¹²⁴ Baimu/ Sturman, see note 119, 43; and Kioko, see note 64, 816.

¹²⁵ Kioko, see note 64.

¹²⁶ Baimu/ Sturman, see note 119, 42.

the ability to intervene in grave circumstances¹²⁷. Because the Protocol establishing the Peace and Security Council was adopted before the amendments to the Constitutive Act, it does not foresee the possibility of intervention as a result of “a serious threat to legitimate order”. Thus, while the Peace and Security Council has been given the power to make recommendations in situations of serious threats to the legitimate order of Member States by way of the amended Constitutive Act; it does not have the formal jurisdiction to make such recommendation by virtue of its own founding Protocol. Further, one should highlight the fact that the amended Constitutive Act; does not, as of yet, bind all Member States of the AU, and thus raises further questions regarding the framework in which the Peace and Security Council will function. As of 25 May 2004, the date of the official launching of the Peace and Security Council, only twenty-three states (of the fifty-three Members States of the AU – party to the Constitutive Act) had signed the Protocol on Amendments to the Constitutive Act of the AU. However the Comoros, South Africa, and Tanzania are the only members to have ratified the amending instrument¹²⁸. Further, it should be mentioned that by the launch date of the Peace and Security Council, only thirty-two states had ratified the Protocol establishing the Council.

While consideration will be given to the relationship between the AU and the United Nations, it is relevant to note that the provisions of article 4 (h), *prima facie*, are far wider than the powers of the United Nations Security Council. It will be recalled that the only basis for the projection of force under the UN Charter is in relation to attempts by the Council to maintain or restore the peace where there has been a determination that there exists: 1.) a threat to the peace; 2.) a breach of the peace; or 3.) an act of aggression. By contrast, article 4 (h) of the Constitutive Act, as amended, introduces four new bases (i.e.: war crimes, genocide, crimes against humanity, and a serious threat to legitimate order) for the use of force. Thus, whether the AU subordinates itself or not the United Nations System is immaterial to the possibility of the

¹²⁷ For further manifestations of this anomaly within the Protocol establishing the Peace and Security Council see article 4 (j) and article 6 (d).

¹²⁸ See African Union, *List of Countries which have Signed, Ratified, Acceded to The African Union Convention on the Protocol On the Amendments to the Constitutive Act of the African Union*. See the website of the African Union at: <<http://www.africa-union.org>>. Note that, by way of article 13, the Protocol will only enter into force thirty days after the deposit of instruments by two-thirds of the members of the AU: that is when a total of thirty-six states have ratified.

UN Security Council authorizing actions with respect to the provisions of article 4 (h), as these four pretexts allowing for the use of force go beyond the Council's competence to act under Chapter VII of the United Nations Charter.

2. Article 4 (j) – Intervention in Order to Restore Peace and Security

By contrast to the provisions of article 4 (h) of the Constitutive Act, article 4 (j) is not encumbered by an amendment and thus establishes the principle of:

“The right of Member States to request intervention from the Union in order to restore peace and security”;

Yet, this right has been narrowly construed by the Assembly in its Rules of Procedure, as the Heads of State and Government, based on a request by a (singular) Member State, are called upon to intervene solely within that state. That is, article 4 (j) has been “interpreted in a manner that restricts the application of the clause to when an affected member state requests intervention itself, rather than other members states requesting intervention in a third country”¹²⁹. The provision of Rule 4 states that the Assembly shall:

“f) decide on intervention in a Member State at the request of that Member State in order to restore peace and security.”

This narrow interpretation has, not however, been confirmed by the Protocol establishing the Peace and Security Council. The Protocol notes that, by virtue of article 4 (k), as a principle, the Council is to be guided by the “right of Member States to request intervention from the Union in order to restore peace and security, *in accordance with Article 4 (j) of the Constitutive Act*”¹³⁰. While a second provision of the Protocol also notes that actions are to be taken “pursuant to article 4 (j) of the Constitutive Act”, this provision speaks of a “Member State” in the singular. The provision of article 7 (f), outlines the power of the Peace and Security Council with respect to interventions wherein it grants the

¹²⁹ J. Cilliers/ K. Sturman, “The Right Intervention: Enforcement Challenges for the African Union”, *African Security Review* 11 (2002), 29 et seq. (36-37).

¹³⁰ Article 4 (k), Protocol Relating to the Establishment, see note 79. Emphasis added.

Council the power to “approve the modalities for intervention by the Union in a Member State, following a decision by the Assembly, pursuant to article 4 (j) of the Constitutive Act”. As the Protocol is an international treaty which requires state consent, the Rules of Procedure of the Assembly by contrast are mere secondary legislation; it is plain therefore that the narrow interpretation taken by Rule 4 need not bind the AU. As the provisions of both articles 4 (k) and 7 (f) of the Peace and Security Council Protocol refer to article 4 (j) of the Constitutive Act, African leaders could well allow for the use of force to transpire against a state other than the one requesting it, “in order to restore peace and security”.

Regardless of whether the provisions of article 4 (j) of the Constitutive Act will be interpreted restrictively or in an expansive manner, the question persists as to whether it – and article 4 (h) – fall within the United Nations System of the use of force or seek to escape it. As will now be considered, the provisions of the constitutive instrument of the Peace and Security Council belie the fact that the AU has sought to ensure a *pax africana* at the expense of the United Nations System and thus, through the development of regional instruments to that effect, undertaken the first true challenge to the normative framework regarding the use of force since the establishment of the United Nations Charter in 1945.

VII. Relationship between the African Union and the United Nations

The challenge of the AU to the normative framework regarding the use of force which is manifest in the United Nations System derives from its unwillingness to subordinate its actions to those of the United Nations Security Council. While regional organizations, such as NATO and the Organization of American States, have recognized this imperative; the AU, though paying homage to the primacy of the UN Security Council, does not place its Peace and Security Council under the obligation to defer to the United Nations in its actions, either generally or specifically, with respect to determining or using force – that is, with respect to intervention as envisioned by article 4 (h) and (j) of its Constitutive Act. Instead of conforming to the dictates of Chapter VIII of the United Nations Charter, the Protocol establishing the Peace and Security Council diffuses the primary role attributed to the Security Council by the United Nations Charter, mentioning the UN Security Council

as but one of a number of organizations which will assist the Peace and Security Council in the area of logistics where peace and security is at issue. With regard to the challenge to the United Nations System, what is most important about the instruments of the AU is what is left unsaid. The Constitutive Act, as amended, is silent on the relationship between the United Nations and the AU. Beyond the need to register the Act with the Secretariat of the United Nations, the sole mention of the United Nations Organization in the Constitutive Act is in regard to one of the Union's objectives, to: "[e]ncourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights"¹³¹.

With respect to the 2002 Protocol relating to the Establishment of the Peace and Security Council of the AU, the preamble acknowledges the primary responsibility of the UN Security Council in issues of international peace and security in the following passage:

"Mindful of the provisions of the Charter of the United Nations, conferring on the Security Council primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership between the United Nations, other international organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa".

Yet, this is juxtaposed against a number of further pre-ambular paragraphs which spell out the wish of African states to take command over issues of the use of force through the establishment of the regime of the AU regarding peace and security:

"Concerned about the continued prevalence of armed conflicts in Africa and the fact that no single internal factor has contributed more to socioeconomic decline on the Continent and the suffering of the civilian population than the scourge of conflicts within and between our States; [...]

Determined to enhance our capacity to address the scourge of conflicts on the Continent and to ensure that Africa, through the African Union, plays a central role in bringing about peace, security and stability on the Continent;

¹³¹ Article 3 (e) Constitutive Act of the Africa Union of 11 July 2000.

Desirous of establishing an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction [...]”.

By the time the Protocol outlines the relationship between the AU and the United Nations at article 17; the nature of the overall regime regarding peace and security has already been given voice within the Protocol. As noted earlier, article 16 (1) states that “The Regional Mechanisms are part of *the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.*”¹³² While African states have pledged, at article 17, that the African Union’s Peace and Security Council will “cooperate and work closely with the United Nations Security Council, which has primary responsibility for the maintenance of international peace and security”, it is clear that the relationship is neither on an equal footing or one which places the UN Security Council above that of the Peace and Security Council. The Protocol, while noting that the Peace and Security Council “shall cooperate and work closely with the United Nations Security Council”, diffuses the primacy of the UN Security Council in the next sentence by stating that “the Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa”¹³³.

Therefore, the UN Security Council is but one of the United Nations bodies which the Peace and Security Council is expected to work with closely, and its interaction is meant to be first and foremost of a logistical nature as article 17 (2) does not speak of the need to seek UN Security Council authorization to use force; instead calls on the United Nations to provide assistance:

“Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions’ activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security”.

The provision, while mentioning Chapter VIII, clearly does so, not in the context of a need to seek authorization or allow for stepping

¹³² Emphasis added. For discussion of Regional Mechanisms see Section V. 2. c. above.

¹³³ Article 17 (1), Protocol Relating to the Establishment, see note 79.

aside should the UN Security Council deem it necessary to take measures to restore or maintain international peace; but with respect to playing a subordinate role of assisting the Peace and Security Council in carrying out its activities. The diffusion of the primacy of the United Nations Security Council is further reflected in article 17 (3) where, first the Peace and Security Council is to “maintain close and continued interaction with the United Nations Security Council”, but also on the same footing with African members of the UN Security Council and the UN Secretary-General. Further dilution of the primacy of the UN Security Council is apparent in article 17 (4), where the Peace and Security Council is to “cooperate and work closely with other relevant international organizations on issues of peace, security and stability in Africa”. The diffusion of the primary role of the Security Council over issues of international peace and security as developed in article 17 of the Protocol, in essence, turns the United Nations System on its head, as the UN Security Council is meant to assist the African Union’s Peace and Security Council not *vice versa*. As a result of the fact that the Protocol, while paying lip-service to the primacy of the UN Security Council, seeks, at every turn, to dissipate its pre-eminence makes clear that intervention as envisioned by the Constitutive Act of the African Union usurps the ultimate control vested in the United Nations System over the use of force.

VIII. Conclusion

On 23 December 2003, the AU brought into operation its exception to the normative framework of the international system as the Protocol establishing its own Peace and Security Council came into force. As a result, for the first time since 1945 the United Nations System regarding the use of force has been truly challenged. While the cases of Kosovo and Iraq have elicited much discussion, the justifications of recourse to the use of force beyond Article 2 (4) of the Charter, whether “humanitarian intervention” or “pre-emptive self-defence”, have failed to meet the threshold of state practice backed by *opinio juris* required to enter the corpus of customary international law. As a result, United States’ led actions in the Balkans and in the Middle East have failed either to fall within the established parameters of the legal use of force or to modify the normative framework accepted by the community of states. By contrast, African states, through their recourse to the Constitutive Act of the AU and the Protocol establishing the Peace and Security

Council of the AU have formally opted out the normative framework of the United Nations System. Not only do they reject the primacy of the United Nations Security Council in the domain of peace and security, they have appropriated for themselves further possibilities for the recourse to the use of force beyond the established order; that is, allowing for armed intervention to halt crimes against humanity, genocide, war crimes, or serious threats to the legitimate order.

What is clear, as Ben Kioko has noted, is that when “setting up the African Union, the heads of State thus intended to endow their continental organization with the necessary powers to intervene if ever the spectre of another Rwandan genocide loomed on the horizon”¹³⁴. This, along with the fact that the UN Security Council lent support, both tacit and open, to ECOWAS interventions in Liberia and Sierra Leone without a mandate to use force allowed African leaders to take their destiny, with respect to continental control over the use of force, into their own hands. The move away from the United Nations System is well reflected in the words of Ben Kioko:

“When questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand. This decision [regarding moving beyond the UN System and allowing for intervention within the African Union] reflected a sense of frustration with the slow pace of reform of the international order, and with instances in which the international community tended to focus attention on other parts of the world at the expense of more pressing problems in Africa”¹³⁵.

With this in mind, it is evident that in a fundamental manner, the AU has challenged the consensus which has existed since 1945: that the United Nations Security Council is the only entity which may legally project force. The incorporating, within the Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council, four new exceptions allowing for the recourse of the use of force and not mandating that the Council or Assembly subordinate its actions to the imperatives of the UN Charter, has meant the African states

¹³⁴ Kioko, see note 64, 815.

¹³⁵ Kioko, *ibid.*, 821.

have truly challenged, for the first time, the framework of the United Nations System of governance regarding the use of force as developed more than half a century ago.

