

**CHALLENGING SECURITY COUNCIL'S MONOPOLY POWER OVER THE USE OF
FORCE IN ENFORCEMENT ACTIONS: THE CASE OF ECOWAS**

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Declaration

This is to certify that this research is my original work and has not been presented for a degree award in any university or institution of higher learning. Information from other sources has been duly acknowledged.

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1. INTRODUCTION

1.1 Background

The treaty of Lagos emerged in 1975 proposing a union of West African states. The treaty was initially meant for economic integration but a wave of political reforms and civil strife in the region led to its revision. This led to an expansion of its scope and powers to include political integration.¹ In 1999, to expand its mandate, Economic Community of West African States (ECOWAS), adopted the Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter Protocol on Mechanism for Conflict Prevention). This was adopted in line with the United Nations Charter's chapter on the exception of the use of force², provisions that allow use of force in the African Union Charter³ and ECOWAS protocols that provide for members to give each other mutual assistance for defence against any armed threat.⁴ There was need for the regional body to develop policies to protect civilians due to an increase in protracted domestic conflicts in the region and restore life to normalcy after conflicts. The Protocol outlines its objectives which include maintaining and consolidating peace, security and stability within the community⁵ and the constitution and deployment of a civilian or military force to maintain or restore peace within the region when the need arises.⁶

In case of conflict, the procedure set out for intervention includes recourse to the Council of elders, the dispatch of fact-finding missions, political and mediation missions or as a last resort military intervention.⁷ The circumstances that permit intervention are not left open but are clearly defined by the Protocol on Mechanism for Conflict Prevention. These are in cases of aggression or conflict in any Member State or threat, in case of conflict between two or several Member States, in case of internal conflict that threatens to trigger a humanitarian disaster or that poses a serious threat to peace and security in the sub-region, in event of serious and massive violation of human rights and

¹ Hartmann, Christof, 'ECOWAS and the Restoration of Democracy in The Gambia' 52(1) *Africa Spectrum*, 2017, 88.

² Chapter VI, VII & VIII, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³ Article 4H, *Constitutive Act of the African Union*, 1 July 2000.

⁴ Preamble, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace keeping and Security*, 10 December 1999.

⁵ Article 3(e), *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace keeping and Security*.

⁶ Article 3(h), *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace keeping and Security*.

⁷ Article 27, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace keeping and Security*.

the rule of law, in the event of an overthrow or attempted overthrow of a democratically elected government and any other situation as may be decided by the Mediation and Security Council.⁸

In 2016, The Gambia had their general elections in which Adama Barrow was declared the winner.⁹ The former president Yahya Jammeh before the official announcement conceded defeat and congratulated Barrow vowing that he would not contest the results.¹⁰ Later, Jammeh changed his earlier position claiming that he no longer had faith in the electoral system; would contest the results and due to the irregularities in aggregation of results from one region, he would ask for fresh elections under a different electoral administration.¹¹ Troops were then deployed on the streets of Banjul.¹² At this point it was clear that Jammeh was no longer committed to handing over power to the president elect.

In a joint statement on 10 December, ECOWAS, African Union (AU) and United Nations Organisation of West African States (UNOWAS) called on the government of The Gambia to abide by its constitutional responsibilities and international obligations.¹³ Placing emphasis on the importance of security for the president elect and the Gambian citizens.¹⁴ Also supported Senegal's position, a non-permanent member of United Nations Security Council (UNSC) at that time, on the issue with regards to calling on an emergency meeting of the UNSC.¹⁵

The AU Peace and Security Council (PSC) had a meeting on 12 December and made a decision on the situation in The Gambia. This was in reference to the AU Constitutive Act as well as the AU Charter on Democracy, Elections and Governance provisions on the total rejection by the AU of unconstitutional changes of government.¹⁶ The PSC decided that a high level delegation be formed to engage all Gambian stakeholders concerned to help facilitate peaceful transfer of

⁸ Article 25, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace keeping and Security*.

⁹ - <http://www.africanews.com/2016/12/02/adama-barrow-officially-declared-winner-of-gambia-s-presidential-election/> > on 15 August 2017.

¹⁰ - <https://jollofnews.com/2016/12/02/gambia-2016-jammeh-reacts-to-election-defeat/> > on 15 August 2017.

¹¹ - <https://jollofnews.com/2016/12/21/gambia-election-2016-our-position-on-the-political-standoff/> > on 15 August 2017.

¹² Hartmann, Christof, 'ECOWAS and the Restoration of Democracy in The Gambia', 87. Interpreted as an act of Jammeh signifying that he was still in control of the security apparatus.

¹³ - <http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-political-developments-in-the-gambia/> > on 16 August 2017.

¹⁴ - <http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-political-developments-in-the-gambia/> > on 16 August 2017.

¹⁵ - <http://www.reuters.com/article/us-gambia-election-senegal/senegal-calls-for-u-n-security-council-meeting-over-gambia-idUSKBN13Z00K> > on 16 August 2017.

¹⁶ Article 23(4), *African Union Charter on Democracy, Elections and Governance*, 30 January 2007. Focus being on the refusal by an incumbent government to relinquish power to the winning candidate after a free and fair election as provided for in the Charter.

power.¹⁷PSC also decided to pursue and intensify coordinating efforts with ECOWAS and United Nations (UN) to facilitate the transfer of power to the president elect.¹⁸ In their decision, PSC emphasised that the AU was determined to take all necessary measures in line with the relevant AU instruments to ensure that the will and desire of The Gambian people is respected and complied.¹⁹

The position change by Jammeh, according to ECOWAS, threatened the peace of the entire West African sub-region. This made ECOWAS send a mediation delegation to The Gambia.²⁰ The UN special representative for West Africa, when asked whether the UN would consider military action if mediation failed said that it would not be necessary depending on the situation at the time.²¹ Mediation failed convincing ECOWAS heads of states to adopt more credible sanctions.²² ECOWAS decided that it will take all necessary measures to strictly enforce the election results.²³ As a sub- regional body it would also request the UNSC and AU to endorse and support all its decisions on the Gambian situation.²⁴ ECOWAS then placed standby forces on alert so that they would intervene militarily if Jammeh did not step down by 19 January.

On 21 December the president of the UNSC made a statement after the UNSC had considered Peace in West Africa during their 7848th meeting. The statement reiterated the UNSC's full support for the continued efforts of AU and ECOWAS to promote peace and stability and good governance in the sub- region.²⁵

The AU Peace and Security Council at its 647 meeting on 13 January 2017 adopted another decision on the Gambian situation. The council reaffirmed AU's zero tolerance policy with regard to coup d'état and unconstitutional changes of government.²⁶ It declared that as of 19 January the AU will no longer recognize Jammeh as the legitimate president.²⁷

¹⁷ PSC/PR/COMM. (DCXLIV) (2016) Post-election situation In the Islamic Republic of Gambia, 2.

¹⁸ PSC/PR/COMM. (DCXLIV) (2016), 2.

¹⁹ PSC/PR/COMM. (DCXLIV) (2016), 3.

²⁰ - <http://www.aljazeera.com/news/2016/12/african-leaders-head-gambia-mediation-talks-161212144241777.html>> on 20 August 2017.

²¹ Farge E and McAllister E, 'Gambia's Jammeh must leave power when term ends: United Nations' Reuters 14 December < <http://www.reuters.com/article/us-gambia-election/gambias-jammeh-must-leave-power-when-term-ends-united-nations-idUSKBN1431IU>> on 22 August 2017.

²² Hartmann, Christof, 'ECOWAS and the Restoration of Democracy in The Gambia',

²³ ECOWAS Final Communique 17 December 2016.

²⁴ ECOWAS Final Communique 17 December 2016.

²⁵ Press statement UNSC 21 December 2016.

²⁶ PSC/PR/COMM. (DCXLVII) (2017) Post-election situation In the Islamic Republic of Gambia, 3.

²⁷ PSC/PR/COMM. (DCXLVII) (2017), 3.

On 14 January, the defence chiefs of ECOWAS gathered. In the meeting they discussed the establishment of the ECOWAS Military Intervention in The Gambia (ECOMIG). The troops would be deployed in The Gambia to install the new president.²⁸ At the end of the meeting no communique was issued.²⁹

On 18 January, troops started to move to the Senegal-Gambia border. The following day, Barrow was sworn in as president in the Gambian embassy in Dakar, Senegal. In his inaugural speech, he asked AU, UN and ECOWAS to assist Gambians in enforcing their will.³⁰

The UNSC on the same day approved resolution 2337.³¹ It expressed full support of ECOWAS's quest to ensure by political means first that power was handed over to president elect Barrow. Initially it had referred to ECOWAS' use of all necessary measures but this was dropped as members such Russia objected to any reference supporting military action. Russia's deputy ambassador Iliichev told reporters that Barrow had the option of requesting military assistance if diplomacy fails.³² Britain's deputy UN ambassador Peter Wilson in his statement said that it was clear that if Barrow asked for assistance as the legitimate president, he would be entitled to it.³³

The military invasion was quickly halted to allow final negotiations. Due to the circumstances such as the military invasion, Gambians fleeing and Jammeh's own army chief pledging allegiance to President Barrow, Jammeh agreed to step down.³⁴

1.2 Central Problem

By being party to ECOWAS treaty states have consented to military interventions based on the Protocol on Mechanism for Conflict Prevention. Western Africa states were willing to militarily intervene in The Gambia based on this legal claim of a prior treaty based consent.³⁵ Senegal, as a

²⁸-<<http://www.thisdaylive.com/index.php/2017/01/16/the-gambia-use-of-force-imminent-as-ecowas-plans-to-oust-jammeh/>> on 30 August 2017.

²⁹ -<<http://www.thisdaylive.com/index.php/2017/01/16/the-gambia-use-of-force-imminent-as-ecowas-plans-to-oust-jammeh/>> on 30 August 2017.

³⁰ - <http://www.aljazeera.com/news/2017/01/gambia-president-adama-barrow-takes-oath-senegal-170119170745954.html>> on 30 August 2017.

³¹ UNSC S/RES/2337 (2017) Peace Consolidation in West Africa.

³² - <http://www.dailymail.co.uk/wires/ap/article-4137146/UN-vote-resolution-supporting-Barrow-Gambia-leader.html>> on 30 August 2017.

³³- <https://www.gov.uk/government/speeches/the-people-of-the-gambia-spoke-clearly-at-the-elections-in-december-they-chose-adama-barrow-to-be-their-president> > on 30 August 2017.

³⁴ Hartmann, Christof, 'ECOWAS and the Restoration of Democracy in The Gambia', 90.

³⁵ Kress C and Nussberger B, 'Pro-democratic intervention in current international law: The case of The Gambia in January 2017' *Journal on the Use of Force and international Law*, 2017, 7 - <http://dx.doi.org/10.1080/20531702.2017.1338466>> on 1 September 2017.

non-permanent member of the UNSC, did not comment on the threat of use of force by its troops who crossed the Gambian border at midnight on 19 January before UNSC's authorization.³⁶ This same idea of use of force based on ECOWAS treaty is not present in resolution 2337. UNSC's permanent members Russia and UK authorizing ECOWAS to use of force relied exclusively on intervention through invitation.³⁷ This raises the question of the constitutionality of the threat or use of force in the West African security framework and how it relates with the collective security system of the UN.³⁸

1.3 Hypothesis

Proximity to conflicts in Africa makes regional organisations most suitable to maintain peace and security in Africa.

Because Article 3 and Article 25 of The Protocol on Mechanism for Conflict Prevention permit ECOWAS to use force without prior UNSC authorization, they violate Article 53 of the Charter of the United Nations.

UNSC's silence, open support and not objecting to the use of force by African states reflects the futility of the prior authorization requirement in Article 53 of the Charter of the United Nations.

1.4 Chapter Breakdown

This study is broken down into six chapters. The current chapter being an introduction with the details of the background to the problem, the research problem, the hypothesis and the methodology used during the study. In Chapter 2, a discussion on Third World Approaches to International Law as the theoretical framework for this study. Chapter 3 is on the formation of international law on use of force. Chapter 4 analyses the role of regional organisations in enforcement action. Chapter 5 looks at ECOWAS laws on use of force and AU laws on use of

³⁶Kress C and NuBberger B, 'Pro-Democratic intervention in current international law: the case of The Gambia in January 2017, 7.

³⁷- <http://www.dailymail.co.uk/wires/ap/article-4137146/UN-vote-resolution-supporting-Barrow-Gambia-leader.html> > on 30 August 2017.

³⁸Kress and Nussberger B, 'Pro-democratic intervention in current international law: the case of The Gambia in January 2017, 7.

force and instances where ECOWAS has resorted to force and UNSC's reaction to the use of force. Finally, in Chapter 6, we conclude with our findings and recommendations.

1.5 Methodology

“It is a capital mistake to theorise before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.” Sherlock Holmes³⁹

The research was mainly desk-based. Focusing on interpretation of various treaties, resolutions and decisions on the use of force by UN and ECOWAS. In a bid to establish state practice on use of force at both levels. Other sources such as books and journal articles were also useful. They helped in expounding and analysing state practice on use of force. For the theoretical framework an interview had to be conducted.

³⁹ Hodgson P. 'What user researchers can learn from Sherlock Holmes' 12 April 2015 <http://www.userfocus.co.uk/articles/learn_from_Sherlock_Holmes.html> on 31 August 2017.

2. THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TWAIL)

2.1 Introduction

Chapter one was a background on the recent threat of use of force by ECOWAS in The Gambia. From the background it is seen that ECOWAS may resort to force when there is a threat to peace and security in West Africa. The basis of using force being the Protocol on Mechanism for Conflict Prevention and not Security Council authorization.

This chapter introduces TWAIL as the theoretical framework for this study. TWAIL supports the argument that UN should no longer have monopoly power on the use of force in the world. The chapter proceeds by first explaining what TWAIL as a theory entails by tracing its history. As part of understanding the theory there is an explanation of the meaning of third world states and reasons for this theory. The second part looks at the two classes of TWAIL. A fight against structural discrimination and as state practice. The third part is on the criticisms of TWAIL and a proposed solution to these criticisms. The final part concludes this chapter by linking TWAIL and use of force. It advances that, based on TWAIL as state practice, regional organisations should be the ones to maintain peace and security in Africa.

2.2 What is TWAIL?

It originated as a decentralized network of academics who shared a common commitment in their concern about the third world.⁴⁰ They wanted to critically review the work of the first generation of public international law scholars from the third world⁴¹, and they were particularly interested in engaging the universal claims made by public international law.⁴²

Currently, TWAIL is understood as a body of academic knowledge that is part of a number of critical⁴³ schools of international legal thought.⁴⁴ TWAIL amongst other things re-examines the

⁴⁰ Gathii J, 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography' 3(1) *Trade Law and Development* (2011), 27.

⁴¹ An example would be Taslim Olawale Elias. Toufyan M, 'When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias' in Onazi O, *African Legal Theory and Contemporary Problems Critical Essays*, Springer, New York, 2014.

⁴² Gathii J, 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography', 27-28.

⁴³ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach' 8 *Melbourne Journal of International Law* (2007), 500-501.

⁴⁴ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 501.

historical foundations of international law.⁴⁵This includes the colonial encounter between Europeans and non-Europeans.⁴⁶ Leading to the conclusion that imperial expansion, to subordinate non-European peoples, heavily relied on construction and universalization of international law.⁴⁷ International law, according to TWAIL, regardless of its guarantees of sovereign equality and self-determination carries forward the legacy of imperialism and colonial conquest.⁴⁸ TWAIL thus challenges the complacency in international law to treat this colonial legacy as dead letter because of decolonization.⁴⁹

2.2.1 Why TWAIL?

The international law regime is state-centric i.e. states-and only states- are true legislators of international law.⁵⁰ The function of international courts is to interpret while “publicists” expound upon concepts and provide scientific analysis. On the other hand non-state actors such as the civil society and corporations influence the drafting of international instruments.⁵¹ They also constitute, by far, the majority of complainants to international jurisdictions.⁵² To find international legislation, it is to states, and their explicit legislative action and customary practice that we look.⁵³ Thus the approach of third world states to international law cannot be excluded as these states have created a distinct approach to practice of international law.⁵⁴

Third world international law scholars still have a great task before them. To map the changes that have occurred between states and international law.⁵⁵ They should focus on the major overlapping developments redefining and reconstituting the relationship of state, international law and institutions which may have a different impact on third world states and peoples.⁵⁶ This research attempts to fulfill this task.

⁴⁵ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 30.

⁴⁶ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 30.

⁴⁷ Mutua M, ‘What is TWAIL?’ 94 *American Society of International Law* (2000), 31.

⁴⁸ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 30-31.

⁴⁹ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 30.

⁵⁰ Personal communication with Sipalla H on 10 January 2018.

⁵¹ Personal communication with Sipalla H on 10 January 2018.

⁵² Personal communication with Sipalla H on 10 January 2018.

⁵³ Personal communication with Sipalla H on 10 January 2018.

⁵⁴ Personal communication with Sipalla H on 10 January 2018.

⁵⁵ Chimni B, ‘Third World Approaches to International Law: A Manifesto’ 8 *International Community Law Review* (2006), 8.

⁵⁶ Chimni B, ‘Third World Approaches to International Law: A Manifesto’, 8.

2.2.2 The meaning of third world

The category third world is made up of various countries with different cultures, historical differences and varying economic levels.⁵⁷ However, too much is often made of numbers, variations and differences in the presence of structures and processes of global capitalism which continues to bind and unite.⁵⁸ These are the structures that produced colonialism and have now led to neo-colonialism.⁵⁹ Therefore, third world comes from a common history of subjection to colonialism and/or the continuing underdevelopment and marginalization of countries in Asia, Africa and Latin America.⁶⁰

The process of aggregating, in international law, a diverse set of countries with differences in their patterns of economy also validates the category 'third world'.⁶¹ International law prescribes rules that ignore the uneven development of states in a bid to prescribe uniform global standards.⁶² Third world acts as the response to these abstractions and crucial to organizing and offering collective resistance to hegemonic policies.⁶³ A level of unity that would enable resistance to a range of practices which systematically disadvantage and subordinate an otherwise diverse group of people.⁶⁴

The category third world is still relevant today because of the growing north-south divide.⁶⁵ It serves as a pointer to certain structural constraints that the world economy imposes on one set of countries as opposed to others.⁶⁶

2.3 Classes of TWAIL

a) TWAIL as essentially a fight against structural discrimination⁶⁷

International law has European and Christian origins as asserted by its creators.⁶⁸ Their claim being international law is premised on Europe as the centre, Christianity as the basis for civilization,

⁵⁷ Chimni B, 'Third World Approaches to International Law: A Manifesto', 4.

⁵⁸ Chimni B, 'Third World Approaches to International Law: A Manifesto', 4.

⁵⁹ Chimni B, 'Third World Approaches to International Law: A Manifesto', 4.

⁶⁰ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶¹ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶² Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶³ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶⁴ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶⁵ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶⁶ Chimni B, 'Third World Approaches to International Law: A Manifesto', 5.

⁶⁷ Personal communication with Sipalla H on 10 January 2018.

⁶⁸ Mutua M, 'What is TWAIL?', 33.

capitalism as innate in humans and imperialism as a necessity.⁶⁹ Nonetheless, the concept of international law was not alien to non-Western world.⁷⁰ The idea that international law was simply a product of European Christian civilization has been dispelled.⁷¹

Necessities of colonialism is what led to the development of international law in crucial areas such as territory acquisition, state responsibility, recognition and state succession.⁷² Colonialism was justified, managed and legitimized by the international law principle of sovereignty.⁷³ For example sovereign statehood, as defined by European powers, was the difference between freedom and the conquest and occupation of a people or society.⁷⁴ Third world people and their territory were reduced into mere objects of international law.⁷⁵ They only became subjects of international law while surrendering their sovereignty to colonisers.⁷⁶ This moment of empowerment was only one of complete subjection marked by death, destruction, pillage, plunder and humiliation.⁷⁷

The end of direct colonial rule started after World War II.⁷⁸ As third world states gained political independence they soon realized it was illusionary.⁷⁹ Third world states joined the United Nations, a body formed to create and maintain global order through peace, security and cooperation among states.⁸⁰ Among the organs of the United Nations are the Security Council and the General Assembly the former having primacy over the latter.⁸¹ The Security Council is made up of both permanent and non-permanent members the big powers being the only permanent members.⁸² On the other hand the general assembly consists of all member states with third world states

⁶⁹ Mutua M, 'What is TWAIL?', 33.

⁷⁰ Personal communication with Sipalla H on 10 January 2018.

⁷¹ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 500-501. talks about the book, *An Introduction to the History of the Law of nations in the East Indies*.

⁷² Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 501. Citing Mutua M, 'What is TWAIL?'

⁷³ Mutua M, 'What is TWAIL?', 33.

⁷⁴ Mutua M, 'What is TWAIL?', 33.

⁷⁵ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 501.

⁷⁶ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 501.

⁷⁷ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 501.

⁷⁸ Mutua M, 'What is TWAIL?', 34.

⁷⁹ Mutua M, 'What is TWAIL?', 34.

⁸⁰ Mutua M, 'What is TWAIL?', 34.

⁸¹ Mutua M, 'What is TWAIL?', 34.

⁸² Mutua M, 'What is TWAIL?', 34.

dominating.⁸³ European hegemony over global affairs was thus just transferred to the big powers- United States, Britain, France, Soviet Union and China.⁸⁴

Currently international law is just a system that embodies important safeguards for third world states such as equality of states but still carries forward the legacy of colonial disempowerment and subjugation in the rules relating to various aspects such as use of force.⁸⁵

Angie writes a book *Imperialism, Sovereignty and Making of International Law* in which he puts forth this argument.⁸⁶ His claim is that doctrinal and institutional developments in international law cannot be understood as “logical elaborations of a stable philosophically conceived sovereignty doctrine... [But rather] as being generated by problems relating to colonial order”.⁸⁷

b) TWAIL as Third World State Practice⁸⁸

There have been instances where the Third world has used the same colonial tool of inversion of intent, demonstrated by TWAIL, to advance their proper subaltern cause.⁸⁹ The best example which relates to this research would be in the prohibition of use of force and political interference.⁹⁰ It is known that the illicit US interventions in Latin America were political.⁹¹ Nicaragua lost the political battle against but won the legal battle in its case against the US for its support of the *Contras*⁹² and their atrocities against Nicaragua and its peoples.⁹³ The loss led to US withdrawing its acceptance of compulsory ICJ jurisdiction and used its veto powers in the Security Council to evade its reparations obligations towards Nicaragua.⁹⁴

⁸³ Mutua M, ‘What is TWAIL?’, 34.

⁸⁴ Mutua M, ‘What is TWAIL?’, 34.

⁸⁵ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 31. Also in Mutua M, ‘What is TWAIL?’, 33.

⁸⁶ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 31. Also in Mutua M, ‘What is TWAIL?’, 33.

⁸⁷ Gathii J, ‘TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’, 31. Also in Mutua M, ‘What is TWAIL?’, 33.

⁸⁸ Personal communication with Sipalla H on 10 January 2018.

⁸⁹ Personal communication with Sipalla H on 10 January 2018.

⁹⁰ Charter of the United Nations, Article 2(4).

⁹¹ Personal communication with Sipalla H on 10 January 2018.

⁹² Personal communication with Sipalla H on 10 January 2018.

⁹³ *Military and paramilitary activities in and against Nicaragua*, Merits, Judgment, ICJ Reports 1986, 14.

⁹⁴ American Anthropological Association, Reparations Task Force, *Waging war, making peace: Reparations and human rights* (2009) 67.

2.4 Criticism to TWAIL

The first generation of third world scholars failed to capture the intimate relationship between colonialism and international law.⁹⁵ As a result they imagined the postcolonial state as an agent of emancipation yet these states soon came to play a comprador role.⁹⁶ Scholarship failed to pinpoint the class and gender divides within and was unable to realize the growing collaborative character of the third world elite.⁹⁷ This meant that their belief that colonial international law would metamorphose into an international law of emancipation was naive optimism.⁹⁸

TWAIL has also failed to critique neo-liberal international law and in projecting an alternative vision of international law.⁹⁹ Reasons for this include ideological domination of Northern academic institutions, problems of doing research in the poor world and fragmentation of international legal studies among other things.¹⁰⁰

Hence, a more critical approach is necessary for the interests of third world to be safeguarded.¹⁰¹ As a starting point, there is need for a critique of dominant ideology hand in hand with a theory of resistance.¹⁰² The theory of resistance has to avoid the pitfalls of liberal optimism on the one hand and left wing pessimism on the other. Consequently, TWAIL will also need to find ways and means to globalize the sources of this critical knowledge and address the material and ethical concerns of third world peoples.¹⁰³

2.5 TWAIL and The Use of Force

Powerful states resorting to force against less powerful states carries with it dangers.¹⁰⁴ Force is used to manifest their overwhelming military superiority and to quell the possibility of any challenge being mounted to their vision of world order.¹⁰⁵ Dominant States do not appear to be constrained by international law norms, be it with regard to the use of force or the minimum respect

⁹⁵ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 502.

⁹⁶ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 502.

⁹⁷ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 502.

⁹⁸ Chimni B, 'The Past, Present and Future of International Law: A Critical Third World Approach', 502.

⁹⁹ Chimni B, 'Third World Approaches to International Law: A Manifesto', 3.

¹⁰⁰ Chimni B, 'Third World Approaches to International Law: A Manifesto', 3.

¹⁰¹ Chimni B, 'Third World Approaches to International Law: A Manifesto', 3.

¹⁰² Chimni B, 'Third World Approaches to International Law: A Manifesto', 3.

¹⁰³ Chimni B, 'Third World Approaches to International Law: A Manifesto', 3.

¹⁰⁴ Gathii J, 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography', 45.

¹⁰⁵ Chimni B, 'Third World Approaches to International Law: A Manifesto', 19.

for international humanitarian laws.¹⁰⁶ Perhaps because dominant states are the permanent members of the Security Council.¹⁰⁷ An organ of the UN Tasked with the primary responsibility of maintaining peace and security giving it monopoly power over use of force.¹⁰⁸ The US intervention in Nicaragua and the Gulf War and the NATO intervention in Kosovo are just a few examples of this truth. Thus, peace in the contemporary world is in many ways the function of dominance.¹⁰⁹ TWAIL-ers are only too keenly aware about how these uses of force have been used to the detriment of third world peoples.¹¹⁰

Also the Security Council has not always been able to take decisive action for the maintenance of international peace and for resolving international problems.¹¹¹ Most conflict-stricken states happen to be third world states. Therefore, inaction by Security Council prejudices third world states. This led to an agitation by third world states for regional organisations to have a right of intervention in case of conflict to restore peace and security.¹¹²

2.6 Conclusion

Third world state practice aims to counter Eurocentric international law. Which has been detrimental to third world states on various principles such as use of force. This has led third world states to support regional organisations as having primary responsibility of maintaining peace and security. Therefore, having the power to use force against and in the territory of a member state to achieve peace and security. This can be seen in the various regional organisations treaties. However, maintaining peace and security as a primary role of regional organisations as opposed to Security Council is *prima facie* in derogation of UN Charter. How then do we resolve this?

¹⁰⁶ Chimni B, 'Third World Approaches to International Law: A Manifesto', 19.

¹⁰⁷ Article 23, *Charter of the United Nations*.

¹⁰⁸ Article 24 & 42, *Charter of the United Nations*.

¹⁰⁹ Chimni B, 'Third World Approaches to International Law: A Manifesto', 19.

¹¹⁰ Gathii J, 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography', 45.

¹¹¹ For Example, The Rwandan Genocide.

¹¹² Kioko B, 'The Right of Intervention under the African Union's Act: From Non-interference to Non-intervention' 812-813. Citing President Museveni's Maiden speech to the ordinary session of Heads of State and Government of OAU in 1986.

3. FORMATION OF INTERNATIONAL LAW ON THE USE OF FORCE

3.1 Introduction

Chapter two was on TWAIL as the theoretical framework for this study. TWAIL, as state practice, supports regional organisations as having the primary responsibility of maintaining peace and security in Africa. This in turn makes regional organisations a source of authority on the use of force. However, this statement is inconsistent with international law on the use of force specifically the UN Charter.

This chapter is about international law on the use of force. It is on the prohibition of the use of force. It proceeds by first tracing the law before the UN charter and then after UN charter. According to the UN charter the Security Council has the primary responsibility of maintaining peace and security in the world. Wielding monopoly power over the use of force. This is the Security Council exception to use force.

3.2 Prohibition against the Use of Force

Before the formation of the UN there were a number of treaties and customary law that regulated the unilateral use of force by states.¹¹³ The UN Charter ushered in a new law on the use of force but this did not diminish the relevance of the pre-charter law.¹¹⁴ For us to understand the current law we need to be aware of the historical development of the law on the use of force.¹¹⁵

3.2.1 The Law before the UN Charter

The use of force was in the early days governed by the Just War doctrine.¹¹⁶ This was developed by early writers such as St Augustine and Grotius.¹¹⁷ It stipulated that war was illegal unless undertaken for a just cause. This would be a wrong received or a right denied.¹¹⁸ After the Peace of Westphalia in 1648 the concept of just war disappeared from international law.¹¹⁹ States were now sovereign and equal and therefore no state could judge whether another's cause was just or

¹¹³ Dixon M, *Textbook on International Law*, 7th ed, Oxford University Press, United Kingdom, 2013, 322.

¹¹⁴ Dixon M, *Textbook on International Law*, 322.

¹¹⁵ Dixon M, *Textbook on International Law*, 322.

¹¹⁶ Dixon M, *Textbook on International Law*, 322.

¹¹⁷ Dixon M, *Textbook on International Law*, 322.

¹¹⁸ Dixon M, *Textbook on International Law*, 322.

¹¹⁹ Shaw M, *International Law*, 813.

not.¹²⁰ The governing doctrine at this time was the sovereign right to resort to war, founded on state practice and international law, which would only regulate conduct during war.¹²¹

International relations were governed by the sovereign right to resort to war until the League of Nations was formed in 1919.¹²² States by this time had started classifying use of force according to intended purposes such as self defence, reprisal and rescue of nationals abroad.¹²³ They claimed that force used for these purposes did not amount to war.¹²⁴ The Covenant of the League of Nations introduced a restriction on the sovereign right to resort to war by creating procedural safeguards.¹²⁵ War was only lawful if states adhered to the following procedural safeguards laid down in article 10 to article 16 of the covenant:

1. The members undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.
2. The League may take any action that may be deemed wise and effectual to safeguard the peace of nations.
3. If there is any dispute states will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.
4. Establishment of a Permanent Court of Justice to settle disputes between states.
5. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council.
6. Should any Member of the League resort to war in disregard of its covenants under articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League.

The covenant had two main significant consequences. The right to self defence emerged more clearly as a legal exception to the procedural restraints and categories of use of force that did not amount to war. States could resort to war based on legal claims rather than political

¹²⁰ Shaw M, *International Law*, 813.

¹²¹ Dixon M, *Textbook on International Law*, 322.

¹²² Dixon M, *Textbook on International Law*, 323.

¹²³ Dixon M, *Textbook on International Law*, 323.

¹²⁴ Dixon M, *Textbook on International Law*, 323.

¹²⁵ Dixon M, *Textbook on International Law*, 323.

justifications.¹²⁶ These developments occurred due to the procedural restriction on states earlier unlimited legal competence to go to war.¹²⁷

In an effort to close the gaps left by the covenant and to achieve total prohibition, there was the signing of the General Treaty for the Renunciation of war in 1928.¹²⁸ Parties to the treaty condemned recourse to war and renounced it as an instrument of national policy in their relations.¹²⁹ This treaty is still in force.¹³⁰ It is then clear that prohibition of the resort to war is a valid principle in international law.¹³¹ Reservations to the treaty by some states made it apparent that the right to resort to force in self defence was still a recognized principle in international law.¹³² As such there are instances when the use of force is legal.¹³³

3.2.2 The Law after the UN Charter

The UN Charter stipulates a general prohibition on the unilateral use of force.¹³⁴ This principle has been reaffirmed many times in a number of general assembly resolutions and declarations as we will see below.

General Assembly resolutions and declarations may contain assertions that a certain action is incompatible with a particular norm of UN Charter.¹³⁵ These assertions of compatibility or incompatibility of state conduct with the norms of UN Charter constitute interpretations and application of the UN Charter by member states.¹³⁶ This is how parties to the UN Charter have interpreted the general prohibition on the unilateral use of force.

In the resolution on 'The Essentials of Peace' UNGA called upon states to refrain from any threats or acts, direct or indirect, aimed at impairing freedom, independence or integrity of any state or at fomenting civil strife and subverting the will of the people.¹³⁷

¹²⁶ Dixon M, *Textbook on International Law*, 323.

¹²⁷ Dixon M, *Textbook on International Law*, 323.

¹²⁸ Shaw M, *International Law*, 814.

¹²⁹ Shaw M, *International Law*, 814.

¹³⁰ Dixon M, *Textbook on International Law*, 323.

¹³¹ Shaw M, *International Law*, 814.

¹³² Shaw M, *International Law*, 814.

¹³³ Shaw M, *International Law*, 814.

¹³⁴ Article 2(4), *Charter of the United Nations*.

¹³⁵ Asamoah O, *The Legal Significance of the Declaration of the General Assembly of the United Nations*, Nijhoff Publishers, The Hague, 1966. 6.

¹³⁶ Asamoah O, *The Legal Significance of the Declaration of the General Assembly of the United Nations*, 6.

¹³⁷ UNGA, *Declaration on the Essentials of Peace*, UN A/Res/290(V) 1 December 1949.

UNGA, in the Friendly Relations Declaration, proclaimed the principle that states shall refrain in their international relations from threat or use of force in any manner inconsistent with the purpose of the UN.¹³⁸ Such a threat or use of force would constitute a violation of International Law and the Charter of UN.¹³⁹ The Declaration on Friendly Relations is central to any consideration of international law on use of force.¹⁴⁰ Its importance was stated by the International Court of Justice in the *Nicaragua* case.¹⁴¹ This is because the Declaration on Friendly Relations represents international law.¹⁴² A look at the drafting history of the Declaration on the Non-Use of force contains repeated affirmations of this.¹⁴³ Also its status as international law has never been challenged by any state.¹⁴⁴

Among the principles to be observed in the declaration ‘Preparation of Societies for a Life in Peace’ is that a war of aggression is a crime against peace and it is prohibited in international law.¹⁴⁵

By 1983, UNGA was alarmed over the growing tendency of states to resort to force. These states were ignoring the UN Charter and Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.¹⁴⁶ They emphasised that only UN through the Security Council was authorised to use force in maintenance of peace and security.¹⁴⁷

‘Right of Peoples to Peace’ declaration emphasised that exercise of the right to peace demanded that policies of states be directed towards elimination of the threat of war, particularly nuclear war

¹³⁸ UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN A/ Res/2625 (XXV) 24 October 1970.

¹³⁹ UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN A/ Res/2625 (XXV) 24 October 1970.

¹⁴⁰ Gray C, ‘The Principle of non-use of force’ in Warbrick C and Lowe V, *The United Nations and the Principle of International Law Essays in Memory of Michael Akehurst*, Routledge, London and New York, 1994, 33.

¹⁴¹ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986.

¹⁴² Gray C, ‘The Principle of non-use of force’, 36.

¹⁴³ Gray C, ‘The Principle of non-use of force’, 36.

¹⁴⁴ Gray C, ‘The Principle of non-use of force’, 36.

¹⁴⁵ UNGA, *Declaration on the Preparation of Societies for Life in Peace*, UN A/Res/33/73 15 December 1978.

¹⁴⁶ UNGA, *Implementation of collective security provisions of the Charter of United Nations for Maintenance of international peace and security*, UN A/Res/38/191 20 December 1983.

¹⁴⁷ UNGA, *Implementation of collective security provisions of the Charter of United Nations for Maintenance of international peace and security*, UN A/Res/38/191 20 December 1983.

and the renunciation of the use of force in international relations on the basis of the Charter of the United Nations.¹⁴⁸

The Declaration on the Enhancement of the Effectiveness of the principle of Refraining from the Threat or Use of Force in International Relations stated that every State should refrain from threat or use of force against territory of another State.¹⁴⁹ Other than the Declaration on Friendly Relations, this was another major declaration on use of force.¹⁵⁰ Questions then arose as to whether Declaration on Friendly Relations should be final or this new declaration would have a role.¹⁵¹ The Declaration, however, did not have any new important provisions.¹⁵² This may be explained by the fundamental controversies on the use of force that states failed to resolve.¹⁵³ One of the major controversy that still remains is on the meaning of ‘force’.¹⁵⁴ Western states take a much narrower view unlike the rest of the world whose view differs on; national liberation movements having the right to use force, scope of prohibition of the occupation and acquisition of territory by force, the scope of the right to self defence and outlawing of the use of nuclear weapons.¹⁵⁵ The drafts produced by states for the Declaration on the Non-Use of Force show gaps.¹⁵⁶ Working paper from the West did not mention disarmament, nuclear weapons, economic and political coercion and armed force against colonial and racist domination or propaganda.¹⁵⁷ The contrast on these is clear on the Non-Aligned working paper.¹⁵⁸

The lack of important new content in the Declaration on the Non- Use of Force does not render it valueless.¹⁵⁹ The Declaration was adopted by the General Assembly without a vote.¹⁶⁰ This makes

¹⁴⁸ UNGA, *Declaration on the Right of Peoples to Peace*, UN A/Res/39/11 12 November 1984.

¹⁴⁹ UNGA, *Declaration on Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN A/Res/42/22 18 November 1987.

¹⁵⁰ Gray C, ‘The Principle of non-use of force’, 33. During the negotiating process it was referred to as one link in the chain of precedents which include the Declaration on Principles of International Law concerning Friendly Relations.

¹⁵¹ Gray C, ‘The Principle of non-use of force’, 33.

¹⁵² Gray C, ‘The Principle of non-use of force’, 38.

¹⁵³ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁴ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁵ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁶ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁷ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁸ Gray C, ‘The Principle of non-use of force’, 38.

¹⁵⁹ Gray C, ‘The Principle of non-use of force’, 39.

¹⁶⁰ UNGA Resolution 42/22. The General Assembly had decided in 1986 (by UNGA Resolution 41/76) that the Special Committee should complete a draft declaration and submit its final report in 1987. After only 3 weeks of discussion by the Special Committee in 1987 agreement was reached.

it have a symbolic value as a unanimous expression by states of the permanent validity of the principles it contains.¹⁶¹ Nevertheless, it is unlikely that the Declaration on the Non-Use of Force will attain more than symbolic value.¹⁶²

3.3 Security Council and the use of force

The aim of the drafters of the UN Charter was not only to prohibit the unilateral use of force by states but also to centralize control of the use of force in the Security Council under Chapter VII.¹⁶³ The formal scheme of Chapter VII is that the Security Council can take provisional measures¹⁶⁴ or determine that there is a threat to the peace or breach of the peace or act of aggression¹⁶⁵ and take economic measures¹⁶⁶ or take action by air sea or land forces if they consider that measures under Article 41 would be inadequate or had proved inadequate.¹⁶⁷ The GA at the level of Heads of State and Government in its 2005 World Summit Outcome document reaffirmed:

“That the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter”.¹⁶⁸

The original contemplation was that states would provide troops for a standing military force at the disposal of the Security Council.¹⁶⁹ The Security Council would use the standing military force to fulfill its functions under article 42 directly. However, this standing army never materialized for reasons largely tied to the Cold War.¹⁷⁰ For the Security Council to act by way of Article 42, it is now dependent on the will of individual Member States.¹⁷¹ This is because it has emerged,

¹⁶¹ Gray C, ‘The Principle of non-use of force’, 39.

¹⁶² Gray C, ‘The Principle of non-use of force’, 39. Reference is mainly made to Declaration on Friendly Relations with regard to the use of force in Security Council debates and not the Declaration on the Non-Use of Force.

¹⁶³ Gray C, *International Law and Use of Force*, 3rd ed, Oxford University Press, New York, 2008, 212.

¹⁶⁴ Article 40, *Charter of the United Nations*.

¹⁶⁵ Article 39, *Charter of the United Nations*.

¹⁶⁶ Article 41, *Charter of the United Nations*.

¹⁶⁷ Article 42, *Charter of the United Nations*.

¹⁶⁸ General Assembly Res. 60/1, para. 79.

¹⁶⁹ Article 43, *Charter of the United Nations*

¹⁷⁰ Gray C, *International Law and Use of Force*, 212.

¹⁷¹ Allain J, ‘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’ 8 *Max Plank Yearbook of United Nations Law* (2004), 245.

through practice, that member states are the ones to provide fighting forces for the Security Council on an ad hoc basis.¹⁷²

3.4 Conclusion

The Security Council, as seen above, has the primary responsibility to maintain international peace and security.¹⁷³ This in turn means that the Security Council is the only authorised body that can use force or approve the use of force. Nonetheless, it may delegate this power to regional arrangements or regional agencies.¹⁷⁴ Regional arrangements may take enforcement action under the authority of the Security Council as we will see in the next chapter.¹⁷⁵

¹⁷²Allain J, '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', 245.

¹⁷³ Article 24, *Charter of the United Nations*.

¹⁷⁴Cassese A, *International Law*, 2nd ed, Oxford University Press, New York, 2005, 350.

¹⁷⁵ Article 53, *Charter of the United Nations*.

4. ROLE OF REGIONAL ORGANISATIONS IN ENFORCEMENT ACTION

4.1 Introduction

In the previous chapter we saw that the Security Council has the primary responsibility of maintaining peace and security. And as such having monopoly power over the use of force. However, Security Council has not always been able to take decisive action for the maintenance of international peace and for resolving international problems. This has led the Security Council to rely on regional organisations.

This chapter analyses regional organisations exception on the use of force. Whereby regional organisations may use force if authorised by the Security Council. This then begs the question, why should enforcement actions by regional organisations be authorised by Security Council if they are the more befitting bodies to maintain peace and security as argued earlier and in this chapter? Is it time to accept this law on authorization has evolved through state practice as we will see in the next chapter?

4.2 According to the UN Charter

Chapter VIII of the UN Charter sets out the role of regional organisations in the overall UN framework. The provisions of Chapter VIII have been defined as those which “set out the basic principles governing activities of regional arrangements and agencies and establish the legal framework for cooperation in the United Nations in the area of maintenance of international peace and security.”¹⁷⁶ The provisions in this chapter are as a result of a compromise after lengthy negotiations between partisans of regionalism and partisans of universalism.¹⁷⁷ The Covenant of the League of Nations under Articles 20 and 21 had limited the existence of regional organisations.¹⁷⁸ This changes in the Charter of the United Nations which states in Article 52 that

¹⁷⁶ UNSC S/Res 1197 (1998) Africa, Third preambular paragraph.

¹⁷⁷ Acharya A, ‘Norm subsidiarity and regional orders: Sovereignty, Regionalism and Rulemaking in the Third World’ 55 *International Studies Quarterly* (2011), 97.

¹⁷⁸ Amvane G, ‘Intervention Pursuant to article 4(h) of the Constitutive Act of the African Union without UNSC authorization’ *African Human Rights Law Journal* (2015), 286.

nothing in this Charter precludes the existence of regional arrangements or agencies.¹⁷⁹ However, Article 53 serves as a rider to this recognition forbidding any enforcement action by a regional organization unless authorized by the Security Council.¹⁸⁰ This defines the primacy of the Security Council vis-à-vis regional and sub-regional organizations in enforcement action. The Security Council has oversight role of activities undertaken under regional arrangements for maintenance of peace and security. But what does the charter mean by enforcement action? And what amounts to Security Council authorization?

4.2.1 The meaning of Regional Enforcement Action

Use of military force by a regional organization on a member state constitutes an enforcement action.¹⁸¹ In the original construction, enforcement action was to be equated with the Security Council's UN charter chapter VII powers.¹⁸² Enforcement action by regional organisations would then include economic sanctions, severance of diplomatic or trade relations or other measures short of the use of force.¹⁸³ This, however, is no longer the case as scholars have concluded that economic sanctions or severance of diplomatic relations do not constitute enforcement action under article 53 of UN Charter.¹⁸⁴

4.2.2 Nature of Authorisation

In order for a regional organization to legally engage in an enforcement action it must receive authorisation from Security Council.¹⁸⁵ An analysis of the repertoire of the practice of the Security Council indicates that this authorisation has to be given prior the enforcement action.¹⁸⁶ Nevertheless, scholars have indicated otherwise. The authorisation requirement need not be prior. An interpretation of ECOWAS' 1990 intervention in Liberia which Security Council acquiesced

¹⁷⁹ Amvane G, 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without UNSC authorization', 286.

¹⁸⁰ Amvane G, 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without UNSC authorization', 286.

¹⁸¹ Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example' 51 *Virginia Journal of International Law* (2010), 193.

¹⁸² Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example', 193.

¹⁸³ Article 41, *Charter of the United Nations*.

¹⁸⁴ Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example', 193.

¹⁸⁵ Article 53(1), *Charter of the United Nations*.

¹⁸⁶ Weller M (ed), *The Oxford Handbook on the Use of Force in International Law*, Oxford University Press, Oxford, 2015,318. UNSC was envisaged to always have control over regional actions under Chapter VIII. As such UNSC has to make a prior determination that a threat to the peace, breach of the peace or act of aggression for Article 53 (1) to come into play. See also Walter C, 'Security Council Control over Regional Action' 1 Max Planck Yearbook of United Nations Law Online (1997), 177.

by commending ECOWAS' effort to restore peace, security and stability in Liberia.¹⁸⁷ This interpretation is yet to be reflected in the Security Council. Most of its members still insist that authorisation has to be prior.¹⁸⁸

4.3 Evolution of cooperation between UN and Regional organisations

The Cold War had impaired the proper use of Chapter VIII. After the Cold War, United Nations became financially strained.¹⁸⁹ Member states were also not willing to contribute troops in high numbers for peace-keeping activities.¹⁹⁰ This led to United Nations considering how it could work with regional organisations to share this load.¹⁹¹ The Secretary-General examined this issue and released a report *Agenda for Peace*¹⁹² with more convincing reasons as to why United Nations should rely on regional organisations.¹⁹³

The report first considered what regional arrangements or agencies are as the Charter of the United Nations does not provide a precise definition.¹⁹⁴ According to the report the lack of the precise definition allows useful flexibility for undertakings by a group of states to deal with a matter appropriate for regional action.¹⁹⁵ These associations could include treaty-based organizations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.¹⁹⁶

This was also a new era, ushered in by the end of the Cold War, regional arrangements or agencies could now render great service if their activities were undertaken in a manner consistent with the Purposes and Principles of the Charter, and if their relationship with United Nations is governed

¹⁸⁷ Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example', 195.

¹⁸⁸ Repertoire of the Practice of the Security Council, 2010-2011, 2012-2013, 2014-2015, 2016-2017.

¹⁸⁹ Gray C, 'Regional Arrangements and the United Nations Collective Security System' in Fox H (ed), *The Changing Constitution of the United Nations*, British Institute of International and Comparative Law, London, 1997, 92.

¹⁹⁰ Gray C, Gray C, 'Regional Arrangements and the United Nations Collective Security System', 92.

¹⁹¹ Gray C, Gray C, 'Regional Arrangements and the United Nations Collective Security System', 92.

¹⁹² UN Document A/47/277 (1992) An Agenda for Peace.

¹⁹³ Gray C, Gray C, 'Regional Arrangements and the United Nations Collective Security System', 92.

¹⁹⁴ UN Document A/47/277 (1992).

¹⁹⁵ UN Document A/47/277 (1992).

¹⁹⁶ UN Document A/47/277 (1992).

by Chapter VIII.¹⁹⁷ The report was not going to set forth any formal pattern of relationship between regional organizations and the United Nations or call for any specific division of labour. Nevertheless, it recognized that regional arrangements or agencies in many cases possess a potential that should be utilized for preventive diplomacy, peacekeeping, peacemaking and post-conflict peace building. Maintenance of international peace and security would still primarily be a responsibility of Security Council. With regional action, as a matter of decentralization, delegation and cooperation, to not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.¹⁹⁸ Regional organizations participating in complementarity efforts with the United Nations in joint undertakings would encourage states outside the region to act supportively.¹⁹⁹ And where the Security Council chooses specifically to authorize a regional arrangement or organization to take the lead in addressing a crisis, it would lend the weight of the United Nations to the legitimacy of the regional effort.²⁰⁰

A year after the report by the Secretary-General, the General Assembly adopted the declaration on the Enhancement of Cooperation between the United Nation and Regional Arrangements or Agencies in the Maintenance of International Peace and Security.²⁰¹ States declared that the Security Council shall utilize regional arrangements or agencies for enforcement action under its authority.²⁰²

In 2005, The High-level Panel,²⁰³ the Secretary-General in his report *In Larger Freedom*,²⁰⁴ and the World Summit called for a stronger relationship between the United Nations and regional and sub-regional organisations pursuant to Chapter VIII of the Charter.²⁰⁵ As a response to the World Summit document, the Security Council passed its first resolution on cooperation with regional and sub-regional organizations.²⁰⁶

¹⁹⁷ UN Document A/47/277 (1992).

¹⁹⁸ UN Document A/47/277 (1992).

¹⁹⁹ UN Document A/47/277 (1992).

²⁰⁰ UN Document A/47/277 (1992).

²⁰¹ UNGA, *Declaration on the Enhancement of Cooperation between United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*, UN A/Res 49/57 (9 December 1994).

²⁰² UNGA, *Declaration on the Enhancement of Cooperation between United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*.

²⁰³ Convened by the UN Secretary General for advice on certain issues.

²⁰⁴ UNGA, *In larger freedom: towards development, security and human rights for all: report of the Secretary-General*, UN A/59/2005 (21 March 2005).

²⁰⁵ Gray C, *International Law and Use of Force*, 303

²⁰⁶ UNSC 1631(2005) *Cooperation between the United Nations and Regional Organisations in maintaining peace and security*.

Through this resolution, the Security Council invited regional and sub-regional organizations with a capacity for conflict prevention or peacekeeping to place such capacities in the framework of the United Nations Standby Arrangements System.²⁰⁷ The resolution urged all States and relevant international organizations to contribute to strengthening the capacity of regional and sub-regional organizations, including through human, technical and financial assistance.²⁰⁸ Furthermore, the Security Council, emphasised that it was important to develop the ability of regional organizations to deploy peacekeeping forces rapidly. To support UN peacekeeping operations or other Security Council mandated operations.²⁰⁹ The Security Council called for better communication between the UN and regional and sub-regional organizations; it recalled the obligation for regional organization to keep the Security Council fully informed under Article 54 of the UN Charter.²¹⁰ The Security Council also requested the UN Secretary-General to report on the opportunities and challenges involved and to explore the possibility of framework agreements on cooperation.²¹¹

A year later, the Secretary- General published his Report²¹², *A Regional- Global Security Partnership: Challenges and Opportunities*.²¹³ In the report, he acknowledged the fact UN was not equipped to handle every crisis.²¹⁴ If peace and security were to be maintained, UN had to partner with regional and intergovernmental organisations.²¹⁵ The report examined the history of cooperation and current cooperation between UN and regional organisations.²¹⁶ This led to proposals for the establishment of a more effective partnership, based on a clear division of labour that reflects the comparative advantage of each organization in conflict prevention, peacemaking, peacekeeping and peace building.²¹⁷ There is also development of a programme of action for

²⁰⁷ UNSC 1631(2005).

²⁰⁸ UNSC 1631(2005).

²⁰⁹ UNSC 1631(2005).

²¹⁰ UNSC 1631(2005).

²¹¹ UNSC 1631(2005).

²¹² Gray C, *International Law and Use of Force*, 304.

²¹³ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*, UN A61/204- S/2006/590 (28 July 2006).

²¹⁴ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

²¹⁵ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

²¹⁶ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

²¹⁷ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

capacity building, especially in Africa.²¹⁸ This was an attempt by UN in exploring cooperation on standby arrangements and rapid deployment.²¹⁹

The Security Council holds annual meetings with representatives of regional organizations to consider various aspects of cooperation.²²⁰ Also it has issued statements calling for increased cooperation based on complementarity and the comparative advantages of the different regional organisations.²²¹ This is because regional organisations have the advantage of proximity to threats, a greater understanding of them and they are in a better position to detect early symptoms of conflict acting promptly.²²² When UN is not able to act regional organisations may provide a rapid response.²²³ However, regional organisations may lack the capacity to sustain these operations.²²⁴ As such it may be necessary for UN to step in when the threat goes beyond regional capabilities.²²⁵

Nevertheless, some warn that there can be no enforcement action without prior Security Council authorization.²²⁶ Doesn't this negate the argument of regional organisations having a comparative advantage?

4.4 Conclusion

As seen in this chapter use of force by regional organisations against a UN member state without prior Security Council authorisation is *prima facie* in violation of Article 2(4) of UN Charter. But African regional organizations have already taken a leading role in some conflicts without Security Council authorization.²²⁷ Consequently, would it be inappropriate to say that the UN should stop African states from policing their continent in a manner consistent with their customs and needs?²²⁸

²¹⁸ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

²¹⁹ UNGA, *A Regional-Global Security Partnership: Challenges and Opportunities*.

²²⁰ Gray C, *International Law and Use of Force*, 305.

²²¹ Gray C, *International Law and Use of Force*, 305.

²²² Gray C, *International Law and Use of Force*, 305.

²²³ Gray C, *International Law and Use of Force*, 305.

²²⁴ Gray C, *International Law and Use of Force*, 305.

²²⁵ Gray C, *International Law and Use of Force*, 305.

²²⁶ Gray C, *International Law and Use of Force*, 305.

²²⁷ Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example', 8.

²²⁸ Paliwal S, 'The Primacy of Regional organization in International Peacekeeping: The African Example', 8.

5. PEACE AND SECURITY ARCHITECTURE IN AFRICA

5.1 Introduction

In chapter three we looked at UN's peace and security framework. Concluding that use of force against a UN member state without Security Council authorisation is generally prohibited. However, UN has been encouraging cooperation from regional organisations in maintenance of peace and security as seen in chapter four. Arguing that they are better suited to take enforcement action in case of conflicts in their regions.

This chapter reviews practice of ECOWAS and AU that espouse enforcement action. It examines the coordination between regional organisations and the Security Council during conflicts. In reviewing the practice of ECOWAS and AU, this chapter places particular emphasis on enforcement action that comes in the wake of the organisations establishment of treaty-based right to intervene. The first part focuses on ECOWAS looking at the various conflicts and how they led to formation of security laws as a solution. Then in the second part, a brief analysis of AU's peace and security framework.

5.2 Evolution of Security Regionalism in West Africa

5.2.1 Early Attempts

Conflict and instability in West Africa in 1990s and 2000s made leaders realize peace and security was paramount if they were to achieve regional economic prosperity.²²⁹ They first adopted nascent security protocols in 1978 and the region now has elaborate conflict resolution and security mechanisms.²³⁰ The initial 1975 ECOWAS treaty did not provide for a security role.²³¹ It is conflict and political instability in several member states that made the regional body see the need to add

²²⁹ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, Birmingham, 7 April 2011, 1, Available.

²³⁰ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 1.

²³¹ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 1.

a defence protocol. Portuguese mercenaries attempted to invade Guinea while Benin was attacked by mercenaries.²³² There were also military coups in the region.²³³ Due to this external aggression and military coups ECOWAS leaders adopted measures to ensure security in the region. The Non-aggression treaty was adopted in 1978.²³⁴ This treaty called on members to refrain from the threat and use of force or aggression against each other.²³⁵ The Non-aggression treaty was weak as it failed to provide for a mechanism in case of a breach.²³⁶ ECOWAS leaders then adopted the Mutual Assistance on Defence protocol.²³⁷ Member states were to assist in defence of any armed threat or aggression against another member state.²³⁸ As it was considered as constituting a threat or aggression against entire community.²³⁹ The Mutual Assistance on Defence protocol was more advanced as it stipulated instances where action could be taken and had a response mechanism.²⁴⁰ However, it failed as it mainly focused on external threats and ignored the numerous coups and internal conflicts in the region.²⁴¹

5.2.2 Major Conflicts

In 1989 Civil War began in Liberia when Charles Taylor led a group of rebels from Nimba County in Liberia/Cote d'Ivoire into Liberia with the aim of ousting Doe.²⁴² The group called themselves the National Patriotic Front of Liberia (NPFL).²⁴³ They reached the capital city of Monrovia in June the same year but failed to force Doe out of the presidency.²⁴⁴ This eventually ended up in a

²³² Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²³³ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²³⁴ *Protocol on Non- Aggression*, 20 April 1978.

²³⁵ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²³⁶ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²³⁷ *Protocol Relating to Mutual Assistance of Defence*, 29 May 1981.

²³⁸ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²³⁹ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²⁴⁰ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²⁴¹ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 2.

²⁴² Brown N, 'ECOWAS and Liberia Experience: Peace Keeping and Self Preservation' *Small Wars Journal* (1999), 8.

²⁴³ Kabia J, "Regional Approaches to Peacebuilding: The ECOWAS Peace and Security Architecture "Africa Agency in Peace, Conflict and Intervention, 3.

²⁴⁴ Brown N, 'ECOWAS and Liberia Experience: Peace Keeping and Self Preservation', 8.

full scale war involving various rebel groups that lasted for seven years.²⁴⁵ The effect of the fighting was felt across the neighbouring states affecting industries such as tourism and regional trade.²⁴⁶ ECOWAS heads of states formed a five member Standing Mediation Committee tasked with identifying a peaceful solution to the crisis.²⁴⁷ Mediation failed and the SMC established and deployed the ECOWAS Monitoring Group a peace keeping force.²⁴⁸ After two years ECOWAS eventually stabilized the situation.²⁴⁹ On 19 November 1992 the UNSC adopted resolution 788 that called for the restoration of peace and a weapons embargo against Liberia and authorizing ECOWAS to enforce its terms.²⁵⁰ The UNSC through this resolution affirmed the legality of ECOWAS's actions in Liberia.²⁵¹ This confirmed that an intervention taken outside the authority of the UNSC could be lawful depending on the reasons for intervention.²⁵²

In Sierra Leone, ECOMOG reinstated the ousted President Kabbah and acted as the de facto army. Kabbah was toppled from power by a military coup and he fled to Guinea after requesting ECOWAS to intervene.²⁵³ OAU requested ECOWAS to intervene to restore Kabbah's regime to power.²⁵⁴ The UN Secretary General also requested ECOWAS to intervene.²⁵⁵ The first intervention was by Nigerian forces who were met with strong resistance at first but later would push back and secure some of the areas.²⁵⁶ ECOWAS on 30 August 1991 during its summit it finally gave ECOMOG the mandate to enforce sanctions against the rebels and restore law and order in the country.²⁵⁷ The UNSC then supported this efforts by adopting Resolution 1132.²⁵⁸

5.2.3 Institutionalizing Conflict Resolution in West Africa

The first serious attempt to establish a security mechanism is in the revised ECOWAS treaty of 1993.²⁵⁹ This was after having to intervene in the situation in Liberia a few months before. The

²⁴⁵ Brown N, 'ECOWAS and Liberia Experience: Peace Keeping and Self Preservation', 8.

²⁴⁶ Brown N, 'ECOWAS and Liberia Experience : Peace Keeping and Self Preservation', 9.

²⁴⁷ Brown N, 'ECOWAS and Liberia Experience : Peace Keeping and Self Preservation', 9. Also howe

²⁴⁸ Brown N, 'ECOWAS and Liberia Experience: Peace Keeping and Self Preservation', 9.

²⁴⁹ Levitt J, 'Pro- democratic Intervention in Africa' 24 *Wisconsin International Law Journal* (2006), 6.

²⁵⁰ UNSC S/Res/ 788 (1992) Liberia.

²⁵¹ Repertoire of the Practice of Security Council 05-51675 (1989-1992) The Situation in Liberia, 269.

²⁵² Levitt J, 'Pro- democratic Intervention in Africa', 6.

²⁵³ Levitt J, 'Pro- democratic Intervention in Africa', 7.

²⁵⁴ Levitt J, 'Pro- democratic Intervention in Africa', 7.

²⁵⁵ Levitt J, 'Pro- democratic Intervention in Africa', 7.

²⁵⁶ Levitt J, 'Pro- democratic Intervention in Africa', 7.

²⁵⁷ ECOWAS Standing Mediation Committee Final Communiqué 13 February 1991.

²⁵⁸ UNSC S/Res/1132 (1997) The Situation in Sierra Leone.

²⁵⁹ *Revised Treaty of the Economic Community of West African States*, 24 July 1993.

contracting parties agreed to maintain peace, stability and security.²⁶⁰ They also agreed to promote democratic systems of government in member states.²⁶¹ The states would also provide assistance for the observance of democratic elections, establish a regional peace and security observation and peace keeping forces where appropriate.²⁶² The treaty also provides for other protocols with additional provisions governing political cooperation and regional peace and stability.²⁶³

ECOWAS then adopted the Protocol Relating to the Mechanism for Conflict Prevention Management, Resolution, Peacekeeping and security in 1999.²⁶⁴ Months after the intervention in Sierra Leone. Aimed at further implementation of the revised ECOWAS treaty. This was later followed by a supplementary protocol to this protocol in 2000 on Democracy and Good Governance.²⁶⁵

The ECOWAS Mechanism recognizes that central to development of West Africa is peace, security, stability democracy and good governance. Among its objectives²⁶⁶ the ones relevant to this research are:

1. Prevent, manage and resolve internal and inter-state conflicts under the conditions in paragraph 46 of the framework.
2. Implement relevant provisions of Article 58 of the Revised ECOWAS treaty.²⁶⁷
3. Maintain and consolidate peace, security and stability within the community.
4. Constitute and deploy a civilian and military force to maintain or restore peace within the sub-region whenever the need arises.

The protocol establishes various institutions tasked with achieving its objectives. The Authority which comprises of the various members heads of state, Mediation and Security Council,

²⁶⁰ Article 58, *Revised Treaty of the Economic Community of West African States*.

²⁶¹ Article 58, *Revised Treaty of the Economic Community of West African States*.

²⁶² Article 58, *Revised Treaty of the Economic Community of West African States*.

²⁶³ Article 56 (2), *Revised Treaty of the Economic Community of West African States*. These are Protocol on Non-Aggression, Protocol on Mutual Assistance on defence, Community Declaration of Political Principles.

²⁶⁴ *Protocol Relating to Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security and Security*.

²⁶⁵ *Protocol on Democracy and Good Governance*,

²⁶⁶ Article 3, *Protocol Relating to Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security and Security*.

²⁶⁷ *Revised Treaty of the Economic Community of West African States*.

Executive Secretariat.²⁶⁸ It goes further and states that any other institution may be formed to achieve the protocols objectives.²⁶⁹ All forms of intervention are authorized by the Mediation and Security Council.²⁷⁰ It mainly decides on the deployment of political and military missions. Organs are established to assist the Mediation and Security Council with this function.²⁷¹ The Defence and Security Commission which formulates the military mandate, determines composition of contingents and appoints the force commander.²⁷² It mainly comprises of the Chiefs of Defence of the member countries.²⁷³ There is also the ECOWAS Cease Fire Monitoring Group which is the military force of the sub-regional organization with functions such as peace keeping and restoration and preventive deployment.²⁷⁴

There is also a provision permitting ECOWAS to support processes that aim at restoring political authority at the same time as the development of respect of human rights, enhancement of the rule of law and the judiciary.²⁷⁵ The support may include preparation, organization, monitoring and management of electoral processes with the cooperation of regional and international organisations. In the implementation of its mechanism, ECOWAS is to cooperate with both the AU and the UN.²⁷⁶

The supplementary protocol to the mechanism states constitutional principles shared by all the member states.²⁷⁷ Among them are that power should be acquired through free and fair elections²⁷⁸ and a policy of zero tolerance for power obtained or maintained by unconstitutional means.²⁷⁹

²⁶⁸ Article 4, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁶⁹ Article 4, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷⁰ Article 10, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷¹ Article 17, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷² Article 19, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷³ Article 17, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷⁴ Article 22, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷⁵ Article 45, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷⁶ Article 52, *Protocol on Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security*.

²⁷⁷ Article 1, *Protocol on Democracy and Good Governance*.

²⁷⁸ Article 1(b), *Protocol on Democracy and Good Governance*.

²⁷⁹ Article 1(c), *Protocol on Democracy and Good Governance*.

Where democracy is abruptly brought to an end or where there are human rights violations it provides that ECOWAS may impose sanctions on such a state.²⁸⁰ In such a situation the sub-regional body on the recommendation of the Mediation and Security Council may take the measures stipulated in article 45 of the 1999 Protocol which I have also discussed in this section.²⁸¹

5.3 African Union Security Framework

The principle of non-interference has been reformulated in the AU.²⁸² It only applies to interference in the internal affairs of a member state by another member.²⁸³ Unilateral interventions are prohibited and not collective interventions.²⁸⁴ The Constitutive Act of the African Union provides for the right of a member state to request intervention. Article 4 of the Act provides:

“h) The right of AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, crimes against humanity.

j) The right of member states to request intervention from the Union in order to restore peace and security.”

The General Assembly can therefore decide on intervention on two levels. First on its own initiative²⁸⁵ and secondly at the request of a member state.²⁸⁶ The latter has been interpreted by a scholar to mean restriction is not placed on the concerned member state. Any member state may make an intervention request.²⁸⁷

Incorporation of the right to intervention in the Constitutive Act may have been influenced by two major factors according to Kioko. These are past African experiences and President Museveni’s maiden speech.²⁸⁸ OAU had failed to intervene when massive human rights violations were being

²⁸⁰ Article 45(1), *Protocol on Democracy and Good Governance*.

²⁸¹ Article 45(4), *Protocol on Democracy and Good Governance*.

²⁸² Article 4 (g), *Constitutive Act of the African Union*.

²⁸³ Yusuf A, ‘The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?’ 11 *African Yearbook of International Law* (2003), 7.

²⁸⁴ Yusuf A, ‘The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?’, 7.

²⁸⁵ Article 4(h), *Constitutive Act of the African Union*.

²⁸⁶ Article 4 (j), *Constitutive Act of the African Union*.

²⁸⁷ Kioko B, ‘The Right of Intervention under the African Union’s Act: From Non-interference to Non-intervention’ 85 (852), *International Review of the Red Cross*, 2003, 817.

²⁸⁸ Kioko B, ‘The Right of Intervention under the African Union’s Act: From Non-interference to Non-intervention’ 812-813.

committed by Idi Amin in Uganda and Bokasu in Central African Republic in the 70's. They also failed to intervene in Rwanda when they had a genocide in 1994.²⁸⁹ In his maiden speech to the ordinary session of Heads of State and Government of OAU in 1986, President Museveni had the following to say:

“Over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives (...) I must state that Ugandans (...) felt a deep sense of betrayal that most of Africa kept silent (...) the reason for not condemning such massive crimes had supposedly been a desire not to interfere in the internal affairs of a Member State, in accordance with the Charters of the OAU and the United Nations. We do not accept this reasoning because in the same organs there are explicit laws that enunciate the sanctity and inviolability of human life.”²⁹⁰

In July 2003 AU adopted the Protocol on Amendments to the Constitutive Act. Among the amendments proposed was an addition to Article 4(h) to include “as well as a serious threat to legitimate order to restore peace and stability to the member states of the African Union upon recommendation of the Peace and Security Council.”²⁹¹ Therefore, the Peace and Security Council determines grave circumstances have occurred or are about to occur in a member state then recommends intervention by the Union.²⁹² These grave circumstances that may justify intervention are limited to war crimes, genocide and crimes against humanity taking place.²⁹³ The Assembly of Heads of State and Government then makes the final decision on the matter.²⁹⁴

As seen earlier regional organizations require authorization from UNSC before undertaking an enforcement action. AU has contemplated this by stipulating an article on its relationship with UN and other international organisations.²⁹⁵ AU recognizes that UNSC has primary responsibility to

²⁸⁹ Kioko B ‘The Right of Intervention under the African Union’s Act: From Non-interference to Non-intervention’ 812.

²⁹⁰ Kioko B ‘The Right of Intervention under the African Union’s Act: From Non-interference to Non-intervention’ 813.

²⁹¹ Article 4, *Protocol on Amendments to the Constitutive Act of African Union*, 11 July 2003.

²⁹² Yusuf A, ‘The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?’, 9.

²⁹³ Article 4(h), *Constitutive Act of the African Union*.

²⁹⁴ Yusuf A, ‘The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?’, 9.

²⁹⁵ Article 17, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002.

maintain peace and security and will closely work with it.²⁹⁶ Also that AU may rely on UN for financial, logistical and military support while undertaking enforcement action.²⁹⁷ This mainly because of the financial limitations of AU as enforcement actions are costly.²⁹⁸

Nonetheless, it has been argued that in case of hesitation, delay or failure by UNSC to act on its own or to authorize the AU to act the Assembly of Heads of State and Government would muster the requisite political will to undertake on its own prompt and targeted military intervention in a member state.²⁹⁹ This has been argued by some authors, seen earlier, as *prima facie* a violation of article 53 of UN Charter but we have arguing differently.

5.4 Conclusion

UNSC has on many occasions failed to decide or is disinclined to act in the face of conflicts in Africa. This has led to regional organisations in Africa to incorporate treaty-based right to take enforcement action to restore peace and security. It is through this right that regional organisations consider themselves having a responsibility to maintain peace and security in the region. Taking enforcement action with or without UNSC's authorization because of this responsibility.

²⁹⁶ Article 17, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

²⁹⁷ Article 17(2), *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

²⁹⁸ Kioko B 'The Right of Intervention under the African Union's Act: From Non-interference to Non-intervention' 822.

²⁹⁹ Yusuf A, 'The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action?' , 15.

6. Conclusion

6.1 Introduction

The relationship between chapter VII and chapter VIII of UN Charter has not been studied as deeply as the individual chapters. Yet understanding this relationship is crucial for the maintenance of security in the world. The relationship between UNSC and regional organisations in maintenance of peace and security has evolved. It is not the same as envisaged by the drafters of UN Charter as this research has attempted to show.

6.2 Restating the initial Problem

This research proceeded from the hypothesis. Proximity to conflicts in Africa makes regional organisations most suitable to maintain peace and security in Africa. Also because Article 3 and Article 25 of the Protocol on Mechanism for Conflict Prevention permit ECOWAS to use force without prior UNSC authorisation, they violate Article 53 of the Charter of the United Nations. And UNSC's silence, open support and not objecting to the use of force by African states reflects the futility of the prior authorization requirement in Article 53 of the Charter of the United Nations.

6.3 Research Findings

6.3.1 Peace and Security in Africa should be maintained by regional organisations

UNSC is mainly composed of powerful states. Intervention by any of them is mostly in the guise of UNSC's power over use of force. This power stems from the primary responsibility of maintaining peace and security. Thus most of them seem not to be confined by international norms. They can easily get away with it. Powerful states will be held accountable once this veil they hide under is removed. Not forgetting that colonisation itself was undertaken as a form of intervention by powerful states.

Also UNSC due to its detachment (in the sense of members and proximity) from Africa is slow to take enforcement actions. In some instances, such as Rwanda, it completely failed to take enforcement action to restore peace. It is due to this that African states agreed that they shall never again watch a country burn and agitated for a right of intervention through regional organisations.

6.3.2 African states prioritize human rights values over sovereignty based values

African states through regional treaties have agreed to take enforcement action to safeguard human rights and restore peace and security. This means that within member states of the regional organisations human rights abuses and repressive regimes cannot be cloaked by state sovereignty.

6.3.3 Regional organisations determine if there is a threat to peace in their regions

Before resorting to an enforcement action there is need to determine that there is a threat to peace. One of the reasons behind UNSC's prior authorisation requirement was so that UNSC could determine if there was a threat to peace. This is part of UNSC's primary responsibility to maintain peace and security. However, regional organisations have been taking enforcement actions without UNSC's prior authorisation. This is after they determine that there is a threat to peace and security in their regions.

6.3.4 The Relationship between UN and Regional organisations in enforcement action is one of resource support

Enforcement actions require a lot of resources to sustain. Regional organizations in Africa are under resourced. For enforcement actions by regional organisations to be successful they will need support from UN as envisaged in article 54 of UN Charter.

6.4 Conclusion

It is time for states as the true legislators of international law to review the relationship between regional organisations and UNSC. This relationship has evolved and it is not the way it had been envisaged by the drafters of the UN Charter.

6.5 Recommendations

Maintenance of peace and security should be primarily a role of regional organisations. This may mean a proposition to amend the UN Charter or the same becoming law through custom. The former being harder than the latter.

Regional bodies should no longer require prior authorisation before taking enforcement actions. This should only be the case if the enforcement action is undertaken under the authority of a regional organisation.

Due to the huge financial resources needed to undertake enforcement actions regional organisations need to work with UN. UN would provide the necessary support for undertaking enforcement actions.

6.6 Recommendations for Further Research

The research has mainly focused on state practice which is one limb of customary international law. Therefore there is need to examine whether these developments may amount to customary international law.

UNSC's primary responsibility to maintain peace and security is what gives it authority to make referrals to the International Criminal Court (ICC). The argument of this research is that regional organisations are better suited to have the primary responsibility of maintaining peace and security. In the field of international criminal law it would raise a question. Whether these regional organisations by virtue of having primary responsibility have a justification to propose an amendment to the Rome Statute. The amendment would allow regional organisations to refer and defer cases to the ICC. Perhaps this would be a better solution for African states who were disgruntled by UNSC's failure to defer the Al Bashir case. Better than the proposed African Court with an international criminal law division. There is need to research on this before making the conclusion that it is a better solution.

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