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The United Nations Charter and the African Union Constitutive Act: The search for compatibility in addressing African peace and security

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ABSTRACT

Collective security by regional organisations continues to be impacted by evolving global security threats. Previously focused at the global level, the shift from interstate conflicts to intra-state conflicts resulted in the acknowledgement of regionalism and the functions of collective security being implemented at the regional level. This paper examines the development of regionalism in the security sphere and the evolving relationship between the United Nations (UN) and regional organisations. Employing historical and comparative perspectives, it considers both the development of regional security projects and the reasons for their successes and failures. It also critically analyses the various constitutional developments that have occurred within regional arrangements looking particularly at the African Union (AU) and what accounts for such regional organisations to depart from the normative framework of regional arrangements contained in Chapter VIII of the UN Charter. The paper uses primary and secondary material to understand the compatibility of Chapter VIII of the UN Charter and the Constitutive Act of the AU as mechanisms used to respond to peace and security challenges on the African continent. The design of the study is qualitative research and the AU is used as a case study from other regional organisations. The theoretical framework adopted, based on its explanatory power, is collective security.

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Introduction

The formation of the UN provided a framework in which the collective maintenance of international peace and security could be achieved post-World War II. This was to be achieved through the UN Charter and the inclusion of Chapter VIII in particular. Previously focussed on the global level, the shift from inter-state conflicts to intra-state conflicts meant that collective security was now being implemented at the regional and sub-regional levels and, thus, regionalism was now acknowledged as a vital component in the maintenance of international peace and security. The principal rationale for

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establishing an international organisation such as the UN was to uphold international peace and security[1] more critically, to endow it with ways to address disputes between nations peacefully.[2]

Following the establishment of the UN, the acknowledgement of the role of regional organisations in preserving global peace and security transformed. Unlike its precursor, the League of Nations, the UN not only recognised but also incorporated the desired role of regional organisations within the collective security space. As a result, Chapter VIII of the UN Charter, which regulates the parameters of the role of regional organisations, was included in the UN Charter.[3] Given the complexities of global peace and security, Chapter VIII of the UN Charter deals specifically with regional arrangements in Articles 52–54. It authorises regional organisations, such as the AU to resolve disputes through available agencies, prior to intervention by the United Nations Security Council (UNSC).

For its part, the AU has enhanced the agency of African states, governments and political elites in the international arena in many ways. The AU serves as a forum for African states to coordinate their policies and decisions on key continental issues, including peace and security.[4] The AU's security regime, which is predicated on collective security, the establishment of the Early Warning System (EWS), the Panel of the Wise (PW), the African Standby-Force (ASF) and the Peace Fund (PF), clearly marks a major development within the organisation. These developments have repositioned the AU as a major player in the continental peace and security landscape. It has changed the attitudes of many governments in Africa from a culture of indifference to a new culture of caring about African peace and security.[5]

The AU, as a premier continental or inter-governmental body, and the UN, as a premier international body, have identified the need to deepen the partnership of their respective organs, namely the African Union Peace and Security Council (AUPSC) and UNSC to respond to peace and security challenges on the African continent. Although the partnership between the AU and the UN stresses the need for mutual respect and cooperation, there are differences in the technical and operational coordination mechanisms of the two organisations. The structural asymmetries between the two organisations affect the operational and technical aspects of their cooperation.[6] These structural asymmetries pertain to the challenges affecting the funding of AU-led peacekeeping operations and the lack of permanent representation for Africans at the UNSC, therefore limiting Africa's power to influence UNSC decisions, especially pertaining to conflict situations in Africa. Despite their similar objectives, it is important to highlight the different dimensions of the UN and the AU.

The League of Nations, and later the UN, was based on the concept of collective security, whose main principle is the maintenance of international peace and security. The international community established the idea of collective security to propose new ways of building mutual trust among states and resolving common security problems through acceptable methods of cooperation.[7] Collective Security is a significant commitment to promoting international peace between and among states. It is also a means of managing crises in international relations, established to promote international peace since aggression or war impedes global security.[8] Therefore, the concept of collective security views any state that threatens regional or international peace and security as an enemy and as such is subjected to enforcement action by the system.[9]

This paper will critically analyse the various constitutional developments that have occurred within regional arrangements. In particular, the paper will analyse the AU, as

a continental peace and security organisation, to understand how these developments have propelled regional organisations to depart from the normative framework of regional arrangements contained in Chapter VIII of the UN Charter. Considering such arrangements, this paper seeks to establish the extent to which the UN Charter and the AU Constitutive Act are compatible.

Regional organisations and Chapter VIII of the uncharter

Defining regional organisations

Chapter VIII does not define what is meant by 'regional organisation'. Therefore, this makes it difficult to determine which organisation falls under the label of regional organisation. As such, this has created difficulty in providing a clear definition of what regional organisations are, as per Chapter VIII.

Boutros Boutros-Ghali, in his United Nations Secretary General's Agenda for Peace: Preventative Diplomacy, Peace-making and Peacekeeping Report of 1992, highlighted the value of not having a strict definition for regional organisations because the Charter deliberately provides no precise definition of regional arrangements and agencies. In his interpretation, this allows for flexibility for undertakings by a group of states to deal with a matter appropriate for regional action, which also could contribute to the maintenance of international peace and security.[10] Despite this, the Agenda for Peace underpins that such associations or entities could include treaty-based organisations whether created before or after the founding of the UN such as regional organisations for mutual security and defence or groups created to deal with specific political, economic or social issues of current concern.

What has been interpreted as a criterion for regional organisations under Chapter VIII may be useful. Nonetheless, such a definition remains insufficient, as it does not provide clarity on which organisations are referred to under Chapter VIII. The lack of a proper definition for regional organisation by the Charter provides for the term to be open to personal interpretation.

Regional organisations and the right to self defence

Although Chapter VIII of the UN Charter is often viewed as the initial Chapter outlining the role and functions of regional organisations, there is a link between this Chapter and Article 51, Chapter VII of the UN Charter. Article 51 demonstrates a link between regionalism and self-defence, as it emphasises collective self-defence as opposed to individual self-defence.[11] According to Article 51, regional organisations are given the right to collective self-defence, 'until the Security Council has taken measures necessary to maintain international peace and security'.[12]

Despite providing regional organisations the right to collective self-defence, the Article continuously highlights the authority of the UNSC, which is (i) the regional organisations' actions to self-defence are only permitted until intervention by the UNSC; (ii) there should be immediate reporting to the UNSC of any self-defence action taken by the regional organisations and (iii) nothing shall affect the authority and responsibility of the UNSC to maintain or restore international peace and security.

Therefore, the interpretation of Article 54 favours the intervention of regional organisations due to their proximity to local conflicts. Therefore, this means that regional

organisations are viewed as complementary to the collective security system at the regional level.[13] This notion is supported by the AU's Ezulwini Consensus, which stipulates:

Since the General Assembly and the Security Council are often far from the scenes of the conflict and may not be in a position to undertake effectively a proper appreciation of the nature and development of the conflict situation, it is imperative that regional organisations, in areas of proximity to conflicts, are empowered to take actions in this regard.[14]

While the AU acknowledges the need to adhere to Article 51 of the UN Charter, which authorises the use of force for collective self-defence, it provides its own interpretation that justifies the use of collective action in a situation of collective danger.[15]

Peaceful settlement of disputes

The UN Charter, through Chapter VIII, envisioned cooperation between regional organisations and the UN that would ensure a collective response to any threat to international peace and security. As such, Article 52 recognises that states have the liberty to form regional arrangements, which are compatible with the UN's purposes and principles.

Article 52 suggests that regional organisations are at the grassroots level and are the first contact to address and solve any matter that threatens the maintenance of international peace and security. Therefore, regional organisations operating under Chapter VIII should be viewed as forums of first instance in the UN's framework for collective security because they are initially intended to resolve any disputes locally and peacefully. Furthermore, Article 52 stipulates that the matters should be 'appropriate for regional action', without defining what this entails. The inclusion of this provision limits regional organisations to local disputes and as such, the characterisation of the dispute serves the same purpose as the characterisation of 'appropriate regional action' as stipulated in Article 52.[16] It should be noted that nowhere in the UN Charter is the concept of local dispute defined. According to the researcher's analysis, local disputes thus refer to instances wherein political and security instability may threaten peace and security not only within the country but also at the regional level.

Several sources argue that there are three main reasons why Article 52 gives regional organisations the power to settle local disputes. Firstly, given the ever-increasing disputes within the international arena, the UN has its capacity overstretched, to consider practically and financially every issue that arises. Secondly, most disputes are better dealt with at a local level because it is more likely that the regional organisation may have a better understanding and familiarity of the circumstances and is often better placed to local norms and customs, which are to be considered to resolve the issues. Thirdly, local disputes do not always necessitate external enforcement action as peaceful measures often provide lasting solutions that all parties would have agreed on.[17]

Chapter VIII also grants regional organisations the power to resolve local disputes through local means and practices, thus excluding states or regional organisations outside of the region, from the process.[18] However, this exclusion is with the exception of the UNSC. Despite this, there have been unilateral interventions by powerful countries whenever they felt their national interests were threatened. This has been particularly the case with the French in many of its former colonies such as Cote d'Ivoire and Mali.

Although the pacific settlement of disputes is preferred, Article 52(4) states that the implementation of these peaceful measures will not impair the rights of other UN

members to inform the UNSC or the General Assembly of any disputes that threaten international peace and security.[19] However, the UNSC is only permitted to interfere in these disputes if the regional organisation is unable to peacefully settle the disputes. As much as the UNSC has a responsibility to allow regional organisations to take priority in settling disputes, regional organisations also have an obligation to report to the UNSC. In the researcher's analysis, this is a means by the UNSC to monitor the activities of regional organisations as well as to determine whether the dispute poses a threat to international peace and security and as such whether the UNSC should implement enforcement action.

Regional enforcement action

The UNSC has been granted the legal mandate to authorise regional organisations to enforce actions on its behalf and this is encapsulated in Article 53 of the UN Charter. It should be noted that the UN Charter does not provide a definition of enforcement action and has throughout its several chapters used the term enforcement action (Articles 53 & 42) or measures (Articles 2 & 41). Thus, authorisation under Article 53 legitimises actions by regional organisations, which would otherwise be characterised as a breach of international law.[20]

Therefore, it is important for the UNSC to exhaust the use of regional organisations to settle local disputes prior to the involvement of any global actor. The UNSC under Article 53 provides leadership as it uses regional organisations to implement measures, which have been decided at the international level, which are mainly decisions of the UNSC. However, although Article 53 points out that the UNSC can utilise regional organisations, the regional organisations are not compelled to provide enforcement action. For regional organisations to be used by the UNSC under Article 53, they need to provide consent.[21]

Despite this, it is possible that the UNSC could refuse authorisation of enforcement action by regional organisations, especially if such actions by the regional organisations are not in the best interest of the maintenance of international peace and security. Given the centrality of the UNSC in providing prior authorisation for regional organisations to implement enforcement action, this condition is unrealistic as the main basis for empowering regional organisations is to allow them to expeditiously respond to a crisis.[22]

Article 53 does not provide a timeframe for when the UNSC should authorise enforcement action. Therefore, the UNSC could provide authorisation at any time and in any form.[23] Others[24] argue that prior authorisation is what the UN Charter envisages as this will ensure effective UNSC control over regional organisations' use of force. This is important because there is a risk as regional organisations may be tempted to take enforcement action hoping the UNSC would permit it after the fact.[25] In this respect, both Walter and Akehurst[26] argue that prior authorisation by the UNSC should be the regular form of authorisation. By obtaining prior authorisation, consequences for both the regional organisations and the states against which the decision of enforcement action is taken for would be avoided.

Article 53 was intended to subordinate regional organisations to the overall control of the UNSC by imposing the pre-requisite on them to obtain UNSC authorisation to implement enforcement action.[27] In light of this, the exclusion of Article 53 would have granted regional organisations greater liberty to use force, which would not necessarily be in self-defence.

Regional organisations' obligation to report to the UNSC

Article 54 of the UN Charter obligates regional organisations to at all times keep the UNSC fully informed of their activities in relation to the maintenance of peace and security. The main objective of Article 54 is to ensure that the primary responsibility of the UNSC, which is to maintain international peace and security and to control the activities of regional organisations is emphasised.[28] This mandate applies to activities taken by regional organisations in terms of Articles 52 and 53 of the UN Charter.

Despite the mandate prescribed by Article 54, regional organisations do not at times comply with this obligation. This is likely because the Article does not provide a period for regional organisations to report their peace and security-related activities. Therefore, regional organisations report to the UNSC post the enforcement of their activities. As a result, the UNSC has at times had to remind regional organisations of their obligation under Article 54, to fully inform the UNSC of their activities in the maintenance of international peace and security. This was evidenced by the UNSC's decision to increase reporting obligations on the AU in relation to Libya.[29]

The AU's Constitutive Act

The formation of the Organisation of African Unity (OAU), later, the African Union (AU), was a culmination of pan-Africanist ideology, which first emanated from the first pan-Africanist Conference held in 1900 in London and later found its way to Africa through the assistance of great African leaders.[30] While the creation of the OAU in 1963 brought with it high expectations of solving Africa's problems, especially the liberation of the continent from the mares of colonialism and apartheid, its lack of interference in resolving conflict situations and the challenges of globalisation, brought it to its demise.[31]

The creation of the AU through the adoption of its Constitutive Act in 2002 took into consideration the challenges of the continent. As such, unlike its predecessor, the AU aimed to not only promote sustainable development but also address the conflicts happening on the continent. The Constitutive Act of the AU, which is the framework governing the AU, has set out norms and principles by which member states are expected to behave to maintain peace and security on the continent. Despite this, the AU as a regional organisation, although not stipulated in its Constitutive Act, its actions in the maintenance of continental peace and security are subjected to the provisions of Article 52–54 of the UN Charter.

Acknowledgment of the role of the UNSC

The AU and the UN recognise each other's strategic importance and comparative advantage. The AU through Article 3(f) of the Constitutive Act encourages international cooperation by considering the Charter of the UN and the Universal Declaration on Human Rights. However, it is in Article 17(1) of the Peace and Security Protocols wherein the relationship between the UN and the AU is outlined. The Article states that the AUPSC shall, in fulfilment of its mandate in the promotion and maintenance of peace and security on the continent, cooperate and work closely with the UNSC and other relevant UN agencies in the promotion of peace and security in Africa.[32]

Furthermore, Article 17(3) states that the AUPSC and the Chairperson of the Commission shall maintain close and continued cooperation with the UNSC, Secretary-General and its member states by holding periodic meetings and regular consultations pertaining to peace, security and stability on the continent. In addition, the AU, as indicated in Article 17(2), shall if necessary, call upon the UN to provide financial, logistical and military support for the AU's activities in the promotion and maintenance of peace, security and stability on the African continent.[33] Given the above provision, the AU and the UN use their different fora to discuss pertinent African (and global) issues and, if possible, take a common position to mobilise regional and international support for a cause.[34]

Duty to find peaceful resolution of conflicts

Similar to Chapter VIII of the UNSC, the Constitutive Act of the AU calls for the peaceful resolution of conflicts between member states in Article 4(e). The Article further mandates the AU Assembly, which is, according to Article 6(2) the supreme organ of the Union, to decide on appropriate means to resolve the conflicts. However, the Constitutive Act falls short of identifying what these appropriate means are. In the researcher's assessment, this can be explained by Article 4(f), which prohibits the use of force or threat to use force among member states.[35]

The AU's right to intervene

The AU's Constitutive Act supports the principle of domestic sovereignty wherein Article 3 (b) stipulates that states have the right to defend sovereignty, territorial integrity and independence. This is further supported by Article 4(g), which reaffirms the principle of non-interference by member states in the internal affairs of another. However, this non-interference is not inclusive of the AU as Article 4(h) gives the Union the right to intervene in a member state pursuant to a decision of the Assembly.

The intervention is only permitted provided there are grave circumstances, which are characterised as war crimes, genocide and crimes against humanity.[36] Unlike the UN Charter, the Constitutive Act actually describes what grave circumstances are, therefore not leaving the Article open to member states' own interpretation of it. Therefore, this might assist in preventing uncertainties associated with the lack of Chapter VIII's grounds for interventions by regional organisations. In addition, the Protocol on the Amendments to the Constitutive Act of the AU, adopted in February 2023, amended Article 4(h) by including the Union's right to intervene if there is a serious threat to legitimate order to restore peace and stability. Similar to the UN Charter's failure to define terms such as 'threat to peace' or 'breach of peace', the Act fails to define what constitutes a serious threat to legitimate order and how this relates to other grounds of intervention, as mentioned in Article 4(h). Hence the proposal that the AU Peace and Security Council, similar to the UNSC, can interpret the term in a manner that promotes the fulfilment of the organisation's purpose.[37]

Should member states find themselves in a situation wherein they are unable to resolve their own internal affairs, Article 4(j) gives them the right to request intervention from the Union to restore peace and security.[38] However, given that Article 4(j) provides

this right to member states to request the Union's intervention, the inclusion of the right of the AU to intervene in situations threatening legitimate order, give the Union an opportunity to intervene despite an invitation from the member states.[39]

Although the AU's Constitutive Act gives the AU the right to intervene to maintain peace and security, Article 53 of the UN Charter provides limitations to its intervention in that it obligates the Union to obtain authorisation from the UNSC should enforcement action be taken. Regional organisations often do not wait for the UNSC's authorisation as the UNSC has, in some instances, not fulfilled or delayed its obligation in the maintenance of peace and security, often at the expense of the African continent. The lack of a provision in the Constitutive Act on the obligation stipulated in Article 54 of the UN Charter for regional organisations to fully inform the UNSC of enforcement activities undertaken, suggests that the AU does not provide for the duty to report to the UNSC.[40]

Convergence and divergence

Both the AU and the UN have established peace and security frameworks, to maintain peace and security on the continent and globally, respectively. However, the AU's Constitutive Act and Chapter VIII of the UN Charter contain conceptual obscurities and divergences which impact the implementation of collective security between and by the two organisations on the African continent.

Firstly, there is no explicit definition of how the relationship between the UNSC and regional organisations, in this case, the AU, should look as neither the AU Constitutive Act nor Chapter VIII of the UN Charter provides practical aspects or ground rules for the relationship. The Constitutive Act does not provide any clarity on the relationship between the AU and the UN, while Chapter VIII only outlines the role of regional organisations and not the relationship between the two organisations and their organs, the AUPSC or UNSC.

Secondly, although Chapter VIII supports regional organisations to settle conflicts through peaceful means, the Chapter provides several restrictions to regional organisations and the role they play towards the maintenance of international peace and security.[41] This is because the Charter only permits the collective intervention of regional organisations through the backing of the UNSC, which holds the authority to apply military action.[42] Therefore, this notion centralises collective security at the international level and not necessarily at the regional level. This removes the core demand for localised regional security from the regional level, where these insecurity dynamics manifest and centralises peace and security agendas at the behest of the international organisations at the international level. This has resulted in several African member states arguing that the AU's positions on issues of regional peace and security are often ignored or disregarded at the UNSC – as seen in both the Libya and Cote d'Ivoire crises.[43]

Lastly, although the AU and UN recognise each other's strategic importance and comparative advantage, the AU's Constitutive Act provides a different notion of the right to intervene as outlined by Chapter VIII of the UN Charter. The Constitutive Act introduces a new concept of the AU's right to intervene when there is 'threat to legitimate order', which is not listed in Chapter VIII. This raises the question of how will the right be implemented and what challenges will arise between the AU and the UN's cooperation if implemented?

The case of Libya and the litmus test for the African Union

Despite the obligation given to the UNSC to encourage regional organisations to apply the peaceful settlement of disputes under Article 52, there have been incidences of disagreement between the UNSC and regional organisations historically. This specifically pertains to who, between the two, has primacy over the peaceful settlement of disputes. One case, in particular, which remains a source of contention between the UNSC and the AUPSC, is the 2011 Libya crisis. Given the deteriorating security situation in Libya and the threat of a civil war, the AU came up with a five-point plan AU resolution, which was announced on 10 March 2011, by the Heads of State and Government in attendance at the meeting of the AUPSC in Addis Ababa, Ethiopia.

The resolution essentially sought to resolve the Libyan conflict. Its key elements were (1) the protection of civilians and the cessation of hostilities; (2) the humanitarian assistance to affected populations both Libyans and foreign migrant workers, particularly those from Africa, (3) the initiation of political dialogue between the Libyan parties to reach an agreement on the modalities for ending the crisis; (4) the establishment and management of an inclusive transitional period and (5) the adoption and implementation of political reforms necessary to meet the aspirations of the Libyan people.[44]

Despite the AU's efforts to resolve the situation in Libya through peaceful means, the UNSC adopted Resolution 1973 on 17 March 2011, which was proposed by France, Lebanon and the United Kingdom (UK). The resolution entailed 'imposing a no-fly zone over Libya's military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya'. The resolution further authorised all member states to 'take all necessary measures' to achieve the protection of all civilians.[45] The three non-permanent African countries (A3), South Africa, Nigeria and Gabon, voted for the UNSC Resolution 1973, which authorised military intervention in Libya and encouraged the AUPSC to mediate in the conflict. These countries believed that Resolution 1973 advanced the principle of Responsibility to Protect (R2P) to prevent Gaddafi's forces from carrying out further attacks against the Libyan opposition forces.[46] The three UNSC permanent members (P3), France, the UK and the US, withdrew the diplomatic solution, once the resolution was adopted and pursued a North Atlantic Treaty Organisation (NATO)-led military operation.[47] Subsequently, the UN-backed NATO intervention in Libya attacked the Libyan government forces siding with the rebels.

The AU was unequivocal in its condemnation of the indiscriminate use of force and lethal weapons, reaffirmed its strong commitment to respect the unity and territorial integrity of Libya and rejected any foreign military intervention in Libya. The A3 countries'[48] vote was faced with a contradiction in two aspects.[49] Firstly, the vote isolated the AU's call for a resolution rejecting any foreign military intervention, whatever its form. Secondly, the call by the Arab League for a no-fly zone was supported by Chapter VIII, therefore if they voted against it then the A3 would contradict the African Agenda which advocates for the strengthening of UNSC cooperation with regional organisations which it pioneered.

Although the UNSC was legitimate in its authorisation of any force, its mistake was in not providing limitations on what this action entailed. Furthermore, NATO's quick implementation of military force, despite the AU's position to engage in a peaceful

resolution, Resolution 1973 was emptied of its normative objective which was to protect civilians and obtain a ceasefire. This position was also reiterated by the AU's concern at the 'dangerous precedence being set by the one-sided interpretation of the resolution in an attempt to provide a legal authority for military and other actions on the ground, are clearly outside the scope of the Resolution'.[50]

Conclusion

In a very hierarchal way, Chapter VIII of the UN Charter separates any regional organisation(s) from the global organisation, creating different levels for these institutions. This was purposeful and calculated to ensure a single centre of global authority and power. The clear separation imposed by Chapter VIII of the Charter had a very specific aim. It was important for the UNSC to keep control of conflict resolution processes inside its chamber. Hence, despite regional organisations assuming more responsibilities to address their challenges, in practice, the UN downgrades the relationship to that of consultancy rather than subsidiarity with all its implications.

Notwithstanding the cooperation between the UN and the AU, they have found it difficult to prevent and manage rivalry and tension because they have not reached an agreement on the principles and modalities for doing so. There are no robust mechanisms for consultation and coordination on peace-making between the UNSC and the AUPSC.

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