

# The Relationship Between the UN Security Council and the AU Peace and Security Council in the Field of Peacekeeping

Giovanni Cellamare

## Contents

1	The Regulatory Framework in the UN Charter .....	2
2	The Control of the Security Council over the Actions of Regional Organizations Utilized or Authorized by It .....	6
3	The Rules Contained in the Constitutive Act of the African Union and in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union .....	13
4	The Approach Which Emphasize the Autonomy of the Application of the Rules in Question in Relation to Security Council's Powers Under the UN Charter .....	16
5	Criticism of the Opinions in Question .....	17
6	The Scope of Article 17 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union .....	19
7	The Approach of the Peace and Security Council to Operate in Member States of the AU After the Authorization Required to the UN Security Council .....	22
8	The Financial and Strategic Dependence of the AU (and Other African Organizations) from External Aid .....	24
9	The Role that Under the Rules in Question May Be Available to the African Union Peace and Security Council, in View of Its Relationship with the Other Security Council .....	27
	References .....	30

**Abstract** Article 53 gives the SC the power to utilize regional (arrangements or agencies to carry out enforcement action under its direction; but 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'.

The rules of Treaty establishing the AU have been interpreted in several ways in relation to Chapter VIII of the UN Charter. In this respect it is helpful to look at the effects of Article 103 of the UN Charter. This provision directs the conduct of the Member States, which are parts of other international organizations, in a way consistent with the same provision. Article 103 requires that the rules in question

---

G. Cellamare (✉)

Department of Political Sciences, University of Bari Aldo Moro, Bari, Italy

e-mail: [giovanni.cellamare1@uniba.it](mailto:giovanni.cellamare1@uniba.it)

are to be interpreted and applied by Member States of AU in accordance with the combined provisions of Articles 2.4, 24 and 53 of the Charter.

There is a gap between the ambitions for autonomy derived from the rules of the Constitutive Acts of the AU and of other regional and sub-regional African organizations and the actual operating capacity of the organizations in question.

This does not exclude the fact that those rules lead us to focus on the exceptionality of the African situation and on the relevant operational contexts. The rules of the AU Constitutive Act can be used as the basis of a partnership with the UN, characterized by the primacy of the PSC compared to the organs of other regional and sub-regional African organizations with responsibilities for maintaining international peace and security.

## 1 The Regulatory Framework in the UN Charter

The well-known Chapter VIII of the Charter of the United Nations (UN) deals with relations between the UN and regional organizations as regards the maintenance of international peace and security.<sup>1</sup> The principles or purposes of the UN and Chapter VIII are sometimes mentioned in the constitutive acts of other organizations, thus recognizing their role as a benchmark framework in the area in question.<sup>2</sup>

In short, Article 52 provides that the parties to a local dispute must make every effort to reach a peaceful solution to their dispute by regional arrangements or agencies before referring it to the Security Council (SC)<sup>3</sup>; therefore, Article 52 gives such arrangements or agencies a ‘primary’ role in the resolution of disputes

---

<sup>1</sup>On the historical significance of Chapter VIII see Boisson de Chazournes (2010), p. 101 et seq. This paper follows largely Cellamare (2015a, b).

<sup>2</sup>See Paulus and Leiß (2012), p. 2131 (the international organizations ‘are already bound by their own law to recognize the prevalence of the Charter’). For normative examples, see, among others, the Preamble to (Sec. 6) and Articles 1 and 2 of the Treaty of the Organization of American States (OAS); Article 5 of the Inter-American Treaty of Mutual Assistance; recital 1 of the Agreement on mutual assistance between States Parties of the Economic Community of Central African States (ECCAS); Article 17.2 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AU); Articles 3.5, 11.1 and 21.1–2 of the Treaty on European Union (TEU). See also Peyró Llopis (2012), p. 303 et seq.

<sup>3</sup>1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council. 4. This Article in no way impairs the application of Articles 34 and 35’.

in order to facilitate the achievement of one of the purposes of the Charter.<sup>4</sup> Such a role is to be understood in the light of the customary international law principle of free choice for the peaceful settlement of international disputes. In effect, the Charter neither requires States to utilize ‘primarily’ regional organizations and regional arrangements in the field in question,<sup>5</sup> nor delimits the powers between the universal Organization and regional organizations in that field.

Practice shows that the States have proceeded in a different way,<sup>6</sup> and that the activities mentioned by the Article 52 are frequently combined with peacekeeping operations, even robust, which are undertaken, for example, by the UN. In this sense, one can recall the following activities of regional and sub-regional African: the activities of the African Union (AU) and Economic Community of West African States (ECOWAS) concomitant to MINUSMA, to which the authority of AFISMA was transferred<sup>7</sup>; moreover, the activities of the AU and of the Economic Community of Central African States (ECCAS) have been carried out before or after the MICOPAX in RCA. The MICOPAX was transfused in the MISCA; the deployment of the latter was authorized by SC Resolution 2127 (para. 28 et seq); afterwards, the authorities of the same Mission were transferred to MINUSCA (Resolutions 2149 and 2217, para. 3). To the above examples one can add the practice of ECOWAS peacemaking activities combined with UNOCI (recital 2 of SC Resolution 2166).<sup>8</sup>

---

<sup>4</sup>In this regard see Hummer and Schweitzer (2002); Boisson de Chazournes (2010), p. 258 et seq; Gargiulo (2015), p. 955 et seq.

<sup>5</sup>Orakhelashvili (2006).

<sup>6</sup>See, among others, Kamto (2007); Boisson de Chazournes (2010), p. 259 et seq.

<sup>7</sup>SC Resolutions 2100 and 2164; UN Doc. S/2013/338, para. 5 (Mali); UN Doc. S/2013/59, para. 12 et seq (Abyei); UN Doc. S/2014/142 (from MISCA to a UN peacekeeping operation).

<sup>8</sup>On the problems concerning ‘[S]trategic cooperation pre- and post-transition, and the transfer of authority between the operation of AU and UN’, see the letter of the Secretary-General to the Security Council, in UN Doc. S/2015/3. It is useful to remember the merger (see UN Doc. S/2016/89) of the Office of the Special Envoy for the Sahel (OSES) and of the United Nations Office for West Africa (UNOWA) into the United Nations Office for West Africa and the Sahel (UNOWAS). This Office has the responsibility for preventive diplomacy, good offices and political mediation and facilitation efforts in West Africa and the Sahel region: in particular, the UNOWAS supports the activities of AU and other sub-regional organizations in the fields of the maintenance of peace and security (e.g. in the fight against terrorism and violent extremism: see The United Nations Strategy for the Sahel, in UN Doc. S/2013/354).

After the President Yahya Jammeh had refused to accept the results of the presidential elections, the Peace and Security Council (PSC) of the AU, the ECOWAS and the UN SC recognized Adama Barrow as legitimate President of Gambia. For the AU, see PSC/PR/COMM. (DCXLIV): ‘The Council of African union . . . Recalls the relevant provisions of the AU Constitutive Act, as well as those of the African Charter on Democracy, Elections and Governance, on the total rejection by the AU of constitutional changes of government, in particular any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections, as provided for in Article 23 (4) of the Charter; . . . 12. Stresses the determination of the AU to take all necessary measures, in line with the relevant AU Instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of The Gambia on 1 December 2016. For the ECOWAS, see the Final Communiqué of the 15th Ordinary Session of the ECOWAS Authority, 17 December 2016, in [www.ecowas.int](http://www.ecowas.int); the Authority agrees

Article 52 does not prejudice the application of Articles 34 and 35.4. In other words, ‘the Security Council may investigate any dispute, or any situation that might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security’ (Article 34). Moreover ‘any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly’ (Article 35.1).

On the other hand, the application of Article 34 can be functional to the operativeness of Article 53.<sup>9</sup> The latter gives the SC the power to utilize regional (arrangements or) agencies to carry out enforcement action under its direction; but ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council’ (Article 53.1).

In this respect it is helpful to look at the effects of Article 103 of the Charter. This provision directs the conduct of the Member States, which are parts of other international organizations, in a way consistent with the same provision, i.e. to

---

on the following ‘a) To uphold the result of 1st December 2016 election . . . ; b) Guarantee the Safety and protection of the President-elect Mr Adama Barrow . . . ; g) Requests the endorsement of the AU and the UN on all decisions taken on the matter of the Gambia and also requests their support for the mediation efforts of ECOWAS including the provision of technical assistance where required; h) The Authority shall take all necessary measures to strictly enforce the results of the 1st December 2016 elections’). In a Presidential Statement held on December 21, 2016, UN Doc. S/PRST/2016/19, ‘The Security Council reiterates its request to outgoing President Jammeh and the relevant Gambian Authorities to fully respect the results of the presidential election of 1 December 2016, to respect the will of the Gambian people and to carry out a peaceful and orderly transition process, and to transfer power to President-elect Adama Barrow by 19 January 2017 in accordance with the Gambian constitution . . .’. On January 19, 2017 ECOWAS deployed a military contingent (largely Senegalese troops) in Gambia, to support the elected President Adama Barrow. It is noteworthy (see *infra*, note 83) that in resolution 2337 (adopted on January 19, 2017), the SC, without any reference to Chapters VII or VIII, simply ‘Endorses the decisions of ECOWAS and the African Union to recognize Mr. Adama Barrow as President of the Gambia; . . . Expresses its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of 1st December elections . . .’.

<sup>9</sup>1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. 2. The term enemy state as used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory of the present Charter’.

prevent the application of the rules of those entities that are or might in the future clash with the obligations under the Charter.<sup>10</sup>

On the basis of Article 53, which provides the powers of the SC to utilize and to authorize regional organizations, scholars have carried out the following observations. In the case of the initiative of the Council, the latter indicates the purposes and means of the coercive action; in such a case there is a direct connection between the Council and that action. Furthermore, in the case of the initiative of the regional entity the focus shifts on the legitimizing effect of the resolution by which the Council has authorized the future coercive action of the international organization: in the absence of such an authorization, that activity would be contrary to the system of the UN Charter (Articles 2.4 and 39 of the Charter).<sup>11</sup>

Now, taking into account of the provision in Article 52.1, it seems to us, first of all, that, in the presence of an initiative of the SC, the attention is to focus not only on the aspect illustrated above, but also on the capacities and competences of the regional entity in question: in fact, the said capacities and competences delineate a limit for the same Council to use those entities. As noted by the International Court of Justice, ‘les organisations internationales sont des sujets de droit international qui ne jouissent pas, à l’instar des Etats de compétences générales. Les organisations internationales sont . . . dotées par les Etats qui les créent de les compétences d’attribution dont les limites sont fonction des intérêts communs que ceux-ci leur donnent pour mission de promouvoir’.<sup>12</sup>

In the second context, the initiative of the regional organization (authorized by the SC) tends to shift the focus on the relationships of cross reference and reciprocal presupposition that are established between the acts of that organization and the resolution by which the Council grants the authorization: in other words, the scope of the same authorization must be understood considering the pertinent acts of the regional organizations referred to in the resolution of the Council.<sup>13</sup>

On the other hand, the activities authorized by the SC are decided by the regional organizations on the basis of their own institutive acts and structures; therefore, the SC authorizes the activities in question in the light of those acts and systems, which are known to the same Council. And this is likely to affect the relationships between the Council and the authorized international organizations.<sup>14</sup>

With regard to Article 53, it should first be noted that, in practice, there have been developments not in keeping with the letter of that rule: the SC has very often authorized regional organizations (and/or Member States individually or in the

<sup>10</sup>Villani (2001), p. 259 et seq; Balmond (2008), p. 74 et seq.

<sup>11</sup>Cf., among others, Gazzini (2005), pp. 68 et seq and 105 et seq; Balmond (2008), p. 74 et seq; Boisson de Chazournes (2017), p. 167 et seq.

<sup>12</sup>ICJ, Advisory opinion of 8 July 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, ICJ Reports 1996, para. 25.

<sup>13</sup>Cf. Cellamare (2015b), p. 98 et seq.

<sup>14</sup>With reference to the practice of the EU operations, see Boisson de Chazournes (2010), p. 101 et seq.

framework of a regional organization) acting under Chapter VII, and not under Article 53.<sup>15</sup> And this happened also at the request of the regional organizations: with reference to the EU, some authors have highlighted that such a preference for a mandate under Chapter VII is probably intended to avoid that the EU appears on the political scene of international relations in a position of subordination with respect to the SC, under the combined provisions of Articles 53 and 54 of the Charter.<sup>16</sup>

## 2 The Control of the Security Council over the Actions of Regional Organizations Utilized or Authorized by It

Regardless of the legal basis (Chapter VII or Chapter VIII) of the relevant resolution of the SC, the attribution to the latter of the powers before mentioned implies the control by the same organ over the actions of regional organizations utilized or authorized by it.<sup>17</sup> Because of the absence of an express provision on such control, its components have been derived from the Charter's system of collective security. In fact, Chapter VIII is an integral part of that system.

In Resolution 2033 the SC, '[r]eaffirming its primary responsibility for the maintenance of international peace and security,' recalled, '[t]hat cooperation with regional and sub-regional Organizations in matters relating to the maintenance of peace and security and consistent with Chapter VIII of the Charter of the United Nations, can improve collective security' (recitals 2 and 3).<sup>18</sup> Also in the Statement of the President of the SC of 10 December 2012 the Council 'reiterates its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations and recalls that cooperation with regional and sub-regional Organizations, consistent with Chapter VIII of the Charter of the United Nations is an important pillar of collective security'.

Furthermore, the President of the same Council, at the end of the meeting on 'Cooperation between the United Nations and regional and sub-regional organizations in maintaining international peace and security' (August 6, 2013), has, 'on behalf of the Council', declared: '[T]he SC recalls the purposes and principles of the Charter of the United Nations, and reaffirms its primary responsibility under the Charter for the maintenance of international peace and security. The Council further recalls that cooperation between the United Nations and the regional and sub-regional organizations and arrangements in matters relating to the maintenance of international peace and security, as are appropriate for regional action, is an integral part of collective security as provided for in the Charter of the United Nations, and can improve collective security'. In other words, the activities that are

<sup>15</sup>See Peyró Llopis (2012), p. 36 et seq.

<sup>16</sup>Cf., among others, Boisson de Chazournes (2010), p. 297 et seq.

<sup>17</sup>*Ibid.*, p. 101 et seq; Boisson de Chazournes (2017), p. 179 et seq.

<sup>18</sup>See also recital 3 of Resolution 1809; and para. 10 of Resolution 1862.

an expression of that cooperation are integrated into the system of the Charter. Of course, there is a 'need for regional and sub-regional organizations at all times to keep the Security Council fully informed of activities undertaken or in contemplation for the maintenance of international peace and security'.<sup>19</sup>

The effectiveness of the control by the Council presupposes that the controlled operation has clear objectives, i.e. suitable to define the scope of the same operation. It seems to us that these objectives are to be understood in the light of the relevant acts that precede and follow the deployment of the operation; that is, bearing in mind the relationships of cross reference and reciprocal presupposition that are established between the peace agreements, the acts of regional organizations and the resolution of the SC.<sup>20</sup>

The need for clear objectives of the operation has been highlighted by the Council in Resolution 2056 on Peace and Security in Africa: the Council '[t]akes note of the request of ECOWAS and the African Union for a United Nations Security Council mandate authorizing the deployment of an ECOWAS stabilization force in order to support the political process in Mali and assist in upholding the territorial integrity of Mali and in combating terrorism' (para. 17), '[e]xpresses its readiness to further examine the request of ECOWAS once additional information provided has been regarding the objectives, means and modalities of the envisaged deployment and other possible measures . . .' (para. 18). Subsequently, in Resolution 2071 of 12 October 2012, the Council '[R]equests the Secretary-General, in close consultation with the above-mentioned partners, to submit . . . a written report on the implementation of this resolution . . . and detailed and actionable recommendations to respond to the request of the Transitional Authorities of Mali Regarding an international military force, including means and modalities of the envisaged deployment, in particular the concept of operations, force generation capabilities strength and support financial cost' (para. 7). Finally, in Resolution 2085 the SC noted the position of the AU and ECOWAS 'endorsing the Joint Strategic Concept of Operations for the International Military Force and the Malian Defense and Security Forces' (recital 9); moreover, acting under Chapter VII of the Charter, the Council decided to authorize an 'African-led International Support Mission in Mali (AFISMA)', which would take all necessary measures for the implementation of the tasks specified in the Resolution (para. 9). The Council limited the temporal effect of that authorization to an initial period of 1 year.

The above observations about the identification of the objectives of the operation authorized by the SC are significantly reflected also in Resolutions 2121 and 2127 on the situation in the CAR. In the first Resolution, the SC welcomed (recital 18) the decision of the AU Peace and Security Council (PSC) to authorize the deployment of the 'Mission internationale de soutien à la Centrafrique sous conduite africaine (MISCA), ainsi que des Conclusions auxquelles sont parvenues l'Union Africaine et la Communauté Economique des Etats de l'Afrique Central concernant les

---

<sup>19</sup>UN Doc. S/PRST/2013/12; see also Cellamare (2015b), pp. 13 et seq and 73 et seq.

<sup>20</sup>*Ibid.*, p. 8 et seq; more in general see Cellamare (1999), p. 59 et seq.

Modalités de la transition entre la Mission de consolidation de la paix en Centrafrique (MICOPAX) et la Misca'; furthermore, acting under Chapter VII, the Council supported the process of political transition based on the mentioned acts and that called for the immediate application (para. 1 et seq). Finally, the Council agreed to rely on the 'mise en place' of the Mission functional to the formation of a Republic 'stable et démocratique exerçant son autorité sur l'ensemble du territoire national assumant et sa responsabilité de protéger la population civile'. To that end, the SC requested the Secretary-General and the BINUCA to cooperate in the implementation of the transition from the Mission de consolidation de la paix en Centrafrique (MICOPAX) to MISCA (para. 19 s.). In Resolution 2127, acting under Chapter VII, the SC authorized the deployment of MISCA, 'pour une période initiale de 12 mois', to contribute to the achievement of the objectives listed in the same Resolution. Furthermore, the SC reminded the letter with which the transitional Authorities demanded that the MISCA was assisted by French troops (recital 29), and authorized the deployment of those troops, 'pour appuyer the Misca dans l'exécution de son mandat' (para. 50).<sup>21</sup>

As it happened for the operations in Mali,<sup>22</sup> the authorization to the deployment of the Mission was subsequent to the adoption of the operational concept by the AU Council; namely, after the definition of the overall picture of the theater of operations and of the characteristics of the Mission, whose planning, it should be noted, was attended by the UN representatives. Moreover, in view of the activity of the Mission, the Security Council has relied on the EU commitments, in particular in support of future operations (recital 24).<sup>23</sup> On this basis, the SC has authorized the deployment of the African led Mission, within the time limits specified in the Resolution, and called on the AU 'à lui rendre compte à tous les 60 jours, en étroite coordination avec le Secrétaire général et les autres organisations internationales et avec les partenaires bilatéraux concernés par la crise, concernant le déploiement et les activités de la MISCA' (para. 32).

Following up the French solicitations and given the agreement in principle within the Political and Security Committee (Article 38 TEU), the Foreign Affairs Council of EU has pledged to provide aid to African initiatives in the RCA, thus reinforcing the 'engagement européen dans le cadre de son approche global'. In this

---

<sup>21</sup>For the consent of the 'Authorities' to both Forces, see UN Doc. S/PV.709: 8; the 'Déclaration de la 3ème réunion du Groupe International de Contact sur la République Centrafricaine', the European Parliament's resolution n. 2013/2980 (RSP) (recital 4), adopted on 12 December 2013. The interim Government has also participated in the final statement of the fifth special session of the Conference of Heads of State and Government of ECCAS, available at [www.ceeac-eccas.org](http://www.ceeac-eccas.org).

<sup>22</sup>See Cellamare (2013), p. 239 et seq.

<sup>23</sup>See also Resolution 2248 (recitals 19 and 20): the SC, '[W]elcoming the statement of the African Union Peace and Security Council (PSC) on 17 October 2015, and the proposed next steps adopted on that occasion, and *looking forward to their full implementation*, Welcoming the deployment of African Union human rights observers and military experts and urging the Government of Burundi and other stakeholders to provide them full cooperation in order to facilitate the implementation of their mandate . . .' (italics added).



perspective, ‘marqué son accord politique sur . . . une opération militaire CSDP’, on 20 January 2014 the same Council ‘a approuvé le concept de gestion de crise à cette fin’. In view of the decision for the rapid deployment of the operation, the Council agreed on the latter as a force aimed to give ‘une appui temporaire’, in order to provide ‘une environnement sécurisé, dans la région de Bangui’ and ‘passer le relaie à l’UA’. The Council was careful to point out the legal basis of the operation: i.e. an operation ‘basée sur une résolution du Conseil de Sécurité des Nations Unies qui permet d’établir dans les *meilleurs délais* une opération en EUFOR RCA, en soutien aux efforts déployés par la communauté internationale, notamment l’UA, l’ONU et la France, ainsi que par les autorités centrafricaines’.<sup>24</sup>

In Resolution 2134 the SC has taken note of the approval by the transitional Authorities of the displacement of an operation of the EU (last recital); the same Council, acting under Chapter VII, in the context of broader measures, has authorized the deployment of the operation ‘selon les termes’ specified by the EU. So deciding, the Council has established a relationship of reciprocal presupposition between the contents of its resolution and the decisions of the EU. In particular, the Council authorized the operation ‘à prendre toutes les mesures nécessaires, dans la limite de ses capacités et dans ses zones de déploiement, dès son déploiement initial et pendant une période de six mois à compter de la date à laquelle elle aura déclaré être pleinement opérationnelle’. Finally, the SC requested the EU reports ‘sur l’exécution de ce mandat en République et de centrafricaine coordonner ses rapports avec ceux de l’Union Africaine’, and called on the transitional authorities to conclude an agreement with the EU on the status of the Forces (para. 47).

As I mentioned, the temporal effect of the authorizations was limited by the SC; moreover, the Council requested information about the activities of the operations authorized. In fact, the duration of an operation is a component of it that weighs heavily in the Council’s supervision.<sup>25</sup> Rarely is the duration of the operation defined with certainty from its inception. Generally, the SC initially sets the term of the mandate without ruling out its renewal, as in fact often happens.<sup>26</sup>

The information provided by Article 54 is functional to the supervision of the operations by the SC: that information allows for the subsequent control by the Council on the activities of the operation and, therefore, for the Council to take appropriate action by means of the regulatory activity falling within its competence. Article 54 does not provide formal requirements for the modalities for informing the SC, so that the information could be imparted even orally during the meetings of

<sup>24</sup>See the Council’s Conclusions on CAR on January 20, 2014, available at [www.eeas.europa.eu](http://www.eeas.europa.eu). Italics added.

<sup>25</sup>See, e.g., the resolutions reported in the preceding pages; *adde* Resolution 1778. For an example of scheduling of the duration of the operation, from the point of view of the organ establishing it, see the Joint Action 2007/677/CFSP on EUFOR (European Union Force) Tchad/RCA launched on 28 January 2008 (Decision 2008/101/CFSP).

<sup>26</sup>See e.g. para. 9 of Resolution 1464; and the Resolutions on the establishment of SFOR (1088, para. 18) and EUFOR in Bosnia (1575, para. 10), as well as the resolutions on Afghanistan referred to in Resolution 2120.

the Council by the State's delegates participating in those meetings. In principle, the information sent by the regional organizations to the SC is merely descriptive of the situation in question.<sup>27</sup> Information is regularly requested by the Council, even for actions under Chapter VII of the Charter.<sup>28</sup> The information is not always properly passed on; but it does not seem that the SC gives appropriate weight to this lack of information.<sup>29</sup> The foregoing does not exclude that, in the exercise of its responsibilities, the Council may require information about the profiles designated, and this prior to the deployment of the operation.<sup>30</sup>

Since the resolutions at issue are not limited to give an authorization, but have regard for the overall situation in which the regional organization acts,<sup>31</sup> and considered that the relationship between the SC and regional organizations, in the matter in question, may vary in function of the autonomy of the operational capacity of each of them, and given the character of political organ of the SC, as organ of the UN which has the primary responsibility, under the UN Charter, for the maintenance of international peace and security, it is reasonable to conclude that

---

<sup>27</sup>Practice in the field (see Siciliano 2008, p. 154 et seq) is not homogeneous, ranging from complete information (as in the experience of SFOR; EULEX in Kosovo: UN Doc. S/2012/818, Annex I; also the '1st Progress Report of the Commission of the African Union on the Situation in the Central African Republic and the Activities of the African-led International Support Mission in the Central African Republic', available at [www.au.int](http://www.au.int)) to vague and imprecise information (see e.g. the report on the operation Althea, annexed to UN Doc. S/2014/531; and the report on KFOR, annexed to UN Doc. S/2015/106). As mentioned in the text, it may happen that sometimes the regional organization has orally informed the Council (such as the EU with reference to the Artemis operation: UN Doc. S/PV.4790). The reports and information provided by regional organizations do not have the completeness of the information provided by the Secretary-General (SG) on UN operations. Therefore it can happen that the Council requests the SG to be informed of the situation in a given State. In particular, the information in question may be obtained from the SG, who provides it having regard to an action of the SC in collaboration with regional organizations (see para. 19 of Resolution 2123, with reference to the operation Althea); on the other hand (as for Darfur see Gueyou 2005, p. 1339), the reports of the SG to the Council (on the basis of the relationship of the former with regional organizations) can be functional for the purposes of Article 54. In its report of 22 October 2012 (UN Doc. S/2012/787), the SG pointed out that '[t]he assessment and observations in the report are based on information provided by Member States and regional Organizations, in conformity with para. 28 of Resolution 2020' (para. 1). There are examples of cases in which the Council has asked the regional organization to inform it through the SG (Resolution 2036, para. 21, with detailed requests; see also para. 5 of Resolution 2073). Yet, the request may be addressed to States and regional organizations: see Resolution 1897, para. 16. On the other hand, it is possible that the SC asks the regional organization to be informed through the SG (Resolution 1776, para. 6; Resolution 2036, para. 21; and Resolution 2073, para. 5).

<sup>28</sup>Resolutions 2085, para. 5, and 2127, paragraphs 32, 48 and 50; see also the resolutions relating to the operation Althea which are referred to in Resolution 2123.

<sup>29</sup>Walter (2002b), p. 1533.

<sup>30</sup>Resolution 2085, para. 10.

<sup>31</sup>See the 'pillars' of Resolution 2127 and, in connection, Resolution 2196. Moreover, Resolution 1778, which is linked to other resolutions (among others, Resolution 1769, by which the SC authorized the creation of UNAMID) concerning the sub-region in question. See also the Rapport du Secrétaire général sur les activités du Bureau régional des Nations Unies pour l'Afrique centrale et sur les zones sévité où l'Armée de résistance du Seigneur, UN Doc. S/2014/812, para. 3.

the requirement of control by the SC can be satisfied if it exercises the political-regulatory control over the operations. In other words, operational and military control is not crucial; in fact, as experience shows, such control can be lacking with respect to the operations created by the same Council.<sup>32</sup>

In sum, the chief feature of the control exercised by the SC is the following: that control shows the leading role/regulatory management by the Council of the overall situation in which the action carried forward to a regional organization is introduced. In this regard, one can consider, for example, Resolution 2196, which relates to the management of a situation characterized by the presence of missions with different characteristics: as a matter of fact, the Council appreciated the activities of MISCA, EUFOR and operation Sangaris, greeted the establishment of the EU's Advisory Military Mission-EUMAM RCA, succeeding to EUFOR (recitals 6 and 7), ascertained the persistent presence in that State of 'Armée de Résistance du Seigneur-LRA' (recital 15), and acting under Chapter VII adopted measures not involving the use of force favorably to the missions activities in RCA (para. 19).<sup>33</sup>

Moreover, as the power intended to extend or not the action in question belongs to the SC, the latter is always able to exercise overall and final control on the operation action, even though the initial political impulse of the same operation is to be reconnected to the regional organization authorized.<sup>34</sup> Therefore, the power in question should be understood in view of the control of the SC.<sup>35</sup>

That said, it is worth considering that the method of deployment of the Forces is not indifferent to the perception of the theatre of operations by the Council. As noted by the SG in the 'Supplement to an Agenda for Peace', collaboration between the UN and regional organizations on the maintenance of peace can manifest itself in several ways; by consultation, by diplomatic support, through operational support, by means of co-deployment and joint operation.<sup>36</sup> On the other hand, it may happen that in the same operative area the UN mission follows—sometimes absorbing them—the peacekeeping operations set up by the regional organizations along the lines of the different operative models already known in the experience of the universal Organization, or partially moving away from that experience.<sup>37</sup> It may also happen that the operations of regional organizations, in particular

---

<sup>32</sup>Picone (2011), p. 217.

<sup>33</sup>See also UN Doc. S/2015/3: 3.

<sup>34</sup>On this subject, see, among others, Sarooshi (1999), p. 165 (the author observes that, in the absence of total control of the SC on an operation, a transfer of powers by the Council to the entity operating is realized).

<sup>35</sup>See Resolution 2301, paras 40 and 56.

<sup>36</sup>UN Doc. A/50/60-S/1995/1: para. 86.

<sup>37</sup>For the 'émergence d'une doctrine de maintien de la paix' ('différent' by the concept of peacekeeping generally accepted in the UN), in which, 'instead of waiting for a peace to keep, the AU views peacekeeping as an opportunity to establish peace before keeping it', see PSC/PR/2 (CCCVII) (on the partnership between UN and AU), para. 71. See also Cellamare (2015b), p. 63, fn 221.

peacebuilding operations, follow the operations of the UN (such as the operation of the OSCE in Eastern Slavonia, after UNTAES).<sup>38</sup>

Subsequent missions allow each of the organizations involved to make available to the others their experiences and operational capabilities; indeed, it may happen that an operation is absorbed into the next one (like the AMIB in the ONUB and the MISCA in the MINUSCA)<sup>39</sup>; and that in the same context regional organizations perform different operational functions (so the AU in Mali, with the Mission de l'Union Africaine pour le Mali et le Sahel-MISAHEL, deployed contemporary to MINUSMA, which replaced AFISMA).<sup>40</sup> The functioning of subsequent missions in the same operating environment presupposes partnership capacity and coordination among the interested organizations. But this does not affect the perception that one has of the theatre of operations. The possible future role of these operations has been stressed by the SC in Resolution 2167 (para. 13).

On the other hand, the transition from one operation to another can be a part of a stage subsequent to the 'co-deployment': in Tchad and in the CAR, for a certain period of time, the EUFOR and MINUCART coexisted; the latter then replaced the EU Mission.<sup>41</sup> In general, co-deployment promotes the autonomy of the organizations involved in the financial and organizational control of their operations; the creation of a regional Force in co-deployment with a UN operation (e.g., KFOR, in co-deployment with UNMIK) gives legal and political-moral legitimacy to the former; in fact it is a Force which shares the values assumed to underlie the UN operation. Moreover, co-deployment is likely to facilitate the monitoring by the UN of the operative activities of regional Forces (e.g. between MONUG/CEI), although autonomous.<sup>42</sup>

Interaction between the organizations is frequent in joint or hybrid operations, such as UNAMID of the UN and the African Union.<sup>43</sup> It is an experience limited to the above mentioned operation, thus it is difficult to collect data for or against the joint activity. Moreover, in addition to facilitating the transmission of organizational and operational experiences by the UN to the regional organization (such as the AU), the hybrid mission lays the foundations for a more immediate and constant physical control of the theatre of operations.<sup>44</sup>

---

<sup>38</sup>On this subject and the observations made in the text, see Derblom et al. (2008), p. 8. Furthermore, Resolution 2030, on the activities (in Guinea Bissau) of ECOWAS, the Community of Portuguese Language Speaking Countries and the relevant Bureau of the United Nations.

<sup>39</sup>See Resolution 1545, para. 3.

<sup>40</sup>UN Doc. S/2015/229, 2; see Cellamare (2015b), p. 1 et seq.

<sup>41</sup>Cellamare (2009), p. 189 et seq.

<sup>42</sup>For a table of the operations in co-deployment see Aboagye (2007), p. 5.

<sup>43</sup>Resolution 1769, para. 1, based on the joint report by the UN SG and the Chairperson of the African Union Commission: African Union, PSC/PR/2 (LXXIX), para. 54. For the AU see the Report of the Chairperson of the Commission on the African Union-United Nations partnership: the need for greater coherence, PSC/AHG/3. (CCCXC VII), para. 10.

<sup>44</sup>See the reports of the SG on UNAMID (among others, UN Doc. S/2012/548). See also UN Doc. S/2011/805, para. 30 et seq, containing data drawn from the experiences summarized in the text.

### 3 The Rules Contained in the Constitutive Act of the African Union and in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union

The founding treaties of some important regional organizations fully define the competence of the same organizations in the field in question. Indeed, some of those treaties show, *prima facie*, a framework of remarkable initiative and wide autonomy of those organizations in the relationships with the SC.<sup>45</sup>

This is manifest in the Constitutive Act of the AU, adopted on Jul. 11, 2000. Article 4 provides for '(d) . . . a common defense policy', '(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of serious circumstances, namely: war crimes, genocide and crimes against humanity', and '(j) the right of Member States to request intervention from the Union in order to restore peace and security'.

Similar provisions have been included in the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the Union.<sup>46</sup> Articles 6 and 7 give the Council peacemaking and peacebuilding functions; in particular, the power to create peace-support operations, to operate and prevent conflicts and policies that are likely to lead to genocide or crimes, the competence to recommend

---

But for a negative assessment of the hybrid mission see Walter (2012), p. 1339 et seq. For the setting of the examination of the problems of international responsibility of the organizations involved in a hybrid operation, in a general perspective (moving from the case of the European Court of Human Rights), with an extensive bibliography, v. Sicilianos (2008), p. 369 et seq; Boisson de Chazournes (2010), p. 313 et seq; Boisson de Chazournes and Pergantis (2012), p. 193 et seq.

<sup>45</sup>I refer, *inter alia*, to: Article VI of the Statute of the League of Arab States, supplemented by the Joint Defense and Economic Co-operation Treaty (17 Jun. 1950); the Inter-American Treaty of Mutual Assistance (combined provisions of Articles 4 and 6, so that the OAS Charter of 1948, amended several times, contains a Chapter VI on collective security as a guarantee of the 'integrity' of the territory or the sovereignty or political independence of any American State, where 'affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra danger to the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject': Article 29); Article 4.2.a of the Treaty establishing the Organization of Eastern Caribbean States (1981) revised on 18 Jun. 2010 (that rule lists among the organization's goals 'mutual defense and security'); the Commonwealth of Independent States (CIS), which has institutionalized collaboration for the maintenance of international peace and security within the territories of the Member States by the Agreement of 20 March 1992 on groups of military observers and collective peacekeeping forces to prevent or resolve conflicts that may arise out of those territories. In the implementation of the Kiev Treaty, in May 1992 in Tashkent three Protocols concerning the functioning of the system of peacekeeping were adopted, with the provision (in the Protocol on the status of observers and forces) of recourse to the use of force in self-defense and to counter armed attempts aimed at preventing the holding of the mandate by the operation.

<sup>46</sup>Majinge (2010b).

to the Assembly intervention in the serious circumstances indicated in Article 4 quoted above, as well as to implement the decisions of the Assembly, including the intervention in a Member State. Such a rule gives the Council the power to create peacekeeping operations, which are kept distinct, in Article 7, from the intervention on behalf of the Union.<sup>47</sup>

The AU system also establishes an African Standby Force (ASF).<sup>48</sup> The provision of such a Force—which is multidisciplinary and permanently available on the territories of Member States to which the contingents (and other components of the Force) belong—is designed to minimize costs and streamline the deployment of the operations. However, obstacles in making the Force operational should be reported: in fact, an independent panel of experts has drawn a road map to overcome the obstacles that have hindered so far the effectiveness of the ASF, in order to facilitate the achievement of that objective. The recommendations of the panel have been recalled by the SC.<sup>49</sup>

The rules laid down denote a departure from the principle of the absolute prohibition on interference in the internal affairs of the member States, as provided by the Treaty establishing the OAU (Article 13).<sup>50</sup> Scholars have considered such

---

<sup>47</sup>Hollywood (2007). If the amendments (adopted in 2003) to the Constitutive Act of the AU will come into force, there may be problems of reconciliation between that Act and the Protocol in question. In fact, the Protocol on amendments to the Constitutive Act adds the following new subparagraphs to Article 4 of the same Act: '(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of serious circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council; (q) restraint by any Member State from entering into any treaty or alliance that is incompatible with the principles and objectives of the Union; (r) prohibition of any Member State from allowing the use of its territory as a base for subversion against another Member State'. In particular, apart from the problems of interpretation of the expression 'threat to legitimate order', it should be noted that the Protocol relating to the African Council (adopted prior to the Protocol on Amendments) does not include the power to make recommendations in support of an intervention in a member State whose legitimate order is seriously threatened. See Baimu and Sturman (2003); Allain (2004); Yusuf (2012), pp. 335–340.

<sup>48</sup>See the Non-Aggression and Common Defense Pact of the African Union, adopted in Abuja on 31 January 2001. In the Statement of the President of the Security Council of 16 December 2014 (UN Doc. S/PRST/2014/27), the Council: '[W]elcomes the steps taken for the operationalization of the African Capacity for Immediate Response to Crises (ACIRC), including through enhanced decision-making to facilitate rapid deployment'; so, the ACIRC is an anticipation of the Standby Force.

<sup>49</sup>Recital 7 of Resolution 2167 and the Statement referred to in the previous fn; for the Panel, see African Union Independent Panel of Experts (October 2013): Assessment of the African Standby Force and Plan of Action for Achieving Full Operational Capability by 2015, available at [www.panapress.com](http://www.panapress.com). On the role of the Force, in the direction indicated in the text, see, Fanta (2009); for critical comments see Gueyou (2012). On the evolution of the concept of the ASF, see Okeke (2014).

<sup>50</sup>Cf. Baimu and Sturman (2003), Dyani-Mhango (2012), Ndulo (2012) and Yusuf (2012). On the transition from the OAU to the AU, see Tchikaya (2013), p. 390 et seq.

ban to be the cause of the inadequacy of that Organization to face conflict contexts and tackle crises with severe and massive violations of human rights.

The referred provisions, together with those of other regional and sub-regional African organizations,<sup>51</sup> are indicative of the acquisition by the same organizations of competences relating to the maintenance of international peace and security. In particular, the rules in question denote the desire of member States of these organizations to provide African solutions to the problems of peace and security on the African continent.<sup>52</sup>

It is worth dwelling on the relationship between the AU Council and the SC, to which the UN Charter recognizes the primary responsibility for the maintenance of international peace and security.

---

<sup>51</sup>On the evolution of ECOWAS (established by the Treaty of Lagos, adopted on May 23, 1975, to promote economic cooperation between its Member States) see the Protocol on Non-Aggression, signed in Lagos on 22 Apr. 1978, and the Protocol on Mutual Assistance in Defence, signed in Freetown on 29 May 1981 (the Treaty of Lagos was revised, after the Liberian crisis, in 1993, Article 58); the Protocol of 1999 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted on the basis of the experience in Sierra Leone and Guinea-Bissau). The Protocol of 1999 refers to the UN Charter, ‘with Particular reference to its Chapters VI, VII and VIII’ (recital 3 and Article 52); moreover, the Protocol establishes the mechanism in question (Article 11), provides the competences of the relevant Council (including the adoption of the decision to authorize intervention and ‘on the deployment of political and military missions’: Article 10). On December 21, 2001, the Protocol was completed by another Act (A/SP1/12/01): see Sec. IV on the Role of the Armed Forces, the Police and the Security Forces in a democracy. With respect to the obligation of cooperation with the UN, para. 24 of ECOWAS Conflict Prevention Framework (approved with Regulation MSC/REG.01/01/08) states: ‘Ecowas has always acted in concert with the African Union and UN’. On the ECOWAS operations see, *ex multis*, Levitt (2006); Sicilianos (2008), p. 190 et seq; see also Sampson (2011). For SADC, see Article 11 of the Protocol on the Defence Policy and Security of 14 August 2001, available at [www.sadc.int](http://www.sadc.int). In this regard see also Articles 6 and 7 of the Covenant, on 24 February 2000, on the mutual assistance between States Parties to the CEEAC (with the planned deployment on the territory of the Member States of the Multinational Force of Central Africa); Article 18 of the Treaty of 21 March 1986 establishing the IGAD and the more recent Protocol on the Establishment of a Conflict Early Warning and of a Response Mechanism for IGAD Member States: [www.eastafrica.usaid.gov](http://www.eastafrica.usaid.gov). Finally, for CEMAC see the Pact of 2004 on Non-Aggression, solidarity and mutual assistance among the States parties to the same organizations, available at [www.operationspaix.net](http://www.operationspaix.net). For an overview of the mentioned rules see Gray (2008), p. 387 et seq; Poli (2011), p. 128 et seq.

<sup>52</sup>See Rechner (2006); Hollywood (2007), p. 137 et seq; Majinge (2010b).

#### 4 The Approach Which Emphasize the Autonomy of the Application of the Rules in Question in Relation to Security Council's Powers Under the UN Charter

The rules of Treaty establishing the AU have been interpreted in several ways in relation to Chapter VIII of the UN Charter. It is a problem 'dismissed out of hand' in the course of the preparatory work of that Treaty.<sup>53</sup>

Briefly, a first approach, which seems preferable to us, interprets those rules in the light of the UN Charter; i.e. subjecting to the universal Organization the exercise of the powers conferred on the African Council.<sup>54</sup>

A second approach tends to emphasize the autonomy of the system created by those rules with respect to the UN's system of collective security. In particular, according to some authors, the rules in question show the assertion of the primacy of African regional organizations as to the maintenance of international peace and security, in coordination with (and while recognizing the role) of the SC.<sup>55</sup> In this respect the birth in the UN system of a customary rule which allows the action of those organizations until the SC intervention has taken place: in fact, the SC has authorized *ex post* regional operations.<sup>56</sup> Indeed, the rules in question are considered manifestation of the possible exercise of the responsibility to protect.

In addition, some authors allege considerations drawn from the combined provisions of Articles 4 and 6 previously mentioned, as well as Article 17.2 of the Protocol on the African Council ('Where Necessary, recourse will be made to the United Nations to Provide The necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security'). In particular, it was noted that—although 'the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security' (para. 1)—the AU reserves for itself the right to intervene in Africa and the power to ask the UN to become involved, 'when necessary'.<sup>57</sup> It has been observed that a regional customary rule on humanitarian intervention has emerged, codified in the Treaty of the AU and in the Protocol of its Council; and this is reflected in the fact that the SC has authorized *ex post* interventions by African organizations. Therefore, there would be an exception to

---

<sup>53</sup>Kioko (2003). Below, for the sake of exposition, I will refer only to the PSC, without recalling the AU Assembly.

<sup>54</sup>With ample bibliographical information, see Boisson de Chazournes (2010), p. 289 et seq; Paliwal (2010); Corten (2012).

<sup>55</sup>See e.g. Levitt (2005), p. 229 et seq.

<sup>56</sup>For the scope of the term intervention in Article 4, see Yusuf (2012), p. 338 s.

<sup>57</sup>*Ibid.*, with the final specification that 'in practice' the two independent systems, of the UN and of the AU, 'have proven to be complementary'.



Article 103 in favour of the rules of the Treaty and Protocol concerned; indeed, Article 103 does not operate with respect to customary law. Otherwise, it is observed, it remains admissible that the authorizations made *ex post facto* by the SC conflict with Article 103.<sup>58</sup>

Taking into account the configuration of Article 51 of the UN Charter as a rule providing for an exception to the provisions in Articles 2.4 and 39 of the same Charter—i. e. of the possible recourse to self-defense, as an exception to the prohibition of the use of force, ‘until the Security Council has taken measures necessary to maintain international peace and security’—other authors outline Article 4.h of the AU Treaty as a rule which allow a limited form of humanitarian intervention in situations of serious and massive violations of human rights and given the inaction of the SC.<sup>59</sup>

Finally, some scholars have represented Article 4 as a source of the right to intervene in the States Parties of the Act establishing the AU in the situations specified therein: i.e. ratifying that Act, those States have given (in advance and once and for all) their assent to African Council action in the situations in question. And this provided that the use of force would be compatible with the rules of *jus cogens*: in such way, it is observed, the possible conflict of those rules with the UN Charter comes lead, provided that the Charter constitutes the border between the use of force prohibited or not prohibited.<sup>60</sup>

## 5 Criticism of the Opinions in Question

First, in general, it may be noted that the opinions presented evoke ‘authorizations’ adopted by the SC after the entry into operation of a mission; thus, it seems to me, the primacy of the collective security system of the Charter which binds the Council is recognized implicitly, but unmistakably. Those authorizations may be considered as regularization of illegal activities: i.e. such activities, previously alien and incompatible with the UN system, are restored to that system by the authorizations.<sup>61</sup>

Furthermore, it should be noted that the views in question refer also to the creation of a customary rule, in the sense indicated; however, this rule is based on poor practice, in which overall operations are taken into account and which cannot

---

<sup>58</sup>Levitt (2005).

<sup>59</sup>See Walter (2002a), p. 1491 et seq (at 1493 the author observes that the provisions of the Constitutive Act of the AU ‘may be read asserting a right to autonomous regional intervention in case of SC inaction’, i.e. ‘when the SC is unable or unwilling to exercise its responsibility to protect’). In a general different perspective (which utilizes the ‘model’ under Article 51, in response to ‘crimes’ other than those provided for that rule; but for the author the responsibility to protect remains purely hypothetical), see Picone (2015, 2016).

<sup>60</sup>In this regard see among others Harrel (2008).

<sup>61</sup>Among others see Conforti and Focarelli (2012), p. 347.

be carried to unity. Indeed, the characteristics of the operations currently known and the objectives pursued by the same operations appear variable; so, in the literature uniformity of evaluation of the characteristics and objectives of these operations is lacking.<sup>62</sup> Therefore the experiences mentioned cannot be considered cumulatively; all the more, sometimes the operations were managed directly by some States.<sup>63</sup> Therefore obstacles exist to the recognition of the customary rule evoked.

Unlike the argument that relies on the formation of a customary rule which legitimates the action concerned in the system of the Charter, it might be possible—according to an authoritative doctrine—that Article 103 has assumed the value of a peremptory norm of international law. As is well known, this feature is also present in some of the obligations referred to by that rule, including, of course, the principle contained in Article 2.4.<sup>64</sup> Therefore, by following this approach, the interventions allowed by the above customary rule would conflict with a rule higher than the customary one. In other words, given that the Charter does not provide, in particular, for humanitarian intervention by Member States, we have a legally binding prohibition of such an intervention.

*Mutatis mutandis*, an order of analogous considerations may object to the opinion that builds the rules in question as the recognition (or the manifestation) of the existence of a rule on the responsibility to protect. Leaving aside the doubts widely manifested in the literature about the existence of such a rule and the considerations which hinder the recognition of a uniform concept of ‘responsibility to protect’ under the various regional organizations,<sup>65</sup> it can be observed that the opinion in question is not reflected in practice<sup>66</sup>; and this in view of the reliefs previously made with respect to the scope of the practice considered to affirm the existence of a customary rule, in the sense already indicated. Furthermore, the attitude of the AU in the African crises denotes its propensity not to intervene in the member States (against the/in lieu of the governments in power): and this is not consistent with the operation of the doctrine of responsibility to protect and refutes the existence of a practice which brings the doctrine into question.<sup>67</sup>

---

<sup>62</sup>See the observations of Walter (2002a), p. 1491 et seq; Levitt (2006); Sicilianos (2008), p. 256 et seq; Boisson de Chazournes (2010), p. 264 et seq; Boisson de Chazournes (2017), p. 193.

<sup>63</sup>For the approach that focuses on the real characteristics of the operations and on the objectives actually pursued by each of them see Picone (2005), p. 36 et seq.

<sup>64</sup>Conforti (2015), pp. 100 and 189. In general, on the subject see Kolb (2013), p. 20 et seq.

<sup>65</sup>UN Doc. A/65/877-S/2011/393, para. 8 (The role of regional and subregional arrangements in implementing the responsibility to protect: report of the Secretary-General): ‘[T]he responsibility to protect is a universal principle. Its implementation, however, should respect institutional and cultural differences from region to region. Each region will operationalize the principle at its own pace and in its own way’.

<sup>66</sup>See Randelzhofer and Dörr (2012), p. 225 et seq.

<sup>67</sup>See Aning and Atuobi (2009). With reference to the caution of the AU in the Libyan crisis and the critical position with respect to the interpretation of Resolution 1973 as a basis for the intervention in Libya, see Poli (2011), p. 169 et seq; Omorogbe (2012) (with extensive indications of the relevant acts). In general, also for the bibliographical references, see Focarelli (2008); Gargiulo (2012), p. 1422 et seq; [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org).

The proposed interpretation which reconstructs the eligibility of a humanitarian intervention, under Article 4.h, along the line of the functioning of Article 51 of the UN Charter, has the merit to reconnect the possibility of a coercive action to a decision and control of a collective organ. And this can help to ward off the dangers of an intervention essentially functional to the interests of one or a few States.<sup>68</sup> Moreover, precisely because Article 51 provides an exception, the same rule is *strictissimae interpretationis*; so the unilateral method of action permitted by Article 51—i.e. the recourse to the use of force for self-defense in the absence of action of the SC—is admissible only in relation to the cases referred to in that rule. It follows that Article 4, cannot be interpreted, even if through the Chapter VIII, as an exception (like Article 51) to the system established by the UN Charter.<sup>69</sup>

## 6 The Scope of Article 17 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union

Moving on to Article 17 of the Protocol of the Peace and Security Council, it may be noted that the same Council usually invoked that Article without excluding the operativeness of the UN Charter. In particular, in a Press release of 23 September 2013, the Council welcomed the progress of the relationship with the SC, in the context of the Chapter VIII of the UN Charter and Article 17.

The PSC noted that these relationships are not part of a common strategic vision. Therefore, the same Council called for an innovative and flexible interpretation of Chapter VIII (in particular, by systematic consultations, effective involvement of African States parties of the SC in the preparation of Resolutions of the latter). The African Council draws the attention of the SC on the issue of financing the African led support operations.<sup>70</sup>

---

<sup>68</sup>In this regard, see De Wet (2012). For an interpretative variant of the opinion exposed in the text, see Peyró Llopis (2012), p. 411 et seq.

<sup>69</sup>See also De Wet (2012), p. 1558.

<sup>70</sup>PSC/AHG/3 (CCCXCIV), adopted in New York at the end of the 397th meeting of the Council at the level of the Heads of State and Government; see also PSG/AHG/3. On the institutional coordination between the two organizations see the report of the UN SG in UN Doc. S/2011/805, para. 12 et seq (the report shows the not systematic character of that coordination); the Statement in UN Doc. S/PRST/2014/27 (in which the SC ‘reiterates the importance of establishing through more effective relationship between the Security Council and the African Union Peace and Security Council including through blackberries and achieving effective annual consultative meetings, the holding of timely consultations, and collaborative field missions of the two Councils, as appropriate, to put forward cohesive positions and strategies *on a case-by-case basis* in dealing with conflict situations in Africa’; italics added); see also PSG/AHG/3. (DXLVII), Report of the Chairperson of the Commission on Follow-up steps on the Common African Position on the review of United Nations peace operations, adopted on September 26 2015, para. 2 et seq.

Such considerations are aimed at greater and effective appreciation of the African positions by the SC, especially in the phase preceding the deployment of an operation, and have been carried out, therefore, recalling the context of Chapter VIII, Article 17, and the relevant resolutions of the SC; in particular, Resolution 2033, which unequivocally affirmed the primacy of that organ.

Actually, although invoking its own acts and, in particular, Article 17, cited above, the African Council has derived from these sources its continental primacy ‘in the promotion’ of peace, security and stability in Africa, while not affecting the broader powers that Article 24 of the UN Charter assigns to the SC. In the same direction I can also recall the Joint *communiqué* of the African Council and the members of the SC of 12 March 2015.<sup>71</sup>

In sum, Article 17 lends itself to an interpretation different from that reported earlier; once the obligation of the AU Council to ‘cooperate and work closely with the United Nations Security Council’ is affirmed, the rule provides that the ‘African Union’s activities’ must comply with (‘in keeping with’) the ‘provisions of Chapter VIII of the UN Charter on the role of regional Organizations in the maintenance of international peace and security’ (para. 2).<sup>72</sup> In other words, Article 6 shall be considered without prejudice to the obligations arising from the ‘provisions’ in question; the request to the UN relates to the aid for the AU and not the authorization, which indeed the SC is not bound to give. Moreover, the Protocol has been drawn up ‘mindful of the provisions of the Charter of the United Nations, conferring on the SC primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer cooperation and partnership between the United Nations, other International Organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa’ (recital 4).

So, the provision in question does not affect the recognized primacy of the SC. The same provision is indicative of the need for relationships between the relevant organs of the AU and the same Council<sup>73</sup>: Article 17 provides a regulatory connecting channel of the African Council with UN SC; above all, it is a rule that, in

---

<sup>71</sup>UN Doc. S/2015/212, Annex: ‘[T]he Peace and Security Council and the members of the Security Council reaffirmed the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations and the mandate of the Peace and Security Council with regard to the promotion of peace and security in Africa as provided for in the Constitutive Act of the African Union as well as in the Protocol relating to the Establishment of the Peace and Security Council of the African Union’ (para. 2). On The problems of communications between the two Council, see the report in UN Doc. S/2015/229; on ‘the work of the United Nations Office to the African Union,’ in view of a ‘strategic partnership’ between the AU and Un in the field of the maintenance of peace and security, see the report in UN Doc. S/2016/780.

<sup>72</sup>In this regard see, among others, Dyani-Mhango (2012), p. 11: the author seems to support the idea that the authorization of the SC is linked ‘especially’ with the needs of AU of financial support from the UN.

<sup>73</sup>Yusuf (2012), p. 346.