

# Why African Norms Matter: Subsidiarity and Agency in Peacemaking

Obinna Franklin Ifediora

The University of Queensland

[obinna.ifediora@uq.edu.au](mailto:obinna.ifediora@uq.edu.au)

## Abstract

This study explains why the African Union (AU) claims primacy and opposes the UN Security Council's and the ICC's efforts to enforce R2P and nonimpunity norms in peacemaking. It draws on the concepts of norm subsidiarity and African agency in global politics and analyses African norm-setting and policy instruments. The central argument is that the AU is a subsidiary actor in the international system and has created subsidiary norms on immunity, the right to protect, and continental sovereignty to defend Africa's vital security interests. The significance is that existing studies have applied the norm localization model and assumed that the AU is or should be a localizing actor and subordinated African subsidiary norms to international principles. Thus, the current approach has missed the collision of African and international norms we are witnessing. This study contributes to knowledge by enriching the understanding of African subsidiary norms and agency in international relations.

## Introduction

The African Union (AU) opposes the UN Security Council's and the ICC's efforts to enforce the responsibility to protect (R2P) and nonimpunity norms in peacemaking. In Libya, the AU opposed the Security Council-mandated NATO military intervention to protect human rights. In Sudan, the AU resisted the Security Council-authorized ICC investigation to enforce the nonimpunity norm. Likewise, the AU resisted the ICC prosecutions in Kenya. Instead, the AU has claimed primacy in decision-making, asserted the Heads of State and Government immunity, the right to protect, and continental sovereignty norms.<sup>1</sup> Pertinently, the AU primacy claims, and rejection of international norms is a challenge to international authority.

Existing studies<sup>2</sup> on the role of the AU and subregional organizations, such as the Economic Community of West African States (ECOWAS), in implementing R2P and nonimpunity norms have emphasized the authority of the Security Council and the ICC in line with the principle of subsidiarity in the UN-led global order<sup>3</sup> and subordinated African norms to international principles. The thinking is that African norms matter to the extent that they

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<sup>1</sup> African Union, Assembly Decision, Assembly/AU/Dec.140 (VIII), 30 January 2007, para. 2; African Union, Assembly Decision, Assembly/AU/Dec. 493 (XXII), 30-31 January 2014, paras. 6-7; African Union, Assembly Decision, Assembly/AU/Dec. 385 (XVII), 30 June – 1 July 2011, paras. 3, 7. The right to protect refers to article 4(h) of the Constitutive Act, and continental sovereignty relates to AU primacy claims on decision-making in interventions, see Obinna Ifediora, 'Regional multilateralism: The right to protect, not the responsibility to protect, in Africa,' *APSA Preprints*, November 2021. doi:10.33774/apsa-2021-x75m3.

<sup>2</sup> On R2P, see Tim Murithi, 'The responsibility to protect, as enshrined in article 4 of the Constitutive Act of the African Union,' *African Security Studies* 16:3, 2007, pp. 14-24; Paul D. Williams, 'The 'responsibility to protect': Norm localisation, and African international society,' *Global Responsibility to Protect* 1:3, 2009, pp. 392-416; Dan Kuwali, and Frans Viljoen, eds., *Africa and the Responsibility to Protect: Article 4 (h) of the African Union Constitutive Act* (London: Routledge, 2013); Kwesi Aning, and Fiifi Edu-Afful, 'African Agency in R2P: Interventions by African Union and ECOWAS in Mali, Cote D'ivoire, and Libya,' *International Studies Review* 18:1, 2016, pp. 120-133. On nonimpunity, see Dapo Akande, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities,' *Journal of International Criminal Justice* 7:2, 2009, pp. 333-352; Adam Bower, 'Contesting the international criminal court: Bashir, Kenyatta, and the status of the nonimpunity norm in world politics,' *Journal of Global Security Studies*, 4:1, 2019, pp. 88-104.

<sup>3</sup> Norman J. Padelford, 'Regional organization and the United Nations,' *International Organization* 8:2, 1954, pp. 203-16; Francis O. Wilcox, 'Regionalism and the United Nations,' *International Organization* 19:3, 1965, pp. 788-811; Haas, Ernst B., 'The United Nations and regionalism,' *International Relations* 3:10, 1971, pp. 795-815; Andy W. Knight, 'Towards a subsidiarity model for peacemaking and preventive diplomacy: Making Chapter VIII of the UN Charter operational,' *Third World Quarterly* 17:1, 1996, pp. 31-52; David O'Brien, 'The search for subsidiarity: The UN, African regional organizations and humanitarian action,' *International Peacekeeping* 7:3, 2000, pp. 57-83.

have *localized* international principles. Other studies<sup>4</sup> have stressed the principle of partnership to underscore the importance of African contributions to peacemaking, underlying that subsidiarity entails the Security Council's primacy. However, the AU has interpreted subsidiarity as establishing the African priority.<sup>5</sup> So, the research question is: what explains AU primacy claims and interpretation of subsidiarity as African priority in peacemaking?

The central argument is that to grasp AU primacy claims and interpretation of subsidiarity as African priority in peacemaking requires clarifying the character of actors or agents Chapter VIII of the UN Charter, which deals with the role of regional agencies in maintaining global peace and security, anticipated. Chapter VIII envisaged localizing actors which would implement international norms, such as R2P and nonimpunity. However, the AU is a subsidiary actor and has made subsidiary norms to retain autonomy and defend Africa's vital security interests in international politics. The AU has created subsidiary norms on immunity, the right to protect, and continental sovereignty to claim primacy. The AU accepts

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<sup>4</sup> Arthur Boutellis, and Paul D. Williams, *Peace Operations, the African Union, and the United Nations: Toward More Effective Partnerships* (New York: International Peace Institute, 2013); Laurie Nathan, 'Will the lowest be first? Subsidiarity in peacemaking in Africa,' in Pamela Aall and Chester Crocker A., eds., *Minding the Gap: African Conflict Management in a Time of Change* (Waterloo: Centre for International Governance Innovation, 2016), pp. 157-70; Cedric de Coning, Linnéa Gelot, and John Karlsrud, eds., *The Future of African Peace Operations: From the Janjaweed to Boko Haram* (Uppsala; London: Nordiska Afrikainstitutet, 2016), pp. 139-40; Martin Welz, 'Cooperation and competition: United Nations–African Union relations,' in Stephen Aris, Aglaya Snetkov, and Andreas Wenger, eds. *Inter-organizational Relations in International Security: Cooperation and Competition* (Oxon: Routledge, 2018), pp. 54-70; Theresa Reinold, 'The promises and perils of subsidiarity in global governance: Evidence from Africa,' *Third World Quarterly* 40:11, (2019) pp. 2092-2107.

<sup>5</sup> African Union, Assembly Decision, Assembly/AU/Dec.140 (VIII), 30 January 2007, para. 2; African Union, Report of the Chairperson of the AU Commission on the Partnership Between the AU-UN on Peace and Security: Towards Greater Strategic and Political Convergence, PSC/PR/2. (CCCVII), 9 January 2012; African Union, Report of the Chairperson of the AU Commission on the AU-UN Partnership: The Need for Greater Coherence, PSC/AHG/3. (CCCXCVII), September 2013. For the broader policy debate on partnership and subsidiarity in the AU-UN relations in peacemaking, see United Nations, General Assembly, A/61/630, annex, 12 December 2006; United Nations, Report of the Secretary-General on the Relationship Between the United Nations and Regional Organizations, in particular the African Union, in the Maintenance of International Peace and Security, S/2008/186, April 2008; United Nations, Report of the Secretary-General on Strengthening the Partnership Between the United Nations and the African Union on Issues of Peace and Security in Africa, S/2016/780, 13 September 2016; United Nations, 'Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security,' 19 April 2017, <[https://unoau.unmissions.org/sites/default/files/signed\\_joint\\_framework.pdf](https://unoau.unmissions.org/sites/default/files/signed_joint_framework.pdf)>; African Union, 'Report on the Proposed Recommendations for the Institutional Reform of the African Union,' 29 January 2017, p. 11, <<https://au.int/en/documents/20170129/report-proposed-recommendations-institutional-reform-african-union>>; African Union, Assembly Decision, Assembly/AU/Dec.635(XXVIII), 30-31 January 2017, para. 5.

partnership if the UN complements African peacemaking efforts with the necessary resources. Unlike the AU, subregional agencies, like ECOWAS and the Intergovernmental Authority on Development (IGAD), are norm localizing actors. They do not make subsidiary norms but modify (localize) external principles to fit their peacemaking objectives.

This study's significance is to rectify current assumptions that the AU is or should be a norm localizing actor in the UN-led global order. The AU is a subsidiary agent whose subsidiary norms underpin substantive agency in global politics. African norms matter because the AU is a subsidiary actor exercising considerable agency. By subordinating African subsidiary norms to international principles, existing scholarships effectively deny Africa's real agency in peacemaking. This study makes two important contributions to knowledge by 1) identifying African subsidiary norms and 2) enriching the understanding of African agency in international relations.<sup>6</sup> First, this article establishes the conceptual thinking about African norms as norm subsidiarity in world politics, thereby closing an important gap in existing knowledge and underscoring the imperative to reconceive the subsidiarity principle as a progressively pragmatic concept rather than regressively predetermined at the UN level. Second, this paper deepens the knowledge of the idea of African agency, which stresses African actors' unique initiatives in all aspects of global affairs, including in peacemaking, so it advances knowledge by demonstrating the distinctiveness of African subsidiary norms as a vivid illustration of AU agency in international relations.

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<sup>6</sup> William Brown, 'A question of agency: Africa in international politics,' *Third World Quarterly* 33:10, 2012, pp. 1889-1908; Karen Smith, 'Africa as an agent of international relations knowledge,' in Scarlett Cornelissen, Fantu Cheru, Timothy M. Shaw, eds., *Africa and International Relations in the 21st Century* (London: Palgrave Macmillan, 2012), pp. 21-35; Danielle Beswick, and Anne Hammerstad, 'African agency in a changing security environment: Sources, opportunities and challenges,' *Conflict, Security and Development* 13:5, 2013, pp. 471-486; Sophie Harman, and William Brown, 'In from the margins? The changing place of Africa in international relations,' *International Affairs* 89:1, 2013, pp. 69-87; William Brown, and Sophie Harman, eds., *African Agency in International Politics* (Abingdon; England: Routledge, 2013), pp. 1-16; Jo-Ansie van Wyk, 'Africa in international relations: Agent, bystander or victim?' in Paul-Henri Bischoff, Kwesi Aning, and Amitav Acharya, eds., *Africa in Global International Relations: Emerging Approaches to Theory and Practice* (Oxon: Routledge, 2016), pp. 108-120; Lesley Blaauw, 'African agency in international relations: Challenging great power politics?' in Bischoff, Aning, and Acharya, *Africa in Global International Relations*, pp. 85-107.

This article implements two methods of analysis: the conceptual and qualitative approaches. Amitav Archaya's norm subsidiarity concept guides the interpretation of African subsidiary norms on immunity, the right to protect, and continental sovereignty. Also, William Brown's, Danielle Beswick's and Anne Hammerstad's conceptualizations of African agency in international relations translate AU agency within the UN-led global order, as specified in Chapter VIII of the UN Charter.<sup>7</sup> Margaret Hermann's content analysis through the qualitative method in international relations<sup>8</sup> informs the examination of African norm-setting and policy instruments to read African subsidiary norms. Primary data comprise decisions and communiqués of AU principal organs, like the Assembly and the Peace and Security Council.

This article has three main sections: The first section defines the principle of subsidiarity, highlights the main issues surrounding the application of subsidiarity, discusses the central distinctions between subsidiary and localizing actors in the international system, and clarifies the character of actors or agents Chapter VIII of the UN Charter anticipated. The second section analyses African norm-setting and policy documents and establishes the AU as a subsidiary agent and examines African subsidiary norms vis-à-vis the UN-crafted international principles. The third section stimulates the idea that subregional organizations, specifically ECOWAS and IGAD, are norm and institution localizers. The main purpose of part three is to illuminate and strengthen this article's central thesis: the AU is a subsidiary actor and prominently different from subregional agencies. The conclusion teases out this article's implications for knowledge, stressing that what occurs when the UN Security Council and the ICC seek to implement R2P and nonimpunity norms, but the AU asserts the immunity and continental sovereignty norms is 'norm collision' as opposed to 'norm contestation.'

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<sup>7</sup> Amitav Acharya, 'Norm subsidiarity and regional orders: Sovereignty, regionalism, and rule-making in the Third World,' *International Studies Quarterly* 55:1, 2011, pp. 95–123; Brown, 'A question of age'; Beswick and Hammerstad, 'African agency in a changing security environment.'

<sup>8</sup> Margaret Hermann, 'Content analysis,' in Audie Klotz and Deepa Prakash, *Qualitative Methods in International Relations: A Pluralist Guide* (London: Palgrave Macmillan, 2008), pp. 151-67.

## Subsidiarity, Agency, and the UN-led Global Order

The subsidiarity norm or principle is easy to understand. For instance, the Oxford English Dictionary defines subsidiarity as ‘the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more intermediate or local level.’ Similarly, the Cambridge English Dictionary defines subsidiarity as ‘the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country.’ In essence, subsidiarity involves empowering or recognizing the competence of a weaker or less powerful actor in a complex often hierarchical governance system. Despite this apparent definition and purpose, the application and practice of subsidiarity are not so evident. As Ann-Marie Slaughter put it:

[Subsidiarity] is a principle of locating governance at the lowest possible level—that closest to the individuals and groups affected by the rules and decisions adopted and enforced. Whether this level is local, regional, national, or supranational is an empirical question, dictated by considerations of practicability rather than a preordained distribution of power.<sup>9</sup>

Indeed, the function of subsidiarity is complex and often controversial and may require extensive negotiations to determine the locus of decision-making. As such, several studies have explored the uses and interpretations of subsidiarity.<sup>10</sup> For example, Kees van Kersbergen and Bertjan Verbeek studied subsidiarity in Europe as a governance norm undergoing contestation and refinement even after the European Union Member States adopted the principle at the

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<sup>9</sup> Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2009), p. 30.

<sup>10</sup> For a helpful survey of the history, interpretations, and uses of subsidiarity, see John F. Kenney, ‘The principle of subsidiarity,’ *The American Catholic Sociological Review* 16:1, 1955, pp. 31-6; Andrew Murray, ‘The principle of subsidiarity and the Church,’ *The Australian Catholic Record* 72:2, 1995, pp. 163–72; Andreas Follesdal, ‘Subsidiarity,’ *Journal of Political Philosophy* 6:2, 1998, pp. 190–218; Michelle Evans, and Augusto Zimmermann, eds., *Global Perspectives on Subsidiarity* (New York: Springer, 2014).

Maastricht summit.<sup>11</sup> The main point is that the significance of subsidiarity is context-specific, so each scholar must stress the governance setting and actors under examination.

Accordingly, the purpose of this section is to understand subsidiarity in the global order, as represented in the UN governance system established by the Charter, which governs relations between the UN and regional organizations. The UN-led global order stresses the Security Council's primary responsibility for maintaining international peace and security.<sup>12</sup> Essentially, the UN Charter predetermined subsidiarity at the global scale by stressing the Security Council's primacy. So, the vital interest in assessing Chapter VIII of the UN Charter, which deals with the role of 'regional arrangements and agencies' in maintaining global peace and security, is clarifying the idea of a *regional agency*, in the sense of determining the type of agents or actors the Charter envisioned. But first, to understand agent or actor types and characteristics and accurately interpret regional agency in the international system, the concepts of norm subsidiarity and localization are extremely helpful.

Amitav Acharya's concepts of norm localization and subsidiarity explain actors' agency in norm emergence and evolution. First, the localization model explains the interaction between local actors and foreign norms. The framework describes how local agents engage with, accept, or refine external norms and institutions. In particular, localization involves 'the active construction (through discourse, framing, grafting and cultural selection) of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices.' Crucially, the localization process can lead to changes to the institutional design of the localizing actor or the creation of 'new institutions mimicking existing institutional

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<sup>11</sup> Kees van Kersbergen, and Bertjan Verbeek, 'The politics of international norms: Subsidiarity and the imperfect competence regime of the European Union,' *European Journal of International Relations* 13:2, 2007, pp. 217-238.

<sup>12</sup> Padelford, 'Regional organization and the United Nations'; Wilcox, 'Regionalism and the United Nations'; Knight, 'Towards a subsidiarity model for peacemaking and preventive diplomacy'; O'Brien, 'The search for subsidiarity.'

design.’ Also noteworthy is that localization can ‘settle most cases of normative contestation’ through the adaption, by local actors, of foreign norms. Significantly, local actors rarely produce rules or institutions contradicting external norms or institutions. Instead, localizing agents strive to ‘strengthen, not replace, existing institutions’ and accept ideas and programs that promote their goals, ‘without fundamentally altering existing social identity.’ Finally, local actors who engage in the ‘wholesale’ localization process accept foreign norms and institutions without any modification.<sup>13</sup>

Second, and more important for this study, Amitav Acharya describes norm subsidiarity as ‘*a process whereby local actors create rules with a view to preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors.*’ In other words, it involves how local agents produce norms, rules, and institutions to counter foreign ideas and preserve their independence because they are concerned about control by stronger external actors. Importantly, norm subsidiarity is primarily involved with ‘relations between local actors and external powers, in terms of the former’s fear of domination by the latter.’ Regional powers, orders, actors, or agents, like the EU and the AU, are more likely to engage in norm subsidiarity. As the central argument of this article, the African immunity, the

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<sup>13</sup> Amitav Acharya, ‘How ideas spread: Whose norms matter? Norm localization and institutional change in Asian regionalism,’ *International Organization* 58:2, 2004, pp. 239-275, pp. 239-254. See also Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (Ithaca; London: Cornell University Press, 2009). For studies on norm localization and the AU and subregional organizations, see Paul D. Williams, ‘From non-intervention to non-indifference: The origins and development of the African Union’s security culture,’ *African Affairs* 106:423, 2007, pp. 253-279; Aarie Glas, ‘African Union security culture in practice: African problems and African solutions,’ *International Affairs* 94:5, 2018, pp. 1121-1138; Aarie Glas, and Emmanuel Balogun, ‘Norms in practice: People-centric governance in ASEAN and ECOWAS,’ *International Affairs*, 96:4, 2020, pp. 1015–32. For some insightful critiques of the norm localization model, see David Capie, ‘Localization as resistance: The contested diffusion of small arms norms in Southeast Asia,’ *Security Dialogue* 39:6, 2008, pp. 637-658; Daisuke Minami, ‘Lost in translation: Problematising the localization of transnational activism,’ *European Journal of International Relations* 25:2, 2019, pp. 511-537; Lisbeth Zimmermann, ‘Same same or different? Norm diffusion between resistance, compliance, and localization in post-conflict states,’ *International Studies Perspectives* 17:1, 2016, pp. 98-115; Lisbeth Zimmermann, ‘More for less: The interactive translation of global norms in postconflict Guatemala,’ *International Studies Quarterly* 61:4, 2017, pp. 774-785. For foundational understandings of norm evolution and contestation in international politics, see Martha Finnemore, and Kathryn Sikkink, ‘International norm dynamics and political change,’ *International Organization* 52:4, 1998, pp. 887–917; Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018).



right to protect, and continental sovereignty norms are subsidiary norms that the AU has created to defend Africa’s vital security interests against the UN Security Council and the ICC endeavours to enforce R2P and nonimpunity norms.

Notably, a local actor may engage in norm localizing and subsidiary behaviour and then becomes ‘complementary’ or ‘run in tandem’<sup>14</sup> in the system. In some senses, the actor comes across as a double agent in the international order, in the sense of implementing foreign principles and creating subsidiary norms (see the conclusion below for more thoughts on the idea of the AU playing a double agency). Table I provides a visual summary of what this article considers as the three most significant behavioural differences between subsidiary and localizing actors in Amitav Archaya’s concepts.

Table I. Behavioural Differences between Subsidiary and Localizing Agents

<b>Subsidiary Agents</b>	<b>Localizing Agents</b>
Develop local norms and institutions	Accept and modify external norms and institutions
Reject external norms and institutions	Take external norms and institutions
Export local norms and institutions	Import external norms and institutions

*Clarifying Regional Agency*

Now, applying the norm subsidiarity and localization concepts to the UN-led global order, this subsection establishes the type and character of agents the system anticipated to assist the Security Council in maintaining international peace and security. For clarity, Chapter

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<sup>14</sup> Acharya, ‘Norm subsidiarity and regional orders,’ pp. 97-9. The emphasis is in the original text.

VIII of the UN Charter authorizes ‘regional arrangements and agencies,’ such as the EU, the AU, ECOWAS, and IGAD, to undertake ‘appropriate regional action’ that is ‘consistent with the principles and purposes of the United Nations.’ Scholars like Norman Padelford, Francis Wilcox, and Ronald Yalem have indicated that subsidiarity in the global order refers to the role of regional organizations in advancing the Security Council’s mandate to sustain global stability.<sup>15</sup> The presumption is that regional organizations are localizing agents of the UN and would implement if modified versions of global norms and principles designed to maintain and support international order. The assumption underscores the realization that the universalism in peace and security management embedded in Chapter VII of the UN Charter and invested in the Security Council may be insufficient in tackling myriad threats to the world order.

The Cold War rendered subsidiarity in the context of regionalism redundant. Still, the UN Secretary-General, Boutros Boutros-Ghali, revived the vision in the 1992 ground-breaking report on making global security governance through the Security Council more efficient. Boutros-Ghali placed regional agencies at the core of the post-Cold War international security strategy, stressing that:

regional arrangements or agencies in many cases possess a potential that should be utilized in serving the functions covered in this report: preventive diplomacy, peace-keeping, peacemaking and post-conflict peacebuilding. Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security.<sup>16</sup>

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<sup>15</sup> Padelford, ‘Regional organization and the United Nations,’; Wilcox, ‘Regionalism and the United Nations.’ In particular, Ronald Yalem focuses on explaining the implications of rising regional organizations for the stability or instability of the international system, Ronald J. Yalem, ‘Regionalism and world order,’ *International Affairs* 38:4, 1962, pp. 460-471.

<sup>16</sup> United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the summit meeting of the Security Council, A/47/277 - S/24111, 17 June 1992, para. 64.

Invariably, regional organizations are essential agents of the Security Council, contributing to creating ‘a new global order’ and addressing the post-Cold War’s ‘global disorder.’<sup>17</sup> The consensus is that measures for maintaining international security must centre in the regions without qualifying the Security Council’s primacy.

Within the UN system, partnership with regional organizations in peacemaking entail control or, as the Security Council stated, ‘the requirement for oversight by the Security Council for operations authorized by the Security Council and under the Security Council’s authority consistent with Chapter VIII of the Charter.’<sup>18</sup> In essence, the Security Council’s dominance is inherent in the structure of the international order, reflecting the realist system of tangible power and preponderance of dominant actors’ ideas and obscures and marginalizes weaker actors’ beliefs, such as African actors.<sup>19</sup> The UN-based international order is hierarchical, so the meaning of subsidiarity must be understood in that context, even though it contrasts with the general understandings discussed above.<sup>20</sup> Here, the regional actor is relevant to the extent that it serves the UN principles. In other words, the concept of regional agency in Chapter VIII is about localizing global norms and principles, like R2P and nonimpunity.

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<sup>17</sup> David B. Dewitt, David G. Haglund, and John J. Kirton, eds., *Building A New Global Order: Emerging Trends in International Security* (Toronto; New York: Oxford University Press, 1993); Knight, ‘Towards a subsidiarity model for peacemaking and preventive diplomacy,’ p. 45; O’Brien, ‘The search for subsidiarity.’ On the post-Cold War global security architecture, see Barry Buzan, and Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge: Cambridge University Press, 2003); Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge: Cambridge University Press, 1996), chap. 2.

<sup>18</sup> United Nations, Security Council Resolution, S/RES/2320 (2016), 8 November 2016, para. 6.

<sup>19</sup> William I. Zartman, ‘Africa as a subordinate state system in international relations,’ *International Organization* 21:3, 1967, pp. 545-564; Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw Hill, 1979); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred Knopf, 1985); Ian Taylor, and Paul Williams, eds., *Africa in International Politics* (Oxon: Routledge, 2004).

<sup>20</sup> In Europe, the Member States of the EU adopted subsidiarity for the purpose constraining the EU’s power and ambition, see Nicholas Emiliou, ‘Subsidiarity: An effective barrier against ‘the enterprises of ambition’?’ *European Law Review* 17:5, 1992, pp. 383–407, p. 384; Kees van Kersbergen, and Bertjan Verbeek, ‘The politics of subsidiarity in the European Union,’ *Journal of Common Market Studies* 32:2, 1994, pp. 215–36, p 216; Alain Delcamp, *Definition and Limits of the Principle of Subsidiarity: Report Prepared for the Steering Committee on Local and Regional Authorities* (Strasbourg: Council of Europe Press, 1994), p. 24; Christoph Henkel, ‘The allocation of powers in the European Union: A closer look at the principle of subsidiarity,’ *Berkeley Journal of International Law* 20, 2002, pp. 359–85, p. 360; Kersbergen, and Verbeek, ‘The politics of international norms.’

## *The Agency Scholarship Response*

Scholarship on agency in international relations emphasizes different forms of power and underlines less powerful actors' ability to cause or contribute to systemic or structural change. This notion of power and influence is often found in the constructivist social thinking about the structure of the international system.<sup>21</sup> From the constructivist viewpoint of power and agency, scholarship on the concept of African agency in global politics stresses African actors' capabilities despite international structures constraining or obscuring their actions. William Brown described the research agenda, noting that the idea of African agency facilitates the engagement with the 'narratives of Africa that present the entire continent as perpetual victim and lacking political initiatives.' Danielle Beswick and Anne Hammerstad explained that the concept of African agency involves the 'assumption of African actors wielding real agency – making decisions based on their own imaginations and perceptions of aims and interests.' As this article argues, Africa's 'real agency' is evident in the African norms that advance African concerns and objectives. Brenden Vickers's essay underpins the empirical angle, demonstrating that 'African countries are no longer passive players in international relations' because 'African Group has been far more active and assertive' in multilateral negotiations on security governance.<sup>22</sup> This understanding of agency informs this article's analysis of African norm-setting and policy instruments to highlight why African norms matter and explain AU's resistance to the enforcement of international norms and interpretation of subsidiarity as grounding African primacy in peacemaking.

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<sup>21</sup> Martin Hollis, and Steve Smith, 'Two stories about structure and agency,' *Review of International Studies* 20:3, 1994, pp. 241-251; Ruggie, John Gerard, 'What makes the world hang together? Neo-utilitarianism and the social constructivist challenge,' *International Organization* 52:4, 1998, pp. 855-885; Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Michael Barnett, and Raymond Duvall, 'Power in international politics,' *International Organization* 59:1, 2005, pp. 39-75.

<sup>22</sup> Brown, 'A question of agency,' p. 1904; Beswick and Hammerstad, 'African agency in a changing security environment,' p. 480; Brenden Vickers, 'Africa and the rising powers: Bargaining for the 'marginalized many',' *International Affairs* 89:3, 2013, pp. 673-693.

## The African Subsidiary Agent, and Norms

This section operationalizes the norm subsidiarity and African agency concepts to study African subsidiary norms on immunity, the right to protect, and continental sovereignty and translate AU's interpretation of subsidiarity and primacy claims. It examines African norm-setting instruments and policy documents to establish that the AU is Africa's subsidiary agent who created subsidiary norms to protect the continent's vital security interests and advance African priorities. Current empirical studies<sup>23</sup> seeking to grasp the primacy dispute have captured the complexity of the problem. In particular, Laurie Nathan's discussion paints a clearer picture of the challenges:

The African Union's position is contradictory, promoting subsidiarity in terms of AU-UN relations, but not in terms of AU-REC relations, whereas the United Nations has an ambivalent stance, content to support the maxim of "African solutions to African problems" unless a particular conflict is of great concern to the UNSC [UN Security Council], in which case the primacy of the Council prevails. It is only the RECs [Regional Economic Communities] that wholeheartedly endorse the principle.<sup>24</sup>

The conceptual explanation of these seemingly apparent contradictions in AU behaviour requires a determination of actor or agent type, and this is possible only through the implementation of the norm subsidiarity model. So, my focus on African norm-setting and policy instruments is to gain a conceptual understanding of AU normative behaviour and translate the primacy claims and interpretation of subsidiarity as the African priority.

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<sup>23</sup> Bjørn Møller, *The Pros and Cons of Subsidiarity: The Role of African Regional and Subregional Organisations in Ensuring Peace and Security in Africa* (Copenhagen: DIIS, 2005); Michell Ndiaye, 'The relationship between the AU and the RECs/RMs in relation to peace and security in Africa: Subsidiarity and inevitable common destiny,' In De Coning, Gelot, and Karlsrud, *The Future of African Peace Operations*, pp. 52–64. See also Darkwa, 'The strategic relationship between the African Union and its partners,' in De Coning, Gelot, and Karlsrud, *The Future of African Peace Operations*, 65–75; Laurie Nathan, 'How to manage interorganizational disputes over mediation in Africa,' *Global Governance* 23:2, 2017, pp. 151-162.

<sup>24</sup> Nathan, 'Will the lowest be first? pp. 166-7.

## *The AU as Subsidiary Agent*

The AU is Africa's premier regional organization. It occupies a unique position in the global order, bestriding the UN and eight African subregional organizations known as Regional Economic Communities (RECs) and two Regional Mechanisms for Conflict Prevention, Management, and Resolution.<sup>25</sup> This prime position carries the dual responsibility for making African norms through instruments and policies and asserting and defending such norms in Africa's relations with the international community, including the UN. The AU also has a responsibility to coordinate the RECs' policies to align with African norms.

In fulfilling these responsibilities, the AU has created subsidiary norms on immunity, the right to protect, and continental sovereignty, and adopted policies asserting these norms in joint peacemaking efforts with the UN Security Council and the ICC. This analysis shows that the AU designed these subsidiary norms to advance Africa's interests and concerns, different from UN principles. Specifically, the AU created the right to protect in article 4(h) of the Constitutive Act and rejected the R2P principle.<sup>26</sup> Also, the AU created the Heads of State and Government immunity norm in the Malabo Protocol contrasting with the international nonimpunity norm provided in the Rome Statute. Finally, the AU asserted the continental sovereignty norm to underpin the legitimate authority for decision-making on interventions contradicting the UN Security Council's primary role in maintaining international peace and security. The deliberate and purposeful construction of these three vital African subsidiary norms indisputably established the AU as a subsidiary actor and demonstrate original agency

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<sup>25</sup> The RECs are the Arab Maghreb Union, the Community of Sahel-Saharan States, the Common Market for Eastern and Southern Africa, the East African Community, the Economic Community of Central African States, the Economic Community of West African States, the Inter-Governmental Authority on Development, and the Southern African Development Community. The RMs are the East Africa Standby Brigade Coordination Mechanism, and the North Africa Regional Capability, see African Union, *Memorandum of Understanding on Cooperation in the Area of Peace and Security Between the African Union, the Regional Economic Communities, and the Coordinating Mechanisms of the Regional Standby Brigades Eastern Africa and Northern Africa* (Addis Ababa: African Union Commission, 2008), hereafter refer to as the Memorandum of Understanding.

<sup>26</sup> For a detailed discussion of this point, see Ifediora, 'Regional multilateralism.'

in international politics and peacemaking. Significantly, the immunity, the right to protect and continental sovereignty norms underline the norm subsidiary behaviour.

Africa's norm-setting instruments are organized under what the AU Assembly<sup>27</sup> described as 'a Pan-African Architecture on Governance' based on 'African Shared Values.'<sup>28</sup> The Assembly defined African Shared Values as 'democratic governance, popular participation, the rule of law, human and peoples' rights and sustainable socioeconomic development.' The objectives are to ensure 'greater synergy between peace and security matters and governance and democracy, [and] that developments in the terrain of shared values feature prominently in'<sup>29</sup> deliberations on peace and security interventions.

The Pan-African Architecture on Governance (AGA) has three pillars: 1) the norm-setting instruments, such as the Constitutive Act, the Protocol Establishing the Peace and Security Council, Protocol on the Amendment to the African Court on Human and People's Rights, the African Model Anti-Terrorism Law, the Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, and the African Charter on Democracy, Elections, and Governance; 2) the norm implementing institutions, including the Assembly, the Peace and Security Council, the African Union Commission, the RECs, the African Court, the African Commission on Human and People's Rights, the African Peer Review Mechanism, the New Partnership for Africa's Development, Planning and Coordinating Agency; and 3) the norm interaction mechanisms, involving the African Governance Platform like civil society groups, non-governmental organizations, and youth groups. AGA has five tangible clusters, 1) democracy, 2) human rights and transitional justice, 3) governance, 4) constitutionalism and the rule of law, and 5) humanitarian affairs.

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<sup>27</sup> The Assembly is the highest decision-making organ in the AU system and comprises all the 55 Heads of State and Government of the Member States.

<sup>28</sup> African Union, Assembly Decision, Assembly/AU/Dec.304(XV), 27 July 2010, para. 1.

<sup>29</sup> African Union, Assembly Declaration, Assembly/AU/Decl. 1(XVI), 30-31 January 2011, para. 4.

In addition, the Protocol establishing the Peace and Security Council (the Protocol) 2002 identified five central norm implementing institutions: The Peace and Security Council, the AU organ in charge of the day-to-day responses to threats to regional peace and security, the AU Commission, or the Secretariat; the African Standby Force; the Peace Fund; the Panel of the Wise; and the Continental Early Warning System. These institutions, including the RECs, are broadly called African Peace and Security Architecture (APSA), the dynamic, continent-wide blueprint for peacemaking.<sup>30</sup>

The Protocol is the African norm-setting instrument that established in article 16 AU primacy over peace and security on the continent, and article 7 mandates the Peace and Security Council and the Commission to ‘develop policies and action required to ensure that any external initiative in the field of peace and security on the continent takes place within the framework of the Union’s objectives and priorities.’ These provisions empower the AU to create norms subordinating foreign principles and clarify the Assembly’s decision that the initial framework on relations with the UN ‘constitutes a first concrete step towards meeting the priorities of the African Union.’<sup>31</sup> Significantly, the institutional mandate and the Assembly’s policy action demonstrate a claim to the primacy of African norms in peacemaking, portraying the AU as a subsidiary actor.

Specifically, article 17 of the Protocol addresses relations with the UN. It acknowledges the Security Council’s ‘primary responsibility for the maintenance of international peace and security,’ and provides that:

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<sup>30</sup> For more discussion of APSA, see Stephan Kingebiel, ‘Africa’s new peace and security architecture: Converging the roles of external actors and African interests,’ *African Security Studies* 14:2, 2005, pp. 35-44; David J. Francis, *Uniting Africa: Building Regional Peace and Security Systems* (London: Routledge, 2006); Ulf Engel, and João Gomes Porto, eds. *Africa’s New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (London: Ashgate, 2010), pp. 1-12; Alex Vines, ‘A decade of African peace and security architecture,’ *International Affairs* 89:1, 2013, pp. 89-109.

<sup>31</sup> African Union, Assembly Decision, Assembly/AU/Dec.140 (VIII), 2007, para. 2.



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

This provision shows that the AU envisages a complementary partnership where the UN supplies resources advancing African 'priorities' in the context of peacemaking or maintaining international peace and security.<sup>32</sup> In essence, article 17 illuminates AU's interpretation of 'cooperation based on complementarity' in the latest framework for partnership with the UN,<sup>33</sup> which is that the UN complements or supports Africa's priorities. The AU policy actions intended to subordinate global principles to African norms. Notably, the Assembly does not contest the Security Council's primary responsibility for international peace and security, but it does assert the primacy of African norms in peacemaking, demonstrating norm subsidiarity.

The Peace and Security Council has further developed the concept of complementarity in the common African position on the review of peace operations, adding that 'partnership on the basis of division of labour' is the guiding principle of subsidiarity. The Council underscored African 'priority-setting,' noting that the AU and the UN 'need to engage in dialogue to establish a mutually agreed division of labor to foster coherence and limit competition.'<sup>34</sup> The outcome of that dialogue is the current framework for partnership, which observed that 'the

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<sup>32</sup> For more details on the African Union's interpretation of partnership with the United Nations, see African Union, 'Report of the Chairperson of the AU Commission on the partnership between the AU-UN on peace and security: Towards greater strategic and political convergence, PSC/PR/2. (CCCVII), 9 January 2012; African Union, 'Report of the Chairperson of the AU Commission on the AU-UN partnership: The need for greater coherence, PSC/AHG/3. (CCCXCVII), September 2013.

<sup>33</sup> United Nations, 'Joint United Nations-African Union framework for enhanced partnership in peace and security,' p .1

<sup>34</sup> African Union, Common African Position on the UN review of peace operations, PSC/PR/2(DII), 29 April 2015, para. 6. For a helpful discussion of African common positions as agency, see Siphamandla Zondi, 'Common positions as African agency in international negotiations: An appraisal,' in Brown and Harman, *African Agency in International Politics*, pp. 33-47.

United Nations and African Union recognize that their efforts must be combined in a complementary and mutually-reinforcing manner [and] a clear division of labour and consultation are essential for implementation.’<sup>35</sup> Importantly, the Peace and Security Council interpreted ‘division of labour’ as reinforcing African priorities, noting that ‘The AU has a very limited in-house capacity to support its own missions and will therefore have to rely on outsourcing and partnerships.’<sup>36</sup> The phrase ‘its own missions’ refers to African initiatives, which the UN must advance. The AU policy behaviour indicates no intention of following or implementing international norms that contradict African priorities, and the AU has consistently pursued African primacy, exhibiting subsidiary agency in the global order.

Three significant normative actions by the AU provide concrete evidence of norm subsidiarity and real agency in the international order. These are 1) the Heads of State and Government immunity, 2) the right to protect as enshrined in article 4(h), and the Assembly decision asserting continental sovereignty. The first two norm-setting instruments parallel UN norm-making mechanisms, but the norms they created are substantially different, and the continental sovereignty policy is an unprecedented claim in the international system, as there is no comparable assertion by a nonstate actor. Let us consider each norm in some detail.

### *The Immunity Norm*

The Assembly adopted the Protocol on the Amendment to the Statute of African Court of Justice and Human Rights (the Malabo Protocol) in 2014, creating immunity for serving African Heads of State and Government. The Malabo Protocol is not yet in force, as it awaits ratification by at least fifteen of the AU Member States. Pertinently, article 46 provides that:

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<sup>35</sup> United Nations, ‘Joint United Nations-African Union framework for enhanced partnership in peace and security,’ p. 3.

<sup>36</sup> African Union, Common African Position on the UN Review of Peace Operations, para. 25.

No charges shall be commenced or continued before the Court against any serving AU Head of State and Government, or anybody acting or entitled to act in such capacity, other senior state officials based on their functions, during their tenure of office.

The Malabo Protocol parallels the Rome Statute adopted by the UN Member States in 1998 and entered into force in 2000 to the extent that both Statutes broadly seek to prevent and punish core crimes, such as genocide and aggression, war crimes, and crimes against humanity. The crucial difference is what is now known as the nonimpunity norm enshrined in article 27 of the Rome Statute, which states that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Both Statutes have similar objectives but contradictory norms that cause the collision. Customary international law recognizes the validity of the immunity norm relating to sitting senior government officials, but the pursuit of justice irrespective of the official status of the persons involved has taken precedence since the Rome Statute enshrined the nonimpunity, although the new international principle has generated robust academic exchange over its applicability.<sup>37</sup> The significance of the Heads of State and Government and other senior government officials immunity norm in Africa is that it demonstrates norm subsidiarity and

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<sup>37</sup> Steffen Wirth, 'Immunity for core crimes? The ICJ's judgment in the Congo v. Belgium Case,' *European Journal of International Law* 13:4, 2002, pp. 877-893; Akande, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities'; Paola Gaeta, Paola, 'Does President Al Bashir enjoy immunity from arrest?' *Journal of International Criminal Justice* 7:2, 2009, pp. 315-332; Dapo Akande, and Sangeeta Shah, 'Immunities of state officials, international crimes, and foreign domestic courts,' *European Journal of International Law* 21:4, 2010, pp. 815-852.

AU subsidiary normative behaviour, and explains why the AU resisted the UN Security Council and the ICC efforts to enforce nonimpunity norm.<sup>38</sup> The rationale for making the immunity norm is instructive.

The Peace and Security Council explained that the immunity norm was created because of African leaders' concerns that the UN Security Council-mandated investigations in Sudan, as well as the ICC prosecution in Kenya, may jeopardize African-led peace efforts and transitional administrations in societies emerging from war and violent conflict. Thus, the AU requested the UN Security Council's cooperation in implementing the norm, arguing that:

The UN should support the AU in the latter's efforts to articulate more fully the intersection and prioritising of peace, justice and reconciliation as it obtains on the African Continent, and should view the AU's efforts as a contribution to the global search for principled responses to the challenges of the new conflicts the world faces. The UN should support the AU's efforts to enhance its capacity to prosecute and adjudicate serious crimes. The UNSC should treat with the seriousness they deserve the AU's decisions and requests to defer cases before the ICC in order to ensure that peace efforts are not undermined.<sup>39</sup>

Here, the AU opposed the Security Council and the ICC enforcement actions in Sudan and Kenya and claimed primacy in decision-making. The African subsidiary immunity norm prioritizes peace over justice, an idea the AU Commission managed to insert in the new framework for partnership with the UN in the following language: 'Cooperation in response to conflict will be based on agreed principles, including the primacy of political solutions.'<sup>40</sup>

In sum, AU's normative actions in creating and advancing the African subsidiary immunity norm underscore subsidiarity behaviour and agency in the UN-led global order, not

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<sup>38</sup> For a helpful discussion of the difficult relations between the ICC and the AU in the context of norm contestation, see Bower, 'Contesting the international criminal court.'

<sup>39</sup> African Union, Common African Position on the UN Review of Peace Operations, para. 28.

<sup>40</sup> United Nations, 'Joint United Nations-African Union framework for enhanced partnership in peace and security,' p. 5.

a localizing behaviour which may lead to the localization of the international nonimpunity principle. Importantly, although the immunity norm is backward-looking, it matters because it explains norm subsidiarity and AU agency in international politics, and why AU interpreted the subsidiarity principle as African primacy in peacemaking.

### *The Right to Protect Norm*

The Organization of African Unity (OAU), the predecessor to the AU, adopted the Constitutive Act of the AU in 2000. Article 4(h) establishes ‘The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity,’ so it is a substantial subsidiary action and agency in human rights protection.<sup>41</sup> While ‘the right to intervene’ or the African subsidiary right to protect norm share similar objectives with R2P, it is a distinct human rights protection regime of international security governance and basis of AU primacy claim.<sup>42</sup>

The right to protect is a part of the OAU reforms leading to the formation of the AU. Specifically, the Assembly agreed to create the right to protect following Mu’ammār Al-Qadhāfi’s proposal for an African state endowed with continental sovereignty during the Sirte summit on OAU reforms in 1999. In other words, the right to protect was a compromise between African leaders who supported a continental government with sovereignty and those who wanted an empowered regional organization with an inherent right to intervene.<sup>43</sup> In

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<sup>41</sup> Corinne A.A. Packer, and Donald Rukare, ‘The new African Union and its constitutive act,’ *American Journal of International Law* 96:2, 2002, pp. 365-379; Ben Kioko, ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention,’ *International Review of the Red Cross* 85:852, 2003, pp. 807-826; Ademola Abass, and Mashood A. Baderin, ‘Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union,’ *Netherlands International Law Review* 49:1, 2002, pp. 1-38.

<sup>42</sup> For fuller discussion, see Ifediora, ‘Regional multilateralism.’

<sup>43</sup> Kioki, ‘The right of intervention under the African Union’s Constitutive Act,’ pp. 811-2; Said Djinnit, ‘The case for updating the African Union policy on unconstitutional changes of government,’ Policy and Practice Brief #054, ACCORD, October 2021, <<https://www.accord.org.za/publication/case-for-updating-au-policy-unconstitutional-changes-government/>> accessed 5 November 2021.

essence, the right to protect norm is the exceptional outcome of African negotiations about empowering the AU with legal and legitimate authority to use force for human rights protection. Thus, the right to protect is the African subsidiary norm on protecting populations from atrocities, demonstrating originality, exceptional norm-making ability, and agency. From this perspective, the view that the AU is a norm-entrepreneur is noteworthy.<sup>44</sup>

Following the UN General Assembly endorsement of the R2P norm five years later, some studies have argued that article 4(h) localized or enshrined R2P; others have subsumed the African subsidiary right to protect norm under the R2P principle, and others have interpreted article 4(h) as African agency in R2P.<sup>45</sup> These studies have assumed that the AU is or should be a localizing agent in the global order, which justified subordinating the African subsidiary right to protect norm to the R2P principle. However, Thomas Weiss and Martin Welz have underlined the crucial distinction, noting that article 4(h) is ‘Africa’s home-grown version of the responsibility to protect.’<sup>46</sup> Their perspective underscores the AU agency.

The parallel between the right to protect and R2P is that both norms seek to prevent atrocities and protect human rights, but the differences are hugely relevant for understanding subsidiarity and AU agency in peacemaking. For example, global actors are still contesting R2P and contemplating its robustness, so the eventual outcome is yet to be determined.<sup>47</sup>

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<sup>44</sup> Tim Murithi, ‘The African Union as a norm entrepreneur: The limits of human protection and mass atrocities prevention,’ *Global Responsibility to Protect* 8:2-3, 2016, pp. 227-248.

<sup>45</sup> Williams, ‘From non-intervention to non-indifference’; Murithi, ‘The responsibility to protect, as enshrined in article 4 of the Constitutive Act of the African Union’; Williams, ‘The ‘responsibility to protect’; Mwanasali, Musifiky, ‘The African Union, the United Nations, and the responsibility to protect: towards an African intervention doctrine,’ *Global Responsibility to Protect* 2:4, 2010, pp. 388-413; Kuwali and Viljoen, *Africa and the Responsibility to Protect*; Aning and Edu-Afful, ‘African Agency in R2P’; Sarkin, Jeremy, ‘Is the African Union's position on non-indifference making a difference? The implementation of the responsibility to protect (R2P) in Africa in theory and practice,’ *Journal of African Union Studies* 5:1, 2016, pp. 5-37.

<sup>46</sup> Thomas G. Weiss, and Martin Welz, ‘The UN and the African Union in Mali and beyond: a shotgun wedding?’ *International Affairs* 90:4, 2014, pp. 889-905, p. 891.

<sup>47</sup> Cristina G. Badescu, and Thomas G. Weiss, ‘Misrepresenting R2P and advancing norms: An alternative spiral?’ *International Studies Perspectives* 11:4, 2010, pp. 354-374; Amitav Acharya, ‘The R2P and norm diffusion: Towards a framework of norm circulation,’ *Global Responsibility to Protect* 5:4, 2013, pp. 466-479; Natalie Zähringer, ‘Norm evolution within and across the African Union and the United Nations: The Responsibility to Protect (R2P) as a contested norm,’ *South African Journal of International Affairs* 20:2, 2013),

Conversely, besides implementation challenges, like the lack of capacity or will,<sup>48</sup> there is no contest over the normative character of the right to protect.

From the norm subsidiarity viewpoint, AU policy is that the right to protect is the only legitimate basis for the use of force to protect human rights in the international system, so article 4(h) underpins the Assembly's primacy claims. The AU policy compares article 4(h) to article 51 of the UN Charter, not R2P – the former deals with the protection of human rights and the latter with self-defence, thus:

With regard to the use of force, it is important to comply scrupulously with the provisions of Article 51 of the UN Charter, which authorise the use of force only in cases of legitimate self-defence. In addition, the Constitutive Act of the African Union, in its Article 4 (h), authorises intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act, should be prohibited.<sup>49</sup>

Here, the AU is explaining the basis for primacy claims in the sense that given that the African subsidiary right to protect norm is the only legal ground for the use of force for human protection, the Assembly has priority in decision-making. This policy explains why the AU opposed the UN Security Council-authorized NATO intervention in Libya under Chapter VII of the UN Charter and insisted on mediation and diplomacy. Crucially, the policy shows norm exportation, a unique characteristic of subsidiary actors. So, the right to protect and R2P are parallel norms on international security governance, as depicted in Figure I.

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pp. 187-205; Jennifer M. Welsh, 'Norm robustness and the responsibility to protect,' *Journal of Global Security Studies* 4:1, 2019, pp. 53-72.

<sup>48</sup> Jakkie Cilliers, and Kathryn Sturman, 'The right intervention: Enforcement challenges for the African Union,' *African Security Studies* 11:3, 2002, pp. 28-39; Dan Kuwali, 'The conundrum of conditions for intervention under article 4 (h) of the African Union Act,' *African Security Studies* 17:4, 2008, pp. 89-111.

<sup>49</sup> African Union, 'The common African position on the proposed reform of the United Nations: "The Ezulwini Consensus",' Ext/EX.CL/2 (VII), 7-8 March 2005, p. 6. The Assembly has repeatedly endorsed the Ezulwini Consensus since 2006, including recently, see African Union, Assembly Decision, Assembly/AU/Dec.766 (XXXIII), 09-10 February 2020, para. 7.

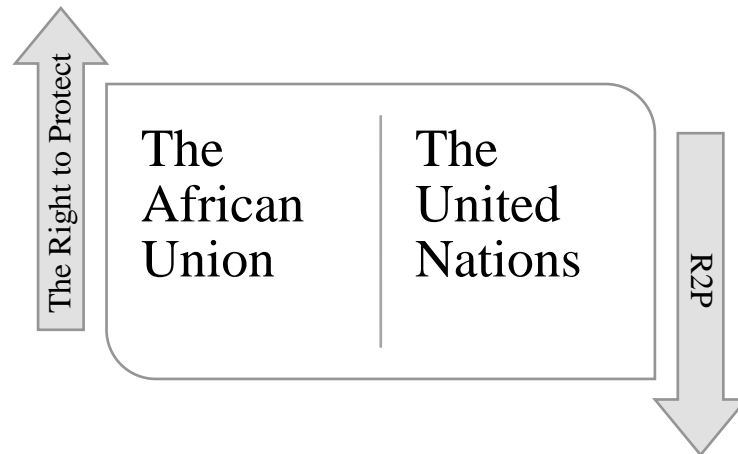


Figure I. Parallel International Norms on Human Rights Protection

As such, the AU has rejected the R2P norm as a legal foundation for using force to protect human rights. The AU policy qualifies R2P with the state sovereignty norm, noting that ‘It is important to reiterate the obligation of states to protect their citizens, but this should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states.’<sup>50</sup> The AU policy position indicates norm rejection, not an endorsement,<sup>51</sup> subordination, contestation, or localization of R2P. The right to protect norm matters because it underpins AU subsidiarity and agency in international affairs and explains the primacy claim.

### *The Continental Sovereignty Norm*

As mentioned in the preceding subheading, the African subsidiary continental sovereignty norm is embedded in the right to protect, which describes a compromise between African leaders who argued for the American style of government and those who insisted on reforming the OAU and creating a stronger continental union with the right to intervene in the Member States to protect human rights. The compromise did not extinguish the ambition and vision of continental sovereignty but only delayed the Assembly’s official claim till 2014. With

<sup>50</sup> African Union, The Ezulwini Consensus, p. 6.

<sup>51</sup> Alex J. Bellamy, ‘Whither the responsibility to protect? Humanitarian intervention and the 2005 World Summit,’ *Ethics & International Affairs* 20:2, 2006, pp. 143-169, pp. 157-162.



the sole intention to create a superstate on the African continent, the idea of continental sovereignty is like state sovereignty to the extent that power is consolidated in the Assembly and external actors, such as the UN Security Council, must respect that authority. The purpose was to make the Assembly the only legitimate and legal authority for decision-making on military interventions, a direct challenge to the UN Security Council powers under Chapter VII of the UN Charter whose dominant authority over international peace and security had been established since 1945.<sup>52</sup>

Today, the African subsidiary continental sovereignty norm underpins AU primacy claims over decision-making on all aspects of intervention or peacemaking, although the Assembly formally asserted the principle in 2014 in the context of enforcing the African subsidiary immunity norm relating to the ICC investigations and prosecutions in Sudan and Kenya. The Assembly had made several unconsidered requests to the UN Security Council and the ICC Prosecutor to defer or suspend or terminate the proceedings against Presidents Omar al-Bashir and Uhuru Kenyatta and Deputy President William Ruto. In the history-making decision, the Assembly underlined:

the need for the UN Security Council to reserve a timely and appropriate response to requests made by the AU on deferral in accordance with Article 16 of the Rome Statute under Chapter VII of the UN Charter so as to avoid the sense of lack of consideration of a whole continent.

Otherwise, the Assembly decided that:

the African Union and its Member States, in particular the African States Parties to the Rome Statute, reserve the right to take any further decisions or measures that may be necessary in order to preserve and

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<sup>52</sup> For a broader discussion of continental sovereignty, see Ifediora, ‘Regional multilateralism.’

safeguard peace, security and stability, as well as the dignity, *sovereignty and integrity of the continent*.<sup>53</sup>

There are two main points in the above passage. First, I described Assembly's decision as *history-making* to underscore that the idea of continental sovereignty is an unprecedented claim by a non-state actor in the international system and raises several significant theoretical and practical questions, albeit outside the remit of the current article. It suffices to say that some scholars have been anticipating the EU would be the first non-state actor to declare sovereignty.<sup>54</sup> Second, and more importantly, the claim focuses on 'the right' to make 'decisions' or take 'measures' to protect continental sovereignty, indicating the Assembly's understanding that the African subsidiary continental sovereignty norm exists in article 4(h) and that the UN Security Council and the ICC were actively violating the principle by refusing to comply with the deferral, suspension, and termination requests. Continental sovereignty is a direct challenge to the Security Council's international authority and legitimacy<sup>55</sup> and demonstrates AU subsidiarity and agency and explains the primacy claim.

### African Localizing Agents

The section operationalizes the norm localization concept to show that subregional organizations or the RECs are norm localizers. Although this article is primarily about African subsidiary norms outlined in the preceding component, this section deepens and sharpens the

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<sup>53</sup> African Union, Assembly Decision, Assembly/AU/13(XXII), 30-31 January 2014, paras. 8-9. See also African Union, Assembly Decision, Assembly/AU/Dec.547(XXIV), 30-31 January 2015, para. 17(c). Emphasis added.

<sup>54</sup> Wæver, Ole, 'Identity, integration and security: Solving the sovereignty puzzle in EU studies,' *Journal of International Affairs* 48:2, 1995, pp. 389-431; Werner, Wouter G., and Jaap H. de Wilde, 'The endurance of sovereignty,' *European Journal of International Relations* 7:3, 2001, pp. 283-313; Schmidt, Vivien A., 'The European Union: Democratic legitimacy in a regional state?' *Journal of Common Market Studies* 42:5, 2004, pp. 975-97; Schmidt, Vivien A., 'Conceptualizing Europe as a 'region-state,' in Anthony Petros Spanakos and Francisco Panizza, eds., *Conceptualising Comparative Politics* (New York: Routledge, 2016), pp. 17-45.

<sup>55</sup> Hurd, Ian, 'Legitimacy and authority in international politics,' *International Organization* 53:2, 1999, pp. 379-408; Orford, Anne, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

knowledge by clarifying that subregional organizations accept the subsidiarity principle as stipulated in the UN-led global order mainly because they are norm localizers. However, they are not ‘wholesale’ localizers, nor do they accept norms and institutions ‘wholeheartedly’;<sup>56</sup> instead they engage in contestation to modify foreign norms to their needs. So, the main purpose of this part is to inspire the understanding of the RECs as localizers of primarily African norm-setting instruments and norm-implementing institutions as well as international principles.

The analysis focuses on two out of the eight existing RECs as examples, IGAD and ECOWAS, and runs in two parts: the first part concentrates on AU relations with subregional organizations to 1) highlight that these African agencies have accepted AU primacy in peacemaking based on the concept of division of labour and 2) demonstrate how IGAD and ECOWAS localized African norm-setting instruments and norm-implementing institutions. The second part emphasizes the basis of the UN, the AU, and subregional organizations’ relations in peacemaking and illustrates how ECOWAS localized the right to protect and R2P norms.

#### *Division of Labour in AU-RECs Relations*

The UN, the AU, and the RECs have embraced the principle of subsidiarity in peacemaking, albeit with different interpretations (the preceding section shows AU interpreting of subsidiarity as a consolidation of the Assembly’s primacy). However, the AU and the RECs have accepted the division of labour concept in their relations, and the RECs have recognized AU’s primacy in peace and security. Division of labour means that the AU will formulate continental peace and security norms and policies, and the RECs will work with AU institutions to harmonize and implement such policies in the subregions. From this perspective, the

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<sup>56</sup> Acharya, ‘How ideas spread,’ pp. 239-254; Nathan, ‘Will the lowest be first?’ pp. 166-7.

harmonization procedure is a form of the norm ‘localization process’ or as Kees van Kersbergen and Bertjan Verbeek put it, ‘the politics of international norms’ involving negotiations after endorsement.<sup>57</sup> In essence, the AU and the RECs adopted subsidiarity but the implementation challenges<sup>58</sup> meant that they pursued a common interpretation which resulted in the division of labour idea.

The AU and the RECs first introduced the principle of subsidiarity in the 2008 Memorandum of Understanding on their relations in peace and security. Article IV of the Memorandum of Understanding established ‘the primary responsibility of the [African] Union’ in maintaining and promoting ‘peace, security, and stability,’ and underlined ‘the principle of subsidiarity.’ The assessment study on APSA’s effectiveness emphasized subsidiarity and ‘division of labour.’ The APSA Roadmap embraced subsidiarity but recognized that the lack of a shared understanding of its implications requires clarification. In that regard, the Assembly adopted Paul Kagame’s recommendations on institutional reforms of the AU, which stressed that ‘There should be a clear division of labour in line with the principle of subsidiarity.’ Finally, article 3 of the Protocol on AU-RECs’ relations provides that the objective is to ‘promote cooperation in all fields and sectors in line with the principle of subsidiarity.’<sup>59</sup>

Paul Kagame’s recommendations on institutional reforms of the AU provided insights into the AU-RECs’ politics of subsidiarity. Kagame’s report, which the Assembly endorsed, recommended that the ‘African Union should focus on a fewer number of priority areas, which are by nature continental in scope, such as political affairs, peace and security, and Africa’s

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<sup>57</sup> Acharya, ‘How ideas spread’; Kersbergen and Verbeek, ‘The politics of international norms.’

<sup>58</sup> Nathan, ‘Will the lowest be first?’

<sup>59</sup> African Union, ‘Memorandum of Understanding’; African Union, *Moving Africa Forward: African Peace and Security Architecture 2010 Assessment Study* (Addis Ababa: African Union Commission 2010), p. 196; African Union, *African Peace and Security Architecture: APSA Roadmap 2016-2020* (Addis Ababa: African Union Commission, Peace and Security Department, 2015), pp. 54-55; African Union, Assembly Decision, Assembly/AU/Dec.635(XXVIII), annex, 30-31 January 2017, paras. 5, A; African Union, Draft revised protocol on relations between the African Union and the Regional Economic Communities, EX.CL/1221(XXXVI)iii, 06-07 February 2020, adopted by the Assembly Decision, Assembly/AU/Dec. 767(XXXIII), 09-10 February 2020, para. 5.

global representation and voice.’<sup>60</sup> The Assembly’s decision aligns with the AU Commission mandate to formulate peace and security norms and harmonize RECs’ policies with the principles. Article 8 of the Protocol on Relations stipulates that the Coordination Committee, including the Assembly Bureau, the AU Commission Chairperson, and the RECs’ CEOs, is ‘responsible for coordinating and harmonising policies ... in the field of peace and security.’<sup>61</sup> The Assembly has noted the progress on outlining the division of labour on the ‘sectors of ... Political Affairs and Peace and Security’ and plans to adopt the framework document on division labour at ‘the 35th Ordinary Session ... in February 2022.’<sup>62</sup>

The significance is that division of labour is the guiding principle of subsidiarity in AU-RECs’ relations in peacemaking. The AU retains primacy and increasingly declares that the RECs ‘serve as its building blocks’ of Africa’s peace and security norms or, as the AU Chairperson for 2020, Cyril Ramaphosa put it, ‘It is imperative that we strengthen the RECs as building-blocks for Africa’s continental integration.’<sup>63</sup> As the basic units of integration and peacemaking, Assembly has urged ‘the RECs to promote African Shared Values [on] democracy, governance and popular participation’<sup>64</sup> through localizing or harmonizing African norm-setting instruments and norm-implementing institutions. Table 2 illustrates ECOWAS and IGAD localization efforts.

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<sup>60</sup> African Union, Assembly Decision, annex, Assembly/AU/Dec.635(XXVIII), 30-31 January 2017, para. A

<sup>61</sup> African Union, Draft Revised Protocol on Relations between the African Union and the Regional Economic Communities, EX.CL/1221(XXXVI)iii, 06-07 February 2020.

<sup>62</sup> African Union, Assembly Decision, Assembly/AU/Dec.801(XXXIV), 6-7 February 2021, para. 5; African Union, ‘Communiqué of the teleconference meeting of the Bureau of the Assembly of African Union Heads of State and Government,’ Press Release, 8 July 2021, p. 4, <<https://au.int/en/pressreleases/20210708/communique-bureau-assembly-held-24-june-2021>> accessed 3 October 2021.

<sup>63</sup> African Union, *African Union Handbook: A Guide for Those Working With and Within the African Union* (Addis Ababa; Wellington: African Union Commission; New Zealand Ministry of Foreign Affairs and Trade/Manatū Aorere, 2021), p. 152; African Union, ‘African Union 2nd mid-year coordination meeting closes with a resolve to strengthen collaboration between the AU, RECs, RMs, the member states, and other continental institutions, in line with the principle of subsidiarity,’ Press Release, 22 October 2020, <<https://au.int/en/pressreleases/20201022/african-union-2nd-mid-year-coordination-meeting-closes-resolve-strengthen>> accessed 3 October 2021.

<sup>64</sup> African Union, Assembly Declaration, Assembly/AU/Decl. 1(XVI), 30-31 January 2011, para. 10.

Table 2. Localization of African Norm-setting Instruments and Norm-implementing Institutions

Institutions/Instruments	ECOWAS	IGAD
Panel of the Wise	Council of Elders or the Wise	Roster of Experienced Diplomats and Respected Public Figures
Peace and Security Council	Mediation and Security Council	Council of Ministers
Continental Early Warning System	Regional Peace and Security Observation System or Early Warning System	Conflict Early Warning and Response Mechanism
Peace Fund	Peace Fund, replaced the Community Levy	Special Drought Fund/Rapid Response Fund/ Mediation Fund
African Standby Force	ECOWAS Standby Force	Eastern African Standby Force
Norm-setting Instruments	Protocol on Democracy and Good Governance, supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security	Protocol on Democracy, Governance and Election

Although ECOWAS and IGAD mimic African norm-setting instruments and norm-implementing institutions, they are not ‘wholesale’ localizers in the sense that they take and adapt regional and global norms and institutions, which explain the occasional disagreements in peacemaking intervention strategies.<sup>65</sup> The RECs do not create norms to counteract the AU or the UN, so there is no norm collision; instead, what occurs is a form of norm contestation that leads to localization or harmonization, as the politics of subsidiarity and division of labour illustrate. The ECOWAS policy on the use of force for human rights protection illustrates the localization of the African subsidiary right to protect and the R2P norms.

<sup>65</sup> For a helpful analysis of the cases where the UN, the AU, and the RECs have disagreed over operational approaches to peacemaking, see Nathan, ‘Will the lowest be first?’

*ECOWAS, the Right to Protect and R2P Norms*

Although the AU represents Africa's external relations, the RECs exercise agency in international politics and so can engage with non-African organizations, including the UN, under Chapter VIII of the UN Charter. Article 25 of the Protocol on AU-RECs' relations deals with the latter's 'external relations' and provides that:

a regional economic community may enter into co-operation agreements with other international organizations or with third countries provided that such agreements do not conflict with the objectives of the Constitutive Act, the Abuja Treaty and the treaties.<sup>66</sup>

ECOWAS, one of the more active RECs, has explicitly defined its relations with the UN and AU in peacemaking. Article 40 of the ECOWAS Conflict Prevention Framework (ECPF) notes that 'The three bodies [the United Nations, the African Union, and ECOWAS] cooperate on the issues of peace and security on the principles of subsidiarity and complementarity in accordance with the provisions of Chapter VIII of the UN Charter.'<sup>67</sup> Article 41 of the ECPF indicates that ECOWAS has modified or localized the right to protect and R2P norms:

ECOWAS is imbued with the necessary supranational powers (acting on-behalf of and in conjunction with Member States, AU and UN), as well as the legitimacy to intervene to protect human security in three distinct ways, namely: a. the responsibility to prevent; b. the responsibility to react; and c. the responsibility to rebuild.

The first important point to note from the above text is that ECOWAS has accepted that some aspects of its power to intervene come from the AU and the UN. However, ECPF also stressed

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<sup>66</sup> African Union, 'Draft revised protocol on relations between the African Union and the Regional Economic Communities.'

<sup>67</sup> ECOWAS, The conflict prevention framework, Regulation MSC/REG.1/01/08, 16 January 2008.

the ‘legitimacy to intervene to protect human security,’ which means that ECOWAS can act to protect human rights with or without AU and UN cooperation. ECOWAS’s formulation aligns with the AU subsidiary right to protect norm on the important question of the legitimacy of the mandating authority,<sup>68</sup> and the R2P norm in the context of the International Commission on State Sovereignty and Intervention (ICISS) construction of the three protection responsibilities. Nevertheless, ECOWAS’s construction falls short of completely adopting either the right to protect or R2P as outlined in the General Assembly resolution which endorsed the ICISS’s framing.<sup>69</sup> Thus, article 41 of the ECPF is an example of localization of the right to protect and R2P, as it did not create a new norm but modified existing regional and global principles to fit ECOWAS’s human security or people-centred security governance objectives in peacemaking.<sup>70</sup> ECOWAS is a localizer in the global order, as envisioned in Chapter VIII of the UN Charter. The significance is that it sharpens and deepens the understanding of the AU as the subsidiary agent and points to grasping the distinctions in the agency of African regional organizations in global politics.

## Conclusion

The African subsidiary norms on immunity, the right to protect, and continental sovereignty are crucial for deepening and sharpening our understanding of African agency in global politics and, therefore, matter. These African subsidiary norms parallel international principles on nonimpunity, R2P, and the UN Security Council authority (sovereignty) but differ in substance, and that explains AU’s primacy claims and opposition to enforcing international principles.

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<sup>68</sup> For a detailed discussion of the significance of the question of legitimate authority in the right to protect norm, see Ifediora, ‘Regional multilateralism.’

<sup>69</sup> United Nations, World Summit Outcome, General Assembly Resolution, A/RES/60/1, 24 October 2005, paras. 138-40; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, chaps. 3-5.

<sup>70</sup> Article 4 of the ECPF notes that as “the new ECOWAS Strategic Vision to transform the region from an ‘ECOWAS of States’ into an ‘ECOWAS of the Peoples’, the tensions between sovereignty and supranationality, and between regime security and human security, shall be progressively resolved in favor of supranationality and human security respectively”.



Thus, what really happens when the UN Security Council and the ICC seek to apply the R2P and nonimpunity norms, and the AU assert the immunity and continental sovereignty norms is ‘norm collision’ as opposed to ‘norm contestation.’ To be clear, the AU does not contest the idea of nonimpunity; instead, the AU seeks to implement the African subsidiary immunity norm, which leads to norm collision in Sudan and Kenya. Also, norm collision occurs when the Assembly claims primacy over the Security Council’s global authority in decision-making on interventions in Africa, especially relating to the right to protect and R2P, such as in Libya. So, this article makes two substantial contributions to the knowledge of 1) African agency, and 2) African subsidiary norms in international relations.

First, this article enriches scholarship on African agency in international relations. African subsidiary norms are a unique component of AU agency, and the subordination of the right to protect to the R2P principle and the immunity norm to nonimpunity overlooks Africa’s original initiatives in global peacemaking endeavours. In many ways, studies that subsume the African subsidiary norm on the right to protect under R2P effectively deny AU agency: Africa’s initiative and decision-making competence to create unique norms and institutions for human rights protection. They also deny the international community the opportunity to learn and understand what makes African subsidiary norms exceptional, which is that the right to protect is robust, stable, and uncontested.<sup>71</sup> Likewise, the Heads of State and Government immunity norm underpins AU’s agency in global politics of international criminal justice and matters. The immunity norm, although idealistically regressive, contributes to a better understanding of norm subsidiarity in the international order and peacemaking. It enriches our knowledge, empirically, of how subsidiary actors in the international system make rules to preserve their independence and manage fears of external domination. The immunity norm-setting instrument, the Malabo Protocol, has set the standard for regional initiatives for atrocity

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<sup>71</sup> On this point, see Ifediora, ‘Regional multilateralism.’

prevention through investigations and prosecutions. When operational, the African Court becomes a crucial component of the global struggle to prevent genocide, war crimes, crimes against humanity, and ethnic cleansing, as well other crimes that threaten international peace and security, such as corruption and money laundering. Indeed, the Malabo Protocol has established the pioneering norms at the regional level on dealing with these crimes and therefore matter. Lastly, the continental sovereignty norm is unmatched in the history of the international system. The AU is the only nonstate actor, the only regional organization ever to claim sovereignty over a continent. A study is underway in the context of change and continuity in the institution of sovereignty in international relations, but it suffices to say that the AU has made a ground-breaking declaration underpinning the Assembly's substantial agency, and so the continental sovereignty norm is significant and matter.

Second, this article contributes to knowledge of the norm subsidiarity concept by conceptualizing African subsidiary norms and explaining why the AU claims primacy in decision-making on peacemaking interventions. The AU is a subsidiary actor and so creates norms to retain autonomy, protect and defend Africa's vital security interests, challenge external principles. The realization that the AU is a subsidiary actor enriches our understanding of AU primacy claims and the causes of collisions with the Security Council and the ICC. More importantly, this study improves existing assumptions that the AU is a localizer by using the norm subsidiarity model to demonstrate that the AU is a subsidiary agent, while the Chapter VIII of the UN Charter anticipated norm localizers. To sharpen and deepen this new thinking about the AU as a subsidiary actor, this article went beyond the central research question methodology and implemented the localization framework, and examined the RECs, establishing that they are the localizers. This fresh thinking will inspire future studies on the RECs, as the examples of ECOWAS and IGAD have initiated the research agenda into how we study African regional organizations as critical actors in international politics.

The knowledge that the AU is a subsidiary actor has a secondary implication for policy and practice in the sense of whether and how African partners, including the UN and the EU, can persuade the AU to become a double agent and resolve the problem of norm collision. By *double agent*, I mean the possibility that the AU agrees to implement, not localize, international norms, if on a case-by-case basis. My notion of double agency builds on AU's demonstration of a remarkable degree of normative flexibility,<sup>72</sup> as the ongoing modification of the norm on unconstitutional changes to government, which had been one of the few near sacrosanct African norms, show. The Lomé Declaration on an OAU Response to Unconstitutional Changes to Government and the African Charter on Democracy, Elections, and Governance prohibit coup d'états and ban perpetrators from participating in subsequent government or elections. However, following the widespread protests in North Africa between 2010 and 2011 that led to resignations and the military removal of a few Heads of State and Government, the AU has altered the norm to accommodate the people's aspirations for freedom, security, human rights, and good governance.

In a rare open session, the Peace and Security Council invited African civil society groups to address the implications of 'popular uprisings in Africa.' They 'expressed understanding' for irregular changes to government 'In circumstances where governments fail to fulfill their responsibilities, are oppressive and systematically abuse human rights or commit other grave acts and citizens are denied lawful options,' and called for a 'review of existing normative frameworks' involving:

appropriate refinement of the definition of unconstitutional changes of government, in light of the evolving challenges facing the continent, notably

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<sup>72</sup> Notably, a study on statebuilding and stabilization operations in Africa found ambiguities in policy formulations and actions within the AU, which demonstrates an example of policy flexibility, see Obinna, F. Ifediora, 'Hybrid regional order: The role of the African Union in statebuilding and stabilization operations in Africa,' *Journal of International Peacekeeping* 20, 3-4, 2016, pp. 363-394.

those related to popular uprisings against oppressive systems, taking into account all relevant parameters.<sup>73</sup>

The Assembly and Peace and Security Council adopted the recommendations of the AU High-level Panel for Egypt that studied the question of popular uprisings and specified conditions under which the AU should accept unconstitutional changes to government, including:

(a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy; (b) the absence or total ineffectiveness of constitutional processes for effecting change of government; (c) popularity of the uprisings in the sense of attracting significant portion of the population and involving people from all walks of life and ideological persuasions; (d) the absence of involvement of the military in removing the government; (e) peacefulness of the popular protests.<sup>74</sup>

What is emerging is the new African norm that the people can change their government through unconstitutional methods if the government acts irresponsibly. Although the Peace and Security Council noted that the lifting of sanctions in the case of Egypt ‘does not constitute a precedent in terms of adherence to norms which stipulate that perpetrators of unconstitutional changes of Governments cannot participate in the elections held to restore constitutional order,’<sup>75</sup> it reacted cautiously to similar events in Zimbabwe, Mali, Sudan, and Guinea. The case of Egypt is seemingly not an exception; it is becoming the new African norm. This normative adaptability to popular demands shows that the AU can change or modify ostensibly firmly rooted norms.

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<sup>73</sup> African Union, ‘Unconstitutional changes of governments and popular uprisings in Africa – challenges and lessons learnt,’ Press Statement, PSC/PR/BR. (CDXXXII), 29 April 2014, pp. 2, 3-4.

<sup>74</sup> African Union, Assembly Decision, Assembly/AU/Dec.536 (XXIII), 26-27 June 2014, para. 8; African Union, Peace and Security Communiqué, PSC/PR/COMM.2 (CDXLII), 17 June 2014, para. 7; African Union, Final Report of the African Union High-Level Panel for Egypt, PSC/AHG/4. (CDXVI), 17 June 2014, para. 83.

<sup>75</sup> African Union, Peace and Security Council Communiqué, PSC/PR/COMM.2 (CDXLII), 17 June 2014, para. 8.

This normative flexibility implies that the Assembly will likely revise the problematic immunity norm, for example, under appropriate circumstances. The African people involving civil society groups convinced the Assembly to change a norm that previously favoured regime security and stability. In some ways, the triggers and catalysts for such norm-altering conversations may have external beginnings through strategic dialogues and engagements with the AU. Specifically, the UN Security Council could explore its role in implementing the right to protect norm, so approving Permanent Five (P5) may turn to the AU when facing veto-the twin problems of legitimacy and induced paralysis.<sup>76</sup> Equally, the ICC Prosecutor may undertake similar exchanges with the African Court Prosecutor when inaugurated regarding the immunity norm. The African people convinced the AU to change a significant norm on regime security and stability. In that case, the international community can do the same, but it requires the Security Council and other global actors to become more influential and compelling with their ideas. Ultimately, an unambiguous division of labour between the Security Council and the AU will promote better sequencing of African subsidiary norms and international principles in peacemaking.

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<sup>76</sup> For more on this point, see Ifediora, 'Regional multilateralism.'