

From stopping to preventing atrocities : Actualisation of Article 4(h)

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Abstract

The Constitutive Act of the African Union (AU) provides for the right of the continental body to intervene in the face of war crimes, genocide and crimes against humanity. According to its formulation, Article 4(h) intervention entails military force, which is triggered when a target state fails to discharge its duty to protect its population from mass atrocities. Although Article 4(h) is an ambitious statutory commitment to intervene in a member state by the AU, the Libyan crisis in 2011 showed the ambivalence of the continental institution to act in a decisive and timely manner. The AU's failure to invoke Article 4(h) exposed the need for building the capacity and political will to intervene and to interpret Article 4(h). Therefore, the primary focus of this article is on how Article 4(h) should be interpreted. Flowing from the Pretoria Principles, which seek to provide clarity on the implementation of the AU's right of intervention, Article 4(h) should be viewed as a duty rather than a right to prevent or stop mass atrocities. The duty dimension of Article 4(h) derives from the international instruments that AU member states have ratified to prevent mass atrocities. Rather than being a paper tiger, Article 4(h) should be used in a proactive and timely manner as a military option available to the AU to persuade member states to prevent or halt atrocities. As a last resort, military force pursuant to Article 4(h) should aim at protecting the population at risk and pursuing the perpetrators in order to avoid contravening Article 2(4) of the Charter of the United Nations (UN). Although military intervention can save lives in the short term, it cannot necessarily address the underlying, structural causes of atrocities, such as ethnic rivalries, economic inequalities and scramble for natural resources, among others. Therefore, the prevention of mass atrocities should not be equated with, or be seen through the prism of, Article 4(h) intervention alone. The focus should instead be on the entire spectrum of preventive strategies at the disposal of the AU in the face of mass atrocities, including the African human rights system and the African Peer Review Mechanism.

Keywords

African Union, Article 4(h), intervention mass atrocity prevention, Pretoria principles, persuasive prevention

Introduction

Article 4(h) of the Constitutive Act of the African Union (AU Constitutive Act) provides for unprecedented powers of intervention by the African Union (AU) in a member state. It provides for 'the right of the [AU] 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'. This formulation is termed 'intervention against mass atrocities'.¹ In 2003, Article 4(h) was amended to include intervention in the case of 'a serious threat to legitimate

order to restore peace and stability' in a member state. However, this amendment is not yet in force, as the required number of ratifications has not yet been reached. This formulation is termed 'intervention to restore legitimate order'.² Article 4(j) of the AU Constitutive Act also provides for the right of member states 'to request intervention from the Union in order to restore peace and security'. This formulation is termed 'intervention by invitation'.³ This discussion focuses on the first formulation of intervention under Article 4(h) – 'intervention against mass atrocities'.

The incorporation of Article 4(h) into the AU Constitutive Act signifies the general acceptance by AU member states of the organisation's right to intervene in the affairs of a state that is unable or unwilling to protect its citizens from mass atrocities. Article 4(h) couches intervention as a 'right' in the form of a prerogative and not as a duty or legal obligation. The means and modalities of intervention are also not spelt out in Article 4(h). What is clear, however, is that the intervention is to be undertaken by the AU as a supranational organisation and not by AU member states acting separately. According to Article 4(h), read with Article 7(1)(e) of the Protocol relating to the Establishment of the Peace and Security Council of the AU (PSC Protocol), the intervention follows a decision by the AU Assembly of Heads of State and Government (AU Assembly) and a recommendation by the AU Peace and Security Council (PSC).

The unprecedented agreement among AU member states to open the possibility of limiting their own traditional rights of absolute sovereignty following the adoption of Article 4(h) is a departure from their strict adherence to the norm of non-intervention in the affairs of other member states as required by Article 4(g) of the AU Constitutive Act. The AU has shifted from the practice of non-interference or non-intervention to what has been called the doctrine of 'non-indifference', to avoiding being indifferent to atrocities against African people.⁴ The paradigm shift to embrace the right to intervene in respect of gross human rights abuses responds to a real need to protect populations at risk of mass atrocities. It also derives from African states' growing interconnectedness and the axiom not to be idle or indifferent bystanders when your neighbour's house is on fire.⁵ Today, it is generally accepted that the protection of the fundamental rights of citizens should prevail over state sovereignty, and that sovereignty entails responsibility.⁶ Thus, where a member state of the AU is unable or unwilling to protect the fundamental rights of the population within its borders, the responsibility falls on the AU to protect the population at risk of mass atrocities.⁷

However, the problem is that challenging the notion of sovereignty also amounts to questioning the cornerstones of the Charter of the United Nations (UN Charter) in Article 2(1), (4), and (7), which guarantee the territorial sovereignty of all member states and prohibit the threat or use of force in international law. Although the wording of Article 4(h) seems straightforward, the conditions that trigger Article 4(h) intervention – namely, war crimes, genocide, and crimes against humanity – are rather amorphous and difficult to define. These 'grave circumstances' are not easy to determine, for several reasons: certain groups such as political minorities are not included in the Genocide Convention's protective scheme, and the requirement of a specific intent required by the Genocide Convention is a high threshold, which is frequently difficult to prove; the challenges in monitoring respect for the laws and customs of armed conflict and the politics of victor's justice when it comes to war crimes; and the need for systematic and widespread attacks to occur in order to invoke the notion of crimes against humanity.⁸ Against this background, this essay explores the substantive and procedural challenges of implementing Article 4(h) of the AU Constitutive Act. The essay also investigates why Article 4(h) was not invoked in the Libyan crisis and provides recommendations for the AU to move from promise to practice. The discussion draws inspiration from the 'Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union' (Pretoria Principles).⁹ The Pretoria

Principles are not AU instruments but informal guidelines adopted by experts following a conference at the University of Pretoria in 2012. The Pretoria Principles are neither definitive nor prescriptive, but rather seek to provide clarity and inform action implementing Article 4(h) intervention.¹⁰

Substantive aspects of Article 4(h)

The right of intervention by the AU

The couching of Article 4(h) intervention by the AU as a ‘right’ – and not a ‘duty’ – could be viewed as conferring on the continental body the discretion – and not obligation – to decide whether or not to intervene in a given situation.¹¹ According to Baimu and Sturman, it does not matter whether it is couched as a right or duty, ‘what matters is whether States have the political will to undertake what they committed themselves to do’.¹² However, in legal terms, a ‘duty to act’ makes a stronger case than a mere ‘right to act’.¹³ In its present formulation, Article 4(h) represents a permissive norm where it stipulates what action can legitimately be taken by the AU in given circumstances but does not oblige the regional body to act in those circumstances.¹⁴ This reasoning resonates with Principle 6 of the Pretoria Principles that the word “‘right” in Article 4(h) implies a legal entitlement or prerogative which is compatible with the notion of sovereignty as responsibility’. However, Principle 6 stipulates that the “‘right” should as far as feasible be interpreted to imply a duty to intervene to prevent or halt mass atrocities in the form of war crimes, genocide and crimes against humanity’.¹⁵

Whether it is a right or duty, it seems reasonable to view Article 4(h) as an institutionalisation of the multilateral enforcement of fundamental human rights and humanitarian law obligations that are of concern to the international community in general, and all AU member states in particular. The basis of this argument is the fact that the threshold for Article 4(h) intervention are gross human rights violations constituting serious crimes under international law, which are arguably subject to universal jurisdiction. Given their almost universal ratification, customary normativity and the gravity of the crimes, among other factors, there is little doubt that the conditions that trigger Article 4(h) intervention are *jus cogens* norms (peremptory rules of international law).¹⁶

It is clear that states have an obligation to end violations of *jus cogens* norms.¹⁷ If the argument is accepted that Article 4(h) intervention is enforcement action by consent, then it can be contended that there is no clash of *jus cogens* norms in implementing Article 4(h); that is to say, there is no conflict between the prohibition of the threat or the use of force and the obligation to prevent and stop genocide, torture and other such atrocities. This view is strengthened by the fact that the use of force pursuant to Article 4(h) is not directed at the territorial integrity or political independence of a state, as stipulated in Article 2(4) of the UN Charter, but rather at preventing or halting mass atrocities.¹⁸ Therefore, Article 4(h) may be seen as enforcement action in the form of *erga omnes partes* or *erga omnes contractantes* (consent by all) to prevent or stop *jus cogens* (heinous) crimes.¹⁹ In this sense, through Article 4(h), such enforcement rights are endowed on the AU as a continental organisation, and not on individual member states.

Therefore, as underscored in Principle 6 of the Pretoria Principles, it is preferable that the competence to intervene under Article 4(h) should be viewed as a duty, and should not be discretionary, as the language of ‘right’ implies. A duty to intervene would imply that once a determination is made of the existence of Article 4(h) thresholds, a decision to intervene follows as a matter of necessity, because the AU Assembly has no option but to intervene. In this way, Article 4(h) would imply that the AU has bound itself in advance to an obligation to intervene under prescribed circumstances.²⁰ The intention of the drafters of Article 4(h) was

not just to make the right to intervene a political pledge, but an obligation for action by the AU.²¹

Intervention under Article 4(h)

As a matter of ordinary language, ‘intervention’ may find its exact meaning along a vast continuum of possibilities. However, to understand the term ‘intervention’ as it is used in Article 4(h), recourse should be made to the context and purpose of this provision in the AU Constitutive Act. Article 4(h)-intervention is not ‘humanitarian intervention’, but rather treaty-based multilateral action by the AU in reaction to mass atrocities in a member state.²² The right to intervene in Article 4(h) gives the AU a strong legal basis for intervention in the face of mass atrocities.²³ It must also be distinguished from intervention with the consent of, or at the request of, a state (intervention by invitation is provided for under Article 4(j)).

Clearly, Article 4(h) must be understood to complement the other measures provided for in the AU Constitutive Act, particularly in Article 23(2) and other non-coercive measures such as dialogue, conflict resolution, preventive diplomacy, the provision of ‘good offices’ and dispatching monitors.²⁴ According to Article 23(2) of the AU Constitutive Act,

any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.²⁵

Thus, while measures that can be imposed for a failure to comply with AU decisions and policies under Article 23 fall short of the use of military force, Article 4(h) would enable coercive military action where a member state does not comply with the decision of the AU Assembly to prevent or stop committing genocide, war crimes and crimes against humanity. Going by this reasoning, Article 4(h) intervention can only mean coercive measures other than sanctions; in other words, the use of military force. In this sense, Article 4(h) is an addition to the panoply of possibilities as a measure of last resort, to allow for measures that would otherwise have been without legal basis under the Constitutive Act. According to Abass:

The better view, therefore, is that the ‘right’ in Art 4(h) relates *only* to the use of force since this is the only kind of operation over which the AU can claim to have a *right* of intervention. That right accrues not merely by the provisions of the Act, such as Art 4(h), but also by the common understanding among the AU Member States that the occurrence of any of the crimes stated in Art 4(h) on the territory of a Member State automatically constrains its sovereignty and necessitates an intervention without an invitation by that Member State. In contrast, an intervention by the AU under Art 4(j) is not conditioned upon the occurrence of any of the mass atrocities listed in Art 4(h).²⁶

This interpretation also corresponds with a purposive reading of Article 4(h), which urges that the kind of intervention that would neutralise the gravity of the listed crimes almost inevitably requires very intrusive means. This view draws credence from the Pretoria Principles, which provide clarifying language that

Article 4(h) intervention relates, in particular, to the third of the three foundational pillars of the ‘responsibility to protect’, namely the use of military intervention as a last resort. The wording of Article 4(h) suggests that intervention on the basis of Article 4(h) is an exceptional measure in the face of grave circumstances that are beyond non-coercive measures and so require military option as a last resort.²⁷

The reticence to accept that military means may be used to curb mass atrocities may arise from the association of military force with war and the concomitant killing. However, it must be borne in mind that Article 4(h) intervention relates to a very particular form of military force, namely incisive and purposeful military action to prevent harm to people under dire circumstances, namely war crimes, genocide and crimes against humanity.²⁸ What is required is less akin to ‘peacekeeping’ and more to ‘peace enforcement’, which entails the imposition of conditions of ‘peace’ (or saving lives) where they do not exist (or where lives are lost in significant numbers), for example in situations where killing amounts to genocide. This understanding also resonates best with the case of the 1994 genocide in Rwanda, which is often cited as the primary rationale for the inclusion of Article 4(h) in the AU Constitutive Act. According to Thakur:

The goal of intervention for human protection purposes is not to wage war on a state in order to destroy it and eliminate its statehood but to protect victims of atrocities inside the state, to embed the protection in reconstituted institutions after the intervention, and then withdraw all foreign troops.²⁹

Although this is a generally accepted interpretation, this does not deny or denigrate the importance of the array of other means to curb – and prevent – mass atrocities and massive violations. Indeed, it is a state of affairs that allows force to be used only if violations of fundamental human rights and human dignity have become systematic and widespread, and the responsible state is unable or unwilling to protect its citizens, as was the case in Libya in 2011. Article 4(h) should, therefore, be understood as just one piece in the panoply of mechanisms to prevent or stop atrocities on the continent. As a last option, Article 4(h) is the last piece that makes the puzzle to end mass atrocities on the continent complete.

Conditions for Article 4(h) intervention

The threshold for intervention pursuant to Article 4(h) is ‘grave circumstances’ that constitute serious violations of human rights and humanitarian law in the form of war crimes, genocide and crimes against humanity. These serious violations of human rights and humanitarian law are crimes under international law. The terms ‘war crimes’, ‘genocide’ and ‘crimes against humanity’ are defined in relevant international conventions and instruments, which implies that the 1949 Geneva Conventions, the Genocide Convention and the Rome Statute provide the key references. However, it is not that straightforward to determine when abuses have reached the threshold for these crimes, as the debates on whether or not genocide was being committed in Rwanda in 1994 and the crisis in the Darfur region of Sudan illustrated.³⁰ As a way forward, the Pretoria Principles provide a guide:

Considering the speed with which mass atrocities occur and that the threshold for Article 4(h) intervention is high, difficult to prove and amenable to political discretion, in deciding on Article 4(h) intervention, the AU must prioritise the imperative to save lives over technical or overly legalistic ascertainment of the commission of war crimes, genocide and crimes against humanity.³¹

The PSC and the AU Assembly, which recommend and decide on intervention, are, first and foremost, political, not judicial or humanitarian bodies.³² They will inevitably rely on political considerations, which, if overlapping with humanitarian concerns, may lead to intervention under Article 4(h). For example, although genocide has a clear, precise and narrow legal definition spelled out in the 1948 Genocide Conventions and repeated in the

Rome Statute, an accusation of genocide is certainly not taken lightly and will usually be controversial and disputed.³³ This is because a determination of the commission of genocide calls for an international response, including the use of military force, for the prevention and suppression of acts of genocide.³⁴ There is information that during the genocide in Rwanda, the United States (US) State Department and National Security Council deliberately avoided using the term ‘genocide’ precisely because they feared that use of the term might compel a response.³⁵ The hesitation to use the word ‘genocide’ is governed by political considerations, although in a legal context.³⁶ Such dithering on the part of the international community, exacerbated by the lack of a common mechanism to establish the existence of atrocities such as genocide, reinforces the need to rapidly and effectively intervene to prevent mass atrocities.³⁷ Below is a brief examination of the sticky issues relating to the conditions that trigger Article 4(h) intervention.

War crimes

According to Article 8(2) of the Rome Statute, war crimes may be perpetrated in the course of either international or internal armed conflicts.³⁸ War crimes are serious violations of customary law or, when applicable, treaty rules concerning international humanitarian law (IHL).³⁹ While the Rome Statute provides a comprehensive list of war crimes, according to Article 8(1) of the Rome Statute, the International Criminal Court (ICC) only has jurisdiction over these crimes where they are ‘part of a plan or policy or as part of a large-scale commission of such crimes’.⁴⁰ War crimes can be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against members of the enemy armed forces. Conversely, crimes committed against friendly forces do not constitute war crimes.⁴¹

The lack of any ‘exact, objective criterion’ defining ‘armed conflict’ also poses challenges to determining when a conflict began. It is generally agreed that a conflict involves the use of armed forces, as opposed to police, and involves the actual firing of weapons.⁴² It is important to recognise that a high threshold of violence is necessary to constitute a genuine armed conflict, distinct from lower-level disturbances such as riots, isolated and sporadic acts of fighting, or unilateral abuses committed by a government in the absence of a widespread armed resistance by the target population.⁴³ Moreover, to qualify as an international armed conflict, the situation must constitute an armed conflict involving two or more states or a partial or total occupation of the territory of one state by another.⁴⁴

Genocide

According to Article 6 of the Rome Statute, ‘genocide’ refers to the intentional killing, destruction, or extermination of groups or members of a group.⁴⁵ The blame for the inability to prevent or halt the Rwandan genocide in 1994 is partly attributed to the failure by neighbouring countries, the erstwhile Organization of African Unity (OAU, the predecessor of the AU), the United Nations (UN) and the international community at large to call the killings in Rwanda genocide and stop the violence.⁴⁶ Article I of the Genocide Convention contains an obligation to prevent acts of genocide and to punish persons guilty of genocide, within a state’s own jurisdiction.⁴⁷ While the Genocide Convention allows preventive action against potential perpetrators, the question whether genocide is actually occurring or about to occur is both epistemologically and legally complex. For, if there is action to prevent genocide and this action is successful, it may be difficult to prove that there was actually an ‘intention to destroy in whole or in part’. If there is a legal finding that genocide has occurred, then it is too late for prevention.⁴⁸

Genocide constitutes any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; and 5) forcibly transferring children of the group to another group.⁴⁹ Genocide is, thus, comprised of three main elements: first, the commission of at least one of the acts enumerated in the definition; second, the act is to be directed at a specified group(s); and third and importantly, the intent to destroy the group wholly or partially. In the Akayesu case, where the accused was found guilty of genocide for acts of rape and mutilation, the International Criminal Tribunal for Rwanda (ICTR) confirmed that the enumeration of genocidal acts in Article II of the Genocide Convention is exhaustive and that the term clearly includes bodily or mental torture, inhuman treatment, and persecution.⁵⁰ For genocide to occur, the involvement of a government is not required and genocide may be committed without an organised plan or policy of a state or similar entity. However, according to *Prosecutor v. Kayishema*, a plan or policy may provide strong evidence of a specific intent for the crime.⁵¹

In determining whether an act is genocidal, the key is the Genocide Convention's primary focus on preventing the physical destruction of groups. The perpetrators must possess specific intent to be guilty of genocide; if the perpetrator merely knew his or her actions would further the destruction of a group but did not have the specific intent to do so, the perpetrator can only be found guilty of complicity in genocide.⁵² The intent to destroy needs to be directed at a protected group for the perpetrator to be convicted of genocide.⁵³ The limitations of the definition of genocide, particularly the restricted list of protected groups and intent requirement, pose significant hurdles to making a case for genocide in instances where it is difficult to determine whether victims constitute a cohesive group that the Genocide Convention protects. In the contemporary political order, there is no justification for only including groups based on religion, nationality or ethnicity, while excluding those based on political views, or social or economic status.⁵⁴

Crimes against humanity

Crimes against humanity refer to 'particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or degradation of human beings'.⁵⁵ Crimes against humanity seem to be the most diffusely defined of the three thresholds for intervention in Article 4(h), as contrasted with genocide's narrow focus on attempted exterminations of defined groups, or the relatively limited focus of war crimes on the most egregious behaviours associated with armed combat.⁵⁶ The classical definition of crimes against humanity includes

murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during a war; or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁵⁷

The Rome Statute extends the definition to include widespread or systematic murder, torture and persecution, among others. It also covers other inhumane acts of a similar character that intentionally cause great suffering, or serious injury to bodily, mental or physical health.⁵⁸ The list of specific acts is expanded to include the crimes of the enforced disappearance of persons and apartheid. Further, the Rome Statute also contains clarifying

language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of a population, torture and forced pregnancy.

In the Erdemovic´ case, the International Criminal Tribunal for the former Yugoslavia (ICTY) decided that crimes against humanity are serious acts of violence that harm human beings by striking at what is most essential to them: their life, liberty, physical welfare, health and dignity. These crimes ‘are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment’.⁵⁹ These crimes also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is the concept of humanity as a victim that essentially characterises crimes against humanity.⁶⁰ The definition of crimes against humanity, then, contains four general criteria, namely the acts must be inhumane in character; they must be perpetrated in a widespread (large scale) or systematic manner as a preconceived plan or policy; they must be directed against a civilian population; and they must be committed on national, political, ethnic, racial or religious grounds.⁶¹ There is still no specialised international convention on crimes against humanity.⁶²

The central dimension of crimes against humanity is that they are directed against the civilian population, rather than against individual civilians in isolation. The individual is victimised not because of his or her individual attributes but because of his or her membership of a targeted civilian population.⁶³ In this sense, the presence of some non-civilians in the midst of a targeted population does not change the overall civilian character of the population.⁶⁴ However, it should be noted that a crime against humanity does not only arise out of mass action involving a large number of victims. For example, an attack on a single individual may constitute a crime against humanity as long as it has a specific character that shocks the human conscience.⁶⁵ Crimes against humanity are not isolated or sporadic events, but are part of either a governmental policy or a widespread or systematic practice of atrocities that are tolerated, condoned or acquiesced to by a government or a de facto authority.

Procedural aspects of Article 4(h) intervention: deciding whether, and if so how, to intervene

Existence of grave circumstances

Intervention under Article 4(h) is triggered by the existence or likelihood of grave circumstances – namely war crimes, genocide and crime against humanity – and the failure of the target state to prevent or halt the atrocities. Although a reading of Article 4(h) shows that the intervention shall be in respect of these grave circumstances, their existence is necessary but not necessarily *sufficient* to trigger an Article 4(h) intervention, the reason being that the AU Assembly may actually decide to intervene under Article 4(h) when the target state is unable or unwilling to prevent or stop the atrocities. Otherwise, the target state can easily call for intervention by invitation under Article 4(j) of the AU Constitutive Act, thereby avoiding forceful Article 4(h) intervention.

The formulation that the AU Assembly's decision has to be ‘in respect of’ the three Article 4(h) crimes presents a challenge in terms of deciding to intervene. The problem arises because the term ‘in respect of’ in Article 4(h) is vague, as it allows the possibility that these crimes have already been committed, are being committed, or are on the verge of being committed. Nonetheless, only reacting to crimes already committed would be defeating the whole purpose of protecting and respecting the sanctity of human life.⁶⁶ From a moral point of view, it seems untenable to defer action until anticipated atrocities actually occur. However, intervention to prevent mass atrocity crimes from occurring would only be possible

if incontrovertible facts exist that such atrocities will occur, *but for* the potential intervention. There are, however, two problems with this approach relating to the level of seriousness that warrants intervention and how to distinguish exaggeration from an actual impending threat.

Recommendation by the AU Peace and Security Council

Since the entry into force of the AU Constitutive Act, the AU has been involved in conflicts in several of its member states but has not yet explicitly invoked Article 4(h). Although the Libyan crisis in 2011 was a clear-cut situation of grave circumstances in the form of war crimes and crimes against humanity, the AU did not invoke its right to intervene under Article 4(h). The PSC has the responsibility to recommend intervention and the modality of such an intervention by virtue of Article 7(1)(e) of the PSC Protocol.⁶⁷ The recommendation is made to the AU Assembly, which has the ultimate responsibility to decide on intervention, as stipulated in Article 4(h) of the AU Constitutive Act. The PSC has used phrases such as ‘take necessary measures to reduce [the] threat posed by Al-Shabaab and other armed opposition groups’ in its mandate to the AU Mission in Somalia (AMISOM), thus suggesting the use of force to save lives.⁶⁸ This formulation, however, does not constitute a recommendation of Article 4(h) intervention as provided by Article 7(1)(e) of the PSC Protocol, since the PSC has the authority to grant AMISOM the relevant mandate in terms of Article 7(1)(c) and Article 7(1)(d) of the PSC Protocol, which respectively mandate the PSC to authorise the mounting and deployment of peace support missions and to stipulate general guidelines for the conduct of such missions, including the mandate thereof, and undertake periodic reviews of the guidelines.

Decision by the AU Assembly

The bottom line in Article 4(h) is that intervention can only be undertaken ‘pursuant to a decision’ of the AU Assembly. It is ultimately up to the AU Assembly to determine whether a set of facts or circumstances amounts to one or more of the three crimes. The fact that the PSC may make a recommendation to the AU Assembly underscores the chain of command, and confirms the distinction between the recommendatory role of the PSC and the decision-making role of the AU Assembly. This difference in weight between the PSC's recommendation and the AU Assembly's decision arises from the fact that the assembly represents all 54 member states, while the PSC only represents 15 (just over one-quarter) of them. It is furthermore relevant that the PSC has a revolving membership, which does not guarantee that any of the subregional hegemony would at any given time be a member of the PSC.

The Pretoria Principles are instructive on deciding when to intervene:

In deciding on intervention under Article 4(h), the AU Assembly should consider the inability or unwillingness of the national government to protect its population from mass atrocities. It follows that one of the determining factors is the inability or culpability of the government concerned in causing, tolerating or failing to stop such atrocities. Therefore, where a State violates the fundamental rights of its own citizens, or tolerates or fails to stop mass atrocities within its territory, the AU is authorised by Article 4(h) to intervene to prevent or halt mass atrocities in order to protect populations and save lives.⁶⁹

To this end, the AU Assembly may have to engage in a two-phase inquiry in order to arrive at its decision under Article 4(h). The first phase is to establish that one of the three crimes has been, is being, or is very likely to be committed. In coming to this conclusion, the assembly should – as far as the relevant legal definitions are concerned – be guided by the

relevant jurisprudence of the ad hoc international criminal tribunals (particularly the ICTR and the ICTY) and the ICC, which is a permanent international penal institution. As far as the facts related to a particular circumstance are concerned, reliance should be placed on credible international fact-finding processes and, in particular, on the reports, recommendations and decisions of the AU's own mechanisms. These include the on-site visits and findings on communications by the African Commission on Human and Peoples' Rights (African Commission), decisions by the African Court on Human and Peoples' Rights (African Court) and recommendations arising from the African Peer Review Mechanism (APRM).⁷⁰ The UN human rights treaty bodies and special mechanisms may also contribute to this process of establishing the facts. Although the phase-one decision is ultimately political, it must be based on legal expertise and reliable evidence.

Couching the competence of the AU Assembly not as a duty but as a 'right' implies that the mere determination that one of the three 'grave circumstances' exists does not necessitate intervention. It follows that there should be a second phase of decision-making. In the second phase of the inquiry, the AU Assembly may use factors implied but not mentioned in Article 4(h) in the exercise of its discretion to intervene. The main (unstated) factor must be the role of the government in the affected state, as stipulated in Principle 9 of the Pretoria Principles.⁷¹ For example, is it committing these atrocities itself? Is it colluding with non-state actors in doing so? Is it unwilling or incapable of restoring order and protecting human life? Other relevant factors may include prior efforts taken by the AU to support or liaise with the state; the ready availability of military capacity and resources; and the role and attitude of both the relevant subregional bodies and international community such as the UN Security Council (UNSC). Ultimately, the AU Assembly is likely to weigh up the relevant factors in deciding based on a cost-benefit analysis.

Does Article 4(h) intervention require authorisation from the UNSC?

In light of their colonial experiences, many African countries have been sceptical about Western justifications for intervention on the continent and are less inclined to view intervention as legitimate, even if it is meant to stop grave human rights abuses. African countries have insisted on UN authorisation as a prerequisite for intervention.⁷² Given the importance attached to their sovereignty by the relatively young African states, most of which became independent in the process of decolonisation after the Second World War, the adoption of the right to intervene is a paradigm shift towards the prevention of serious human rights violations that constitute mass atrocities. However, given the experience of large-scale atrocities against the civilian population in Africa, with spillover effects on neighbouring states, the resolve by the AU for collective action to prevent or halt mass atrocities, with or without prior UNSC authorisation, is easy to explain.⁷³

AU member states are simultaneously members of global, regional and subregional organisations. As member states of the UN, they have accepted the primary role of the UNSC in global peace and security in terms of Article 25 of the UN Charter. As members of the AU, they accept the primacy of the AU and its PSC in respect of continental peace and security pursuant to Article 4(h) of the AU Constitutive Act. As members of subregional organisations, they have accepted the supplementary role of institutions at this level. Potential for conflict and contradiction between these layers comes to the fore in the question of whether enforcement action at the regional and subregional level is only possible with prior authorisation from the UNSC.

Nothing in the AU Constitutive Act or the PSC Protocol explicitly requires the AU to seek prior authorisation from the UNSC before authorising or launching an Article 4(h) intervention.⁷⁴ Levitt informs us that the decision not to include such language in the Protocol

was a 'conscious decision by the AU Assembly due to the debacles in Somalia and Rwanda so the AU Assembly decided not to bind themselves to rules and system that have failed Africa, or the policy prescriptions of certain powers'.⁷⁵ However, Article 53 of the UN Charter states that no enforcement action shall be taken by regional organisations without the authorisation of the UNSC. Yet, Article 4(h) seems to authorise the AU to intervene with or without the authorisation of the UNSC. Despite the requirement of authorisation by the UNSC for enforcement action by regional organisations, Article 7(1)(e) of the PSC Protocol accords the PSC the authority to recommend intervention in a member state on the basis of Article 4(h) of the AU Constitutive Act.⁷⁶ This may imply that the AU considers that it will not be expedient to wait for UNSC authorisation before responding to situations of war crimes, genocide and crimes against humanity under Article 4(h) on the continent.

The question, still, is whether the AU requires UNSC authorisation in order to exercise the right to intervene under Article 4(h). Technically, the answer is negative given that through binding themselves to the Constitutive Act, the AU member states have consented to make themselves subject to intervention should the AU Assembly deem appropriate.⁷⁷ Lieblich has argued that a government that fails to fulfil its responsibility to protect also loses the capacity to withdraw its prior consent in such cases.⁷⁸ Nonetheless, Chapter VII as read with Article 53(1) of the UN Charter requires that any enforcement action by a regional organisation should be authorised by the UNSC. There is a lacuna in the AU Constitutive Act and the PSC Protocol regarding what happens if the UNSC does not authorise enforcement action under Article 4(h).⁷⁹ The PSC Protocol does not state that the AU is obliged to seek UNSC authorisation for collective enforcement action under Article 4(h). It may be argued, therefore, that Article 4(h) of the AU Constitutive Act contradicts the prohibition of force under Article 2(4) and the non-intervention principle in Article 2(7) of the UN Charter in case of enforcement action without a UN mandate. Nonetheless, the position of the AU as regards authorisation by the UNSC was articulated in the 2005 'Ezulwini Consensus', which states:

Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts, are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.⁸⁰

A close reading of this position is that the AU recognises that, as a matter of law, the implementation of Article 4(h) intervention requires the authorisation of the UNSC, although the regional body was keen to make the case for an exception.⁸¹ Despite persuasive arguments to the contrary, a reasonable view is that AU action should be preceded by UNSC authorisation. This view is buttressed by Principle 11 of the Pretoria Principles, which outlines that:

As a matter of legal requirement, the AU requires the authorisation of the UN Security Council for Article 4(h) intervention. The UN Security Council has the responsibility to authorise the use of force in the implementation of Article 4(h) intervention. Where the UN Security Council is unwilling or indecisive in authorising intervention, the conferment of the right to intervene on the AU by Member States of the AU provides greater space for the AU to act in the face of war crimes, genocide and crimes against humanity on the continent.⁸²

The competence under Article 4(h) is not to usurp, but to complement, the role of the UNSC.⁸³ Complementarity means that the AU should, in exceptional circumstances, be able to act without authorisation, especially if the UNSC remains unwilling or unable to intervene, notwithstanding reliable and convincing evidence that mass atrocities are taking place. The overriding importance of the UNSC is also supported from the subregional perspective. Some have argued for the emergence of a (sub)regional custom that obviates the need for prior authorisation, on the basis of the implied *ex post facto* authorisation given to the Economic Community of West African States (ECOWAS) intervention in Liberia. However, the trend seems to have turned recently, with the prior authorisation from the UNSC for the joint AU/ECOWAS African-led International Support Mission in Mali (AFISMA). In any event, in the Southern African Development Community (SADC) subregion, the relevant treaty (the SADC Protocol on Politics, Defence and Security Cooperation, Article 11(3)(d)) makes prior authorisation an explicit requirement.

Efforts at different levels will not necessarily be in harmony. Unfortunately, there is no predetermined logical sequence or simple recipe for coordinated intervention. However, it is wise to view complementarity as the lodestar. On the one hand, the 2011 Libyan crisis provides an example of conflicting positions. While the AU sought the route of diplomacy and political solutions in order to avoid bloodshed, the UNSC opted for military intervention in Libya. African states that were sitting as non-permanent members on the UNSC at the time of discussing the Libyan crisis were trapped in the middle.⁸⁴ On the other hand, the crisis in northern Mali in 2012 provides an example of much greater coordination and harmonisation. The situation in Mali reinforces the primary role of the affected state, and the obvious fact that it is at this level that the immediacy of a first response to mass atrocities is both most likely and desirable. Should this state be unable to respond, neighbours or allies (such as France, in this instance) form the second line of response – upon invitation. If a broader response is required, it is most likely that the political will would be first galvanised at the subregional level. Ideally, subregional efforts should be dovetailed with the AU response, and the proposed action should be as broadly multilateral as possible (in Mali, this took the form of AFISMA). The UN is likely to enter at a slightly later stage, to give the backing of its more extensive logistics and resources.⁸⁵

Why has the AU Assembly not yet invoked Article 4(h)? The need for institutional capacity and the political will to act

As stated earlier, there are a number of instances in which Article 4(h) intervention was not only possible but also warranted. The most obvious and often mentioned cases are the crisis in the Darfur region of Sudan, especially in 2003, the post-election violence in Kenya in 2007–8, and the massacre of civilians by Colonel Muammar Gaddafi's army in Libya in 2011. Taking the Darfur situation, for example, there is little doubt that the answer to the phase-one inquiry was unequivocal. A number of reliable accounts – by the UN High-Level Mission and the US government, for instance – supported the general consensus that at the very least crimes against humanity were being committed, and that there was government collusion with non-state actors.⁸⁶ Likewise, the AU rejected the allegation of genocide but accepted that crimes against humanity were being committed in Darfur.⁸⁷ Given the context, an implicit phase-two inquiry did not favour intervention, most probably on the basis of factors such as the uncertainty about the need for UNSC authorisation, the resistance of the government of Sudan, and the lack of a readily available African Standby Force (ASF).⁸⁸ It should also be taken into account that the PSC only started functioning in 2004, the PSC Protocol having entered into force on 26 December 2003.

In the Libyan crisis, there was overwhelming evidence of ‘widespread and systematic attacks’ against civilians which, as the UNSC noted, ‘may amount to crimes against humanity’.⁸⁹ The UN Human Rights Council called for an end to human rights violations, while the UN General Assembly suspended Libya's membership to the Human Rights Council.⁹⁰ Yet the AU did not invoke Article 4(h) to intervene in order to protect the population in Libya. While there were calls on the UNSC from the other regional bodies – such as the Arab League – to impose a no-fly zone over Libya to protect civilians, one would have expected the PSC to act decisively by recommending Article 4(h) intervention in the face of the deteriorating situation. Instead, the PSC took two important decisions, which were also overtaken by the UNSC action. First, it established a roadmap through which the Libya crisis could be resolved and, second, it established an AU high level ad hoc committee on Libya comprising five heads of state and government, together with the chairperson of the Commission.⁹¹

Further, there were obvious political divisions within the AU on the Libyan crisis. For example, Nigeria recognised the Transitional National Council (TNC) as the legitimate representative of the Libyan people⁹² as early as 23 August 2011, after its 291st meeting held on 26 August 2011, while the AU, in line with the South African position, declined to recognise the TNC as the legitimate authority in Libya. The position was made clear when South Africa's President Jacob Zuma said that the AU could not recognise the rebel council while there was still fighting in Libya.⁹³ Apparently the AU also based its decision on Article 30 of the AU Constitutive Act, which bars governments that come to power through unconstitutional means from participating in the activities of the continental body. Although the then-Chairperson of the AU Assembly, the Equatoguinean President Teodoro Obiang Nguema Mbasogo, made a statement of recognition of the TNC after its capture of the capital, Tripoli, on 20 September 2011, the AU's formal recognition came a month later, following the death of Gaddafi.⁹⁴ The AU's recognition came after the US and most other European countries, along with several prominent African governments including Nigeria, Ethiopia, Senegal and Côte d'Ivoire, had already recognised the TNC.

The Libyan crisis has shown that although the AU made an ambitious and revolutionary statutory commitment to intervene in a member state, such a commitment is yet to find concrete expression in the actions of AU member states where there is a clash between state security and human security. The AU still lacks the political will and courage to deal with state-sponsored abuses of civilian right holders in member states, such as Libya. While the architects of the AU Constitutive Act may have succeeded in adopting the non-indifference doctrine in theory, they cannot influence state practice.⁹⁵ Implementation of Article 4(h) squarely depends on the political will of the AU Assembly. However, most of the leaders seem to remain committed to the older rule of non-interference, going by their ambivalence on taking action in Libya. This view is strengthened by Dembinski and Reinold, who note that the ‘AU's commitment to human security is wavering when realizing human security comes at the expense of regime security’.⁹⁶ In this respect, Sturman has made this analysis:

Where they have acted to condemn unconstitutional changes of government, this is arguably in defence of incumbent governments, rather than democracy *per se*. In addition, while the PSC has applied the norm of rejection of unconstitutional changes of government in many cases, it has stopped short of applying the article 4(h) right to military intervention. Each of the AU peace missions undertaken to date has been with the consent of the government of the country in which the mission has been deployed, even in Sudan, where the PSC worked hard to convince President Al Bashir to consent to the AU deployment to Darfur.⁹⁷

In simple terms, the implementation of progressive and revolutionary principles such as the right of intervention under Article 4(h) still lacks bold leadership, as exposed by the Libyan crisis in 2011. The AU is still ensnared in the quagmire of not matching rhetoric with reality.⁹⁸ Article 4(h) exposes the Janus-faced posture of the AU. It is largely caught between the reality of being an intergovernmental institution, in which the state has primacy of place, and the ideal of being a supranational institution, in which national sovereignty loses its foothold and is replaced by continental institutions to take decisions binding on, and enforced by, its members. As long as most states jealously guard their national sovereignty and do not move beyond the mutual protection of elites, they will not take collective action that encroaches on the sovereignty of one of its members. They will remain reluctant to allow the material and personal cost of sacrificing the lives of their soldiers if they have not fully accepted 'supranational' as locus of importance beyond the 'national'. Principle 29 of the Pretoria Principles is informative on how to mobilise political will in this respect: 'When implementing Article 4(h) intervention, the humanitarian motive to save lives and protect human dignity should override national or strategic interests. Furthermore, States should commit resources towards prevention of mass atrocities and should implement Article 4(h) where prevention fails'.⁹⁹

The failings of Article 4(h)-intervention are ultimately not due to legal lacuna or the lack of legal arguments, but arise from the lack of political commitment. Political will is inextricably linked to enforcement capacity, which includes military means. The ASF, therefore, needs to become fully operational, and should be provided with resources to make it less reliant on the contributions of external donors. Principle 27 of the Pretoria Principles succinctly indicates that '[t]he African Standby Force should have a capability to protect populations at risk of mass atrocities and to deter potential perpetrators of mass atrocities'.¹⁰⁰ It is, however, not only at the regional level where capacity should exist, and be reinforced, but also at the national level, to ensure that the defence and security capacity is in place to deal with instability and other causes of mass atrocities.

Agenda for persuasive prevention

Although Article 4(h) foresees military force and is, therefore, mostly reactive, it has to be read within the context of other provisions of the AU Constitutive Act and the notion of the 'responsibility to protect' (R2P) more broadly. It is much more cost-effective to respond when early warning reveals that people are vulnerable than fire-fighting to manage an emergency response. Contrary to being a paper tiger, Article 4(h) should not be used in a reactive fashion as a fire brigade, but instead in a proactive and timely manner to identify impending atrocities and act. Thus, Article 4(h) should be used by the AU to influence member states to ensure the scrupulous and consistent compliance with human rights and international humanitarian law obligations to prevent atrocities. In this sense, Article 4(h) should be employed for 'persuasive prevention', which is constructive engagement backed by credible multilateral force to prevent or halt mass atrocity crimes.¹⁰¹

Clearly, it is better that these atrocities are prevented before innocent lives are lost. Preventive measures are, therefore, crucial. Principles 12 to 31 of the Pretoria Principles are dedicated to preventive measures to end mass atrocities on the continent.¹⁰² If these measures work well, Article 4(h)-intervention may not enter the picture. One part of the prevention possibility is the African human rights system. By drawing attention to serious massive violations (especially before these violations amount to 'mass atrocities'), the African Commission and the African Court may spur action at the AU level in general, and PSC in particular, that would pre-empt mass atrocities by inspiring political action.

Adopting a larger time frame, the promotional mandate of the African Commission (periodic state reporting and promotional visits) provides opportunities to examine the root causes and improve the rule of law, governance and human rights at the domestic level. The work of the African Commission in this regard should be complemented by the reviews of the APRM, which is one of the systems for monitoring adherence to the rule of law on the continent.¹⁰³ Adopting a narrower time frame, the ASF comes into play when conflict is already underway and the real possibility of mass atrocities starts emerging. When these atrocities have already occurred, the role of the human rights system changes. It then serves to provide a reliable factual basis for potential intervention. One option is to approach the African Court for its view on such a situation, by way of a request for an advisory opinion – bearing in mind, however, that time is of the essence in these circumstances.¹⁰⁴

Conclusion

The provision of the right to intervene under Article 4(h) of the AU Constitutive Act shows an ambition by the AU to provide effective solutions to prevent or halt mass atrocities in AU member states that have caused unfathomable suffering to innocent civilians on the continent.¹⁰⁵ It can be inferred from the wording of Article 4(h) that the rationale of the drafters of the provision was to grant discretion to the AU, as a regional body, to intervene where a member state is unable or unwilling to protect its citizens from mass atrocities, namely war crimes, genocide and crimes against humanity. Arguments that the ‘right’ really is a duty are based on moral and legal arguments. Moral arguments aside, the strongest legal argument is that the three atrocity crimes under Article 4(h) constitute *jus cogens*, and that their prevention is an obligation under international law. In this way, Article 4(h) can be seen as providing the mandate to the AU as a continental body to respond to serious violations of fundamental human rights and humanitarian law.¹⁰⁶ Another argument is that a purposive reading of Article 4(h) necessitates the conclusion that its purpose (preventing harm in grave situations) cannot be served without intervention in the specified cases. Therefore, Article 4(h) has endowed the AU with the necessary powers to intervene in the affairs of a member state in the event of mass atrocities, regardless of the consent of the target state, in a quest to avoid a repeat of the inaction in Rwanda in 1994.¹⁰⁷

The right of intervention under Article 4(h) is not only a departure from the traditional notions of the principle of non-interference and non-intervention in the territorial integrity of nation states, but also contrasts with the long-standing principle of state sovereignty in Africa.¹⁰⁸ By endorsing the right to intervene under Article 4(h), AU member states have accepted that the protection of their populations from atrocities is not only a domestic issue but also a continental concern. African leaders have consciously and willingly contracted away sovereignty for the purpose of protecting their citizens from mass atrocities.¹⁰⁹ The non-interference principle in the internal affairs of states embodied in Article 4(g) is thus qualified by Article 4(h), to the effect that mass atrocity crimes are of legitimate concern to the AU and the international community.

The aim of the Article 4(h) intervention should, first and foremost, be to prevent mass atrocities from occurring and, in the event of mass atrocities, intervention should be aimed at protecting the populations at risk and the pursuit of perpetrators. Therefore, the goal of Article 4(h) intervention should be to protect human lives, and not to go beyond that purpose. Article 4(h) should not be used for persuasive prevention – that is to say, as a tool for potential use of force to compel member states to comply with their human rights and humanitarian law obligations to prevent or halt atrocities.¹¹⁰ Although military intervention can save lives and bring about security in the short term, it cannot necessarily address the underlying, structural causes of atrocities, which involve complex issues such as ethnic

conflicts, economic inequalities and the scramble for natural resources, among others. Therefore, prevention of mass atrocities should not be equated with, or be seen through the prism of, Article 4(h)-intervention alone.¹¹¹ The focus should instead be on the entire spectrum of preventive strategies at the disposal of the AU in the face of mass atrocity crimes, including the African human rights system and the APRM.

No doubt, the African Peace and Security Architecture (APSA) looks excellent on paper. It is slowly being put in place, but is only likely to take off if the leap to supranationalism is made by both states and subregional organisations. Much of the success of the AU's institutional architecture depends on the strength of the subregional units as building blocks, and their acceptance to relinquish authority to the AU. Importantly, the AU should reduce the need for costly intervention and focus more on dealing with the causes of crisis rather than its symptoms. Specifically, the AU should focus more on improving human security and promoting the rule of law, good governance and economic development in AU member states. These factors are crucial to the prevention of mass atrocities. The challenge for the AU is to develop a political-normative framework that promotes a culture of prevention and promotes a climate of compliance with international human rights and international humanitarian law obligations by AU member states in order to end mass atrocities on the continent.¹¹²

Notes

¹ Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 4.

² Protocol on Amendments to the Constitutive Act of the African Union 2003, adopted in Maputo, Mozambique on 11 July 2003, Article 4.

³ Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 4.

⁴ B Kioko, The right of intervention under the African Union's Constitutive Act: from non-interference to non-intervention, *International Review of the Red Cross*, 852, 2003. See also T Maluwa, Reimagining African unity: some preliminary reflections on the Constitutive Act of the African Union, *African Yearbook of international Law*, 9, 2001.

⁵ SJTM Samkange, African perspectives on intervention and state sovereignty, *African Security Review*, 11:1, 2002. See also T Ekiyor, Implementing the responsibility to protect doctrine in Africa, FES Briefing Paper 01, Berlin: Friedrich Ebert Stiftung, 2007; D Geldenhuys, Brothers as keepers: Africa's new sovereignty regime, *Strategic Review for Southern Africa*, 28:2, 2006.

⁶ FM Deng et al, *Sovereignty as responsibility – conflict management in Africa*, Washington, DC: Brookings Institution, 1991.

⁷ LS Sunga, The role of humanitarian intervention in international peace and security: guarantee or threat?, in H Köchler (ed.), *The use of force in international relations: challenges to collective security*, Vienna: International Progress Organization, 2006. See also United Nations (UN), World Summit outcome, 60th session, UN Doc. A/60/L.1/2005, 15 September 2005.

⁸ The Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 1998, Articles 6–8. See also D Kuwali, Old crimes, new paradigms: preventing mass atrocities under R2P, in RI Rotberg (ed.), *Mass atrocity crimes: preventing future outrages*, Washington, DC: Brookings Institution, 2010.

⁹ Centre for Human Rights, *Pretoria principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union*, Pretoria: Centre for Human Rights, 2012.

¹⁰ Ibid.

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- ¹² E Baimu and K Sturman, Amendment to the African Union's right to intervene: a shift from human security to regime security?, *African Security Review*, 12:2, 2003, <https://www.issafrica.org/pubs/ASR/12No2/AfWat.html> (accessed 26 August 2015).
- ¹³ TD Gill, Humanitarian intervention: legality, justice and legitimacy, *Utrecht Journal of International and European Law*, 24:65, 2007.
- ¹⁴ PD Williams, From non-intervention to non-indifference: the origins and development of the African Union's security culture, *African Affairs*, 106, 2007.
- ¹⁵ Centre for Human Rights, *Pretoria principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union*, Pretoria: Centre for Human Rights, 2012, Principle 6.
- ¹⁶ See, for example, Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice (ICJ) Judgement, General List No. 9, 26 February 2007. See also MC Bassiouni, International crimes: *jus cogens* and *obligatio erga omnes*, *Law and Contemporary Problems*, 59:9, 1996.
- ¹⁷ CJ Tams, *Enforcing obligations erga omnes in international law*, Cambridge: Cambridge University Press, 2005.
- ¹⁸ For a detailed discussion, see D Kuwali, *The responsibility to protect: implementation of Article 4(h) intervention*, Leiden: Martinus Nijhoff, 2011.
- ¹⁹ MC Bassiouni, International crimes: *jus cogens* and *obligatio erga omnes*, *Law and Contemporary Problems*, 59:9, 1996. See also A Clapham, Rights and responsibilities: a legal perspective, in O Jütersonke and K Krause (eds.), *From rights to responsibilities: rethinking interventions for humanitarian purposes*, Geneva: PSIS, 2006.
- ²⁰ O Corten, Human rights and collective security: is there an emerging right of humanitarian intervention?, in P Alston and E MacDonald (eds.), *Human rights, intervention, and the use of force*, Oxford: Oxford University Press, 2008.
- ²¹ For a detailed discussion, see D Kuwali, The end of humanitarian intervention: evaluation of the evolution and revolution of the AU right of intervention, *African Journal on Conflict Resolution*, 9, 2009. A similar argument is made with reference to the responsibility to protect in C Stahn, Responsibility to protect: political rhetoric or emerging legal norm, *American Journal of International Law*, 101, 2007.
- ²² For an in-depth analysis of such treaty-based interventions, see OA Hathaway et al, Consent-based intervention: giving sovereign responsibility back to the sovereign, *Cornell International Law Journal*, 46, 2013. See also D Wippman, Military intervention, regional organizations, and host-state consent, *Duke Journal of Comparative & International Law*, 7, 1996.
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- ²⁴ See, for example, Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 4(e).
- ²⁵ Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 23(2).
- ²⁶ A Abass, Calibrating the conceptual contours of Art 4(h), in D Kuwali and F Viljoen (eds.), *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act*, London: Routledge, 2013, 42.

²⁷ Centre for Human Rights, *Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union*, Pretoria: Centre for Human Rights, 2012, Principle 5.

²⁸ S Sewall, D Raymond and S Chin, *Mass atrocity response operations: a military planning handbook*, Cambridge, MA: Carr Center for Human Rights Policy, Harvard Kennedy School and US Army Peacekeeping and Stability Operations Institute, 2010.

²⁹ R Thakur, Freedom from fear, in P Heinbecker and P Goff (eds.), *Irrelevant or indispensable? The United Nations in the 21st century*, Waterloo: Wilfred Laurier Press, 2005, 123.

³⁰ O Beckman, *Armed intervention: pursuing legitimacy and the pragmatic use of legal argument*, Lund: Lund University, 2005.

³¹ Centre for Human Rights, *Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union*, Pretoria: Centre for Human Rights, 2012, Principle 10.

³² As Judge Schwebel rightly noted in the Nicaragua Case, the UN Security Council (UNSC) is, first and foremost, a political, not a judicial or humanitarian body; see The military and paramilitary activities in and against Nicaragua (Nicaragua v. US), ICJ Reports, 1986 Merits.

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³⁴ See the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Articles I, VIII.

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³⁹ Charter of the International Military Tribunal Nuremberg, 1945.

⁴⁰ The Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 1998, Article 8(1).

⁴¹ A Cassese, International criminal law, in MD Evans (ed.), *International law*, Oxford: Oxford University Press, 2003.

⁴² SR Ratner and JS Abrams, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd ed., Oxford: Oxford University Press, 2001, 84.

⁴³ Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts 8 June 1977, 1125 UNTS 609, [Additional Protocol II], Article 1(2), 1977. Additional Protocol II does 'not apply to situations of internal disturbances and tensions, such as riots [and] isolated and sporadic acts of violence'.

⁴⁴ Geneva Conventions of 12 August 1949, www.icrc.org, (accessed 27 September 2014), Conventions I–IV, Common Article 2.

⁴⁵ R Lemkin, *Axis rule in occupied Europe: laws of occupation – analysis of government – proposals for redress*, Washington, DC: Carnegie Endowment for International Peace, 1944.

⁴⁶ Organization of African Unity, *Rwanda: the preventable genocide*, Addis Ababa: AU, 2000; WA Schabas, Was genocide committed in Bosnia and Herzegovina? First judgments of the International Criminal Tribunal for the former Yugoslavia, *Fordham International Law Journal*, 25, 2001, citing the gravity of the sentences in *Prosecutor v. Krstic*, IT-98-33-T (2001) and *Prosecutor v. Kambanda*, ICTR-97-23S, (1998), para. 16.

⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1.

⁴⁸ T Lindberg, The only way to prevent genocide, *Wall Street Journal*, 3 April 2009, <http://online.wsj.com/article/SB123870435894683767.html>

⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 2; LS Sunga, *International responsibility in international law for serious human rights violations*, Dordrecht: Martinus Nijhoff, 1992; SR Ratner and JS Abrams, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd ed., Oxford: Oxford University Press, 2001.

⁵⁰ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement (2 September 1998). See also D Kuwali, Old crimes, new paradigms: preventing mass atrocities under R2P, in RI Rotberg (ed.), *Mass atrocity crimes: preventing future outrages*, Washington, DC: Brookings Institution, 2010.

⁵¹ This is evident in Article IV of the Genocide Convention, which states that persons committing genocide or any of the other acts outlined in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals; see Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 4; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T (1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement (2 September 1998). See also WA Schabas, *Genocide in international law*, Cambridge: Cambridge University Press, 2000.

⁵² Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article III; *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement (2 September 1998); SR Ratner and JS Abrams, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd ed., Oxford: Oxford University Press, 2001.

⁵³ SR Ratner and JS Abrams, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd ed., Oxford: Oxford University Press, 2001.

⁵⁴ *Ibid.*

⁵⁵ The Rome Statute of the International Criminal Court Explanatory Memorandum, RSICC/C, Vol. 1, 360. See also C Macleod, Towards a philosophical account of crimes against humanity *European Journal of International Law*, 21:2, 2010, 281–302.

⁵⁶ The Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 1998, Article 7. See also Stanley Foundation, *Actualizing the responsibility to protect: 43rd Conference on the United Nations of the Next Decade*, Muscatine, IA: Stanley Foundation, 2008, 12.

⁵⁷ The 1945 Charter of the International Military Tribunal (IMT, also known as the London Charter), Article 6(c).

⁵⁸ G Evans, Facing up to our responsibilities, *The Guardian*, 17 May 2008.

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⁶⁵ International Law Commission, *Yearbook of the International Law Commission: fourth report on the Draft Code of Offences against the Peace and Security of Mankind*, Part I, New York, NY: International Law Commission, 1986.

⁶⁶ Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 4(o). See also the Protocol relating to the Establishment of the Peace and Security Council of the African Union, Article 3(f), http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf (accessed 25 August 2015).

⁶⁷ The Protocol relating to the Establishment of the Peace and Security Council of the African Union, Article 7(1)(e) states that 'the PSC, in conjunction with the Chairperson of the AU Commission shall: recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments'.

⁶⁸ African Union (AU), Peace and Security Council Communiqué, 27 February 2013, PSC/PR/Comm (CCCLVII).

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⁷⁰ See AU, African Commission on Human and Peoples' Rights, www.achpr.org/ (accessed 10 November 2013); AU, African Court on Human and Peoples' Rights, www.african-court.org/en/ (accessed 10 November 2013); AU, African Peer Review Mechanism (APRM), <http://aprm-au.org/> (accessed 10 November 2013).

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⁷⁴ JI Levitt, The Peace and Security Council of the African Union: the known unknowns, *Transnational Law & Contemporary Problems*, 13, 2003.

⁷⁵ Ibid., 126.

⁷⁶ According to the Protocol relating to the Establishment of the Peace and Security Council of the African Union, Article 7(1)(e), the PSC shall, in conjunction with the Chairperson of the AU Commission, recommend to the AU Assembly, intervention pursuant to Article 4(h). However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority. According to the Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, Addis Ababa, 26 May 2001, Article 7(1), the

AU Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of member states. Two-thirds of the total membership of the AU forms a quorum at any meeting of the assembly.

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