

# The legality of the African Union's right to intervention

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2013

# **The legality of the African Union's right to intervention**

by

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Submitted in partial fulfilment of the  
requirements for the degree

Master of Laws in Public International Law

in the Faculty of Law,

University of Pretoria

April 2013

## Summary

The African Union (AU) was established by the African Union Constitutive Act in 2000 to address the shortcomings of its predecessor the Organisation for African Unity (OAU). One of the main considerations for the establishment of the AU was the OAU's strict adherence to the principle of non-intervention. The OAU was established on the principle of sovereignty and territorial integrity but the leaders of Africa realised that while the protection of sovereignty and territorial integrity was important ambitions for the African continent, it was just as important that African conflicts are resolved more effectively. While the AU Constitutive Act restates the commitment of the AU to the principles of sovereignty and territorial integrity, the AU Constitutive Act also provides for protection of human rights and, most significantly, for the limited intervention by the AU in grave circumstances.

Article 4(h) of the AU Constitutive Act provides 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". The right to intervention contained in this article provides a great opportunity to improve the effectiveness of conflict management on the African continent. However, Articles 2(4) and 2(7) of the United Nations Charter pose a strong challenge to the legality of intervention under article 4(h) of the AU Constitutive Act.

It is generally accepted that consent or invitation by the state concerned precluded any wrongfulness of the *prima facie* violation of international law and in particular a valid exception to the prohibition on the use of force. By signing the AU Constitutive Act the member states of the AU consented in advance to the possibility of intervention and consequently there is no conflict between the right to intervene and the prohibition of the use of force, as long as the AU remains within the bounds set out in the AU Constitutive Act and the succeeding mandate given by the Assembly.

It might be argued that the prohibition on the use of force is a *ius cogens* norm that cannot be contracted out and that any agreement to this effect is void. However, the

commentaries to Article 26 of the Articles on State Responsibility state that consent may be relevant when applying such a peremptory norm. Furthermore, only the prohibition on aggression is peremptory in nature. The definition of aggression states *inter alia* that aggression is the use of armed force on the territory of another in contravention of an agreement between the parties concerned. Thus, use of force undertaken in the territory of a state within the bounds of the agreement between the parties is not aggression and thus not a violation of a peremptory norm.

The increased international focus on human rights and human security has influenced the way the notion of sovereignty and the principle of non-interference are understood. In 2001 the International Commission on Intervention and State Sovereignty's report "The Responsibility to Protect" introduced the twin norms of sovereignty as a responsibility and the Responsibility to Protect. The notion of sovereignty as a responsibility implies that every state has the responsibility to protect its people from gross human rights abuses, while the Responsibility to Protect (R2P) refers to the responsibility of the international community to act should as state be unwilling or unable to fulfil its responsibilities towards its citizens.

By incorporation of the right to intervention in its Constitutive Act, the AU has embraced the concept of Responsibility to Protect. While the international endorsement of this concept and the constant paralysis of the SC, especially in respect of Africa, adds considerable legitimacy to possible intervention by the AU in terms of article 4(h).

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# **Abbreviations**

ASR	ARTICLES ON STATE RESPONSIBILITY
AU	AFRICAN UNION
ECOWAS	ECONOMIC COMMUNITY OF WESTERN AFRICAN STATES
GA	UNITED NATION'S GENERAL ASSEMBLY
ICC	INTERNATIONAL CRIMINAL COURT
ICISS	INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY
ICJ	INTERNATIONAL COURT OF JUSTICE
ILC	INTERNATION LAW COMMISSION
NATO	NORTH ATLANTIC TREATY ORGANISATION
OAU	ORGANISATION FOR AFRICAN UNITY
R2P	RESPONSIBILITY TO PROTECT
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SC	UNITED NATIONS'S SECURITY COUNCIL
UN	UNITED NATIONS
VCLT	VIENNA CONVENTION ON THE LAW OF TREATIES

# **Declaration**

I, **Stephanie Anne Fogwell**, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Public International Law.

Signed: \_\_\_\_\_

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# Chapter 1

## Introduction

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### 1.1 Background and rationale

With the introduction of the United Nations Charter (UN Charter) in 1948 the Security Council (SC) of the United Nations (UN) was given the primary responsibility to ensure peace and security<sup>1</sup>. On 17 March 2011 the SC passed a resolution authorising the North Atlantic Treaty Organisation (NATO) to intervene in Libya in order to save the lives of civilians caught up in the unrest in that country<sup>2</sup>. The SC has, however, not always fulfilled this obligation either because of veto voters' interference or their lack of interest. The SC has irrefutably become a political playground and Africa has suffered immensely due to the lack of political interest in the continent and the role that the permanent members of the SC have played. This is not simply a cynical view but can be backed by events such as the genocide in Rwanda where the SC failed to take action and consequently hundreds of thousands of lives were lost that might have been saved had the SC fulfilled its obligation.

The SC cannot bear the entire blame. Some of the responsibility must be placed on the shoulders of African Leaders and the African regional body, the Organisation for African Unity (OAU 1963 – 2002). The OAU adopted a strict adherence to the principle of non-intervention and even with the growing international focus on Human Rights and the continued suffering of innocent Africans, the leaders of Africa remained jealously possessive of its newly acquired independence<sup>3</sup>.

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<sup>1</sup> Art 1(1) of the Charter of the United Nations (1945) (hereinafter the UN Charter).

<sup>2</sup> UNSC Resolution 2022 (2011).

<sup>3</sup> The Excerpts of the Charter of the Organisation for African Unity (1963) (hereinafter the OAU Charter).

With the establishment of the African Union (AU), the successor to the OAU in 2001, the principle of non-intervention gave way to the principle of non-indifference<sup>4</sup>. The AU adopted for itself the right to intervene in a Member State in the case of grave circumstances amounting to genocide, war crimes and crimes against humanity<sup>5</sup>.

While this new approach to African human security could go a long way in addressing the serious human rights abuses on the African Continent, the legality of this right of intervention is questionable. Articles 2(4) and 2(7) of the UN Charter pose a strong challenge to the legality of intervention under article 4(h) of the AU Constitutive Act.

I argue, however, that article 2(4) does not pose a challenge to the legality of the right to intervene as intervention in terms of article 4(h) is based on consent. Consent is generally accepted as a valid ground for intervention<sup>6</sup>. This view is supported by most commentators, international courts and other international instruments such as the Articles on the Responsibility of State for International Wrongful Acts<sup>7</sup>.

The problem with article 2(7) is that it was often used as a blanket defence to shield states from international responsibility for human rights and other violations. I examine the claim by certain commentators, that the right to intervention, as enshrined in the AU Constitutive Act, is supported by the doctrine of Responsibility to Protect (R2P) and the principle of Sovereignty as a Responsibility<sup>8</sup>.

The concepts of R2P and Sovereignty as a Responsibility were first introduced by the International Commission on Intervention and State Sovereignty (ICISS) in 2001<sup>9</sup>.

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<sup>4</sup> Kuwali (2010) Responsibility to Protect: Implementation of Article 4(h) Intervention, 75; Sarkin "The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect" 53 Journal of African Law 1 (2009) Kioko "The right of Intervention under the African Union's Constitutive Act: From non-interference to non-intervention" (2003) 85 IRRC 807, 819.

<sup>5</sup> Art 4(h) of the AU Constitutive Act.

<sup>6</sup> See generally Chapter 3 *infra*.

<sup>7</sup> See Chapter 3 *infra*.

<sup>8</sup> See Chapter 4 *infra*.

<sup>9</sup> International Commission on Intervention and State Sovereignty: The Responsibility to Protect (2001) available at < [responsibilitytoprotect.org/ICISS\\_Report.pdf](http://responsibilitytoprotect.org/ICISS_Report.pdf) > (last visited on 24 November 2012) (hereinafter The ICISS Report (2001)).

The twin norms of R2P and Sovereignty as a Responsibility can be summed up as follows:

Every sovereign State has the responsibility to protect its populations from human rights abuses. If a State is unwilling or unable to conform to this responsibility, it loses its right to sovereignty and the responsibility to protect affected people falls to the International Community. This doctrine has received widespread international support, including from the UN system<sup>10</sup>.

I submit that the international acceptance of the R2P together with the paralysis of the SC adds considerable legitimacy to intervention undertaken in terms of article 4(h) of the AU Constitutive Act.

## 1.2 Research questions

1. Why did the AU decide to introduce the right to intervene?
2. Are there legal grounds for the right to intervene?
3. Does the AU's right to intervene reflect an acceptance of the R2P?

## 1.3 Methodology

The research approach that I followed in this contribution is a literature-based approach. The primary source of research was books and journal articles on the topic, but also considerable research was done on international documents and reports relating to this topic, including AU and UN documents.

## 1.4 Chapter outline

In the second chapter the history of the African Regional Organisations with specific reference to conflict management and resolution is examined. Specific emphasis is

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<sup>10</sup> World Summit Outcome, 60<sup>th</sup> Session of UN General Assembly (2005) available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>> (last visited on 25 November 2012).

placed on the establishment of the AU and in particular, the reasons behind the abolishment of the OAU. It focuses on the OAU's non-interference policy and attempt to demonstrate how this policy led to the abolishment of the OAU. While the AU Constitutive Act still recognises the sovereignty and territorial integrity of its member states, the AU Constitutive Act also entrenches the right of the AU to intervene in a member state should grave circumstance exist<sup>11</sup>.

The legality of the right to intervene is discussed in Chapter 3. The establishment of the AU brought about a major shift in the way conflict management and resolution on the continent is approached. Chapter 3 deals particularly with the relationship between the AU's right to intervene and the prohibition on the use of force contained in article 2(4) of the UN Charter. It focuses on consent as a possible ground for the legality of the use of force outside the UN structures as well as the apparent obstacle of the *ius cogens* nature of the prohibition on the use of force.

The newly developed concepts of Sovereignty as a Responsibility and the Responsibility to Protect are discussed in the fourth chapter. Many commentators believe that the AU's right to intervene is based on the same school of thought as the R2P and that this adds considerable legitimacy to the right to intervene<sup>12</sup>.

Finally, I attempt to draw relevant conclusions on the legality and legitimacy of the AU's right to intervene.

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<sup>11</sup> Art 4 of the AU Constitutive Act.

<sup>12</sup> See Chapter 4 *infra*.

# Chapter 2

## The History of Intervention in Africa

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### 2.1 Introduction

At an extraordinary session of the Organisation for African Unity (OAU) in 1999 the leaders of African states and governments decided to demolish the OAU and establish a new regional organisation, the African Union (AU)<sup>13</sup>. In this Chapter the history of the African regional organisations is discussed and in particular the circumstances that led to the abolishment of the OAU and to the establishment of the AU.

### 2.2 The Organisation for African Unity

The OAU was established during May 1963. The main objective of the OAU revolved around promoting unity, solidarity and cooperation between African States *inter se* and between African States and the international community; abolishing the colonialist and apartheid regimes that reigned throughout African and safeguarding the sovereignty and territorial integrity of member states<sup>14</sup>.

Although the OAU had succeeded in assisting in the decolonisation of states such as Zimbabwe in 1980 and played an important role in releasing South Africa from the claws of apartheid, it failed to prevent and control conflicts on the continent<sup>15</sup>.

One of the main considerations for the failure by the OAU to act appropriately in situations of conflicts was the non-intervention principle strictly adhered to by the OAU.

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<sup>13</sup> The Sirte Extraordinary Session (1999) (hereinafter the Sirte Declaration).

<sup>14</sup> Article 2 and 3 of the OAU Charter; See Naldi (1999) *The Organization for African Unity: A Analysis of its role* (2<sup>nd</sup> edition) for a full discussion on the establishment, history and structure of the OAU.

<sup>15</sup> See generally Abass & Baderin "Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union (2002) 49 NILR 8 -13.

### 2.2.1 The OAU's non-intervention principle

Article 2 of the Charter of the Organisation for African Unity setting out the purposes of the OAU declares that the OAU will defend the sovereignty, territorial integrity and independence of the African people. Article 3 determines that member states, in pursuit of the purposes in article 2, solemnly affirm and declare their adherence to certain principles. These include the "sovereign equality of all member states", "Non-interference in the internal affairs of states" and "Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence"<sup>16</sup>.

It is clear from the above that when drafting the Charter, strong focus was placed on the protection of sovereignty and on the principle of non-interference. The reason for this is regarded by many to be that African countries and their leaders were reluctant to cede any control over their internal affairs to the OAU<sup>17</sup>. This appears to be a direct consequence of the colonial regime that existed in Africa, a regime that the OAU had as goal to demolish. African states had become jealously possessive of their independence and stood weary of any system that threatened this "new found" independence.

"*Determined* to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms".<sup>18</sup>

This principle of non-intervention is supported not only by the UN but is recognised and accepted to such an extent that it forms part of customary international law<sup>19</sup>.

Article 2(7) of the UN Charter:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require

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<sup>16</sup> Art 2 of the OAU Charter.

<sup>17</sup> Rechner "From the OAU to the AU: a Normative Shift with Implications for Peacekeeping and Conflict Management, or just a name change?" (2006) 39 Vand. J. Transnat'l L 543, 548 and Abass & Baderin (2002), 9.

<sup>18</sup> Extract from the Excerpts of the OAU Charter.

<sup>19</sup> Abass & Baderin (2002), 9 and Naldi (1999), 6.

the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

While the UN made provision for interference in certain circumstances amounting to a threat or breach of international peace and security<sup>20</sup>, the OAU adopted a rigid approach whereby no interference would be allowed and sovereign equality and the protection of the territorial integrity of Member State was of paramount importance to the OAU and its system. The OAU was barred from interfering in any situations that fell in the exclusive jurisdiction of a member state<sup>21</sup>.

The OAU’s conflict management system lacked any institutional system for dealing with conflicts and was conducted on an *ad hoc* basis<sup>22</sup>. This meant that the only exception to the principle of non-intervention was the rare case where the OAU was invited by the government of a state to intervene and help solve security issues. Such an intervention was however subject to the continued consent of the invitee state. This meant that if at any stage the OAU acted in a manner that contradicted the interest of the invitee state, the state could simply withdraw its invitation and the intervention would be considered a violation of international law<sup>23</sup>.

During the period from 1977 - 1981 the OAU and Nigeria conducted peacekeeping operations in Chad<sup>24</sup>. This intervention was unique as it was the first time in the history of the OAU that the state in crisis, Chad, consented to an intervention. First, a neutral Nigerian peacekeeping force was sent to Chad, their neutrality was however not accepted by the Chadian government. In 1981 the Nigerian forces were replaced by a neutral OAU peacekeeping force. At a meeting held to discuss the situation in Chad the OAU reaffirmed the neutrality of their forces. The President of Chad insisted that the OAU force should fight actively on the side of the Chadian government against the rebels. The neutrality of the forces was considered by Chad

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<sup>20</sup> UN Charter Chapter vii.

<sup>21</sup> Gomes “Peacemaking Role of the OAU and the AU: A Comparative Analysis” in Akokpari *et al* (2008) *The African Union and its Institutions* 117(hereinafter Gomes (2008) “A Comparative Analysis”.

<sup>22</sup> *Id.* 119 and Naldi (1999), 32.

<sup>23</sup> Abass & Baderin (2002), 11 and Naldi (1999), 32.

<sup>24</sup> See generally Amoo “Frustration of Regional Peacekeeping: The OAU in Chad 1977-1982 available at <<http://www.cartercentre.org/documents/1208.pdf>> (last visited on 3 June 2012).

to be a betrayal by the OAU and consent was subsequently withdrawn. The withdrawal of consent meant that any mandate that the OAU had in Chad ended and the forces were withdrawn.

The situation in Chad once again highlighted how the OAU's policy on non-intervention without the consent of the state greatly hampered any security aspiration that the organisation might have had.

The most robust response to conflict resolution by the OAU was taken in 1993 with the introduction of the Mechanism for Conflict Prevention Management and Resolution (the Mechanism)<sup>25</sup>. This Mechanism was established with the goal to prevent, manage and resolve conflict in African Countries. While the establishment of the Mechanism appeared to signal a change in the conflict management system of the OAU, the performance of this Mechanism was poor. Powell considers the foremost reason for this failure the nearly unequivocal commitment to the principle of sovereignty and non-interference and the respect for territorial integrity<sup>26</sup>. It was made clear that the functioning of the Mechanism would be based on consent and cooperation of the parties to the conflict<sup>27</sup>. Thus the principle of non-intervention still formed the basis of the functioning of the Mechanism and the OAU was still prevented from acting appropriately in times of conflicts.

Although the principle of non-intervention was relaxed from time to time, it was the lack of political will on the side of African leaders that was the deeper problem. The effect of this principle and the lack of political will by African leaders was that the OAU's functions were limited to attaining political independence and demolishing the apartheid regime<sup>28</sup>. Ultimately the OAU was not legally or operationally equipped to deal with conflicts on the continent<sup>29</sup>.

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<sup>25</sup> OAU Declaration on a Mechanism for Conflict Prevention and Resolution (Cairo Declaration)(1993).

<sup>26</sup> Powell "The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect" Working Paper The North-South Institute May 2005, available at <<http://www.iss.co.za/pubs/Monographs/No119/Chap3.htm>> (last visited on 3 June 2012), 9.

<sup>27</sup> Gomes (2008) "A Comparative Analysis" 120-121 and Naldi(1999), 32.

<sup>28</sup> Abass & Baderin (2002) NILR 9

<sup>29</sup> Powell (2005) "The AU's Emerging Peace and Security Regime" 9.

### 2.3 The History of (non-)intervention in Africa

The most significant recent mass atrocity event to have taken place on the African Continent is without much doubt the genocide committed in Rwanda during 1994. More than 800 000 people died at the hands of their countrymen. The greatest shame was that despite peacekeeping efforts by the OAU and the UN as well as reports submitted to the UN indicating that the genocide was impending; the tragedies that unfolded in 1994 were not prevented<sup>30</sup>. Further, given the OAU's institutional and logistical limitations, it was powerless to control the conflict. The conflict that was fought on foot and through the media was characterised by indifference and unfortunately the doctrine of non-interference entrenched in the minds of African Leaders meant that the OAU was left standing on the side lines. The peacekeeping alone was found to be ineffective and the UN finally authorised its forces to use force to protect civilians<sup>31</sup>. The general international reaction was that it was all a too little too late and that such atrocities should NEVER HAPPEN AGAIN. These events seemed to create a shift in the mind-set of not only African leaders but also the international community as a whole.

Furthermore, the growing involvement of sub-regional organisation in African conflicts proved more effective, contributing greatly to the continued irrelevance of the OAU<sup>32</sup>. The stringent reliance on and commitment to the principle of non-intervention and the protection of sovereignty meant that the OAU was watching from the stands as some sub-regional organisations played a larger role in conflict prevention and reaction on the continent.

The Economic Community of Western African States (ECOWAS) was established in 1974 to promote economic and social cooperation by the Western African States<sup>33</sup>. In 1990 ECOWAS launched an intervention in Liberia to help resolve the on-going internal conflict. The conflict started when Charles Taylor led an armed invasion against the government of Samuel Doe that was not only politically motivated but

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<sup>30</sup> Rechner (2006) 39 Vand. J. Transnat'l 551-552

<sup>31</sup> UN Security Council Resolution 918 (1994).

<sup>32</sup> Abass & Baderin (2002) NILR 6, see also Naldi (1999), 7-8.

<sup>33</sup> See the revised Treaty of the Economic Community of Western African States (1993).

also involved killings based on ethnicity. Apart from the killing of innocent civilians over 2.6 million people were displaced both internally and externally<sup>34</sup>.

ECOWAS based the intervention on its Protocol on Mutual Assistance and Defence (the Protocol). This protocol was adopted in 1981 to supplement the Protocol on Non-Aggression (the 1978 Protocol) regulating the use of force between member states adopted in 1978. The reason for the extension of the 1978 Protocol was to further regulate the conflicts caused or supported by foreign (non-member state) forces<sup>35</sup>. The Protocol recognised that instability, whether caused by internal or external sources, has a direct effect on the economic and social stability of the ECOWAS region. This was the main reason raised as justification of ECOWAS's intervention in Liberia. It was stated that the conflict in Liberia was causing regional instability due to the overflow and displacement of refugees<sup>36</sup>. Furthermore, the leaders of the ECOWAS region were outraged by the senseless killing of innocent civilians thus raising humanitarianism as another reason for the intervention.

While the UN's attention was elsewhere, the OAU's reaction was limited to expressing their support for the ECOWAS's intervention. Once again, the OAU lacked the resources and political will to intervene.

The Southern African Development Community (SADC) was another sub-regional organisation that undertook activities without the OAU. SADC intervened in the conflict in the Democratic Republic of Congo under the auspices of The Protocol on Politics, Defence and Security adopted in 2001<sup>37</sup>. This Protocol gave SADC the right to intervene not only in inter-state conflicts but also in intra-state conflicts<sup>38</sup>.

These growing activities of the sub-regional organisations pointed out the flaws of the OAU and the effect thereof was that the OAU became even more irrelevant in the security structures on the continent.

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<sup>34</sup> See generally Ero (1995) "ECOWAS and the Subregional Peacekeeping in Liberia" *Journal for Humanitarian Assistance* accessed online at <<http://sites.tufts.edu/jha/archives/66>> (Last visited 3 June 2012) and Naldi (1999), 10.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Blantyre Summit (2001).

<sup>38</sup> Article 2(e).

Apart from the institutional limitations of the OAU, it was further hampered by a lack of financial and logistical resources. The effect of this was that even when the OAU was invited to intervene, it could not make a meaningful impact<sup>39</sup>. The Chadian conflict represents a good example of how the lack of resources contributed to the failure of the OAU efforts; first, only 3 countries were able to contribute human resources to the peacekeeping mission and secondly, the cost of the mission exceeded the annual OAU budget by over 10 times<sup>40</sup>. The OAU had to appeal to the UN for financial assistance, a call that was responded to by only a limited number of countries due to the lack of interest by the international community in Africa<sup>41</sup>. The financial woes of the OAU were exacerbated due to unpaid contributions by member states. The lack of enforcement mechanism in the OAU structure contributed significantly to this failure by member states<sup>42</sup>.

The OAU is however not entirely to blame for the lack of action. The UN has the primary responsibility to maintain international peace and security while the regional organisations should play a more supporting role<sup>43</sup>. The UN has, however, gained a reputation for not acting adequately in the face of African conflicts. The main reasons for this failure are the lack of strategic value that Africa held for the international community and the self-interest of the permanent members of the SC<sup>44</sup>.

In the Lome Declaration adopted at the 36<sup>th</sup> summit of the OAU, the African leaders expressed concern at the long due reform of the SC in order to provide better reaction in times of conflict. It was said that the international community has not always accorded attention to conflict management in Africa and was not always willing to provide mission in African with much needed financial and logistical support<sup>45</sup>. This and the OAU's own failures formed the basis upon which the African leaders established the African Union.

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<sup>39</sup> Abass & Baderin (2002) NILR 12.

<sup>40</sup> Rechner (2006) 39 Vand. J. Transnat'l 550 -551.

<sup>41</sup> Abass & Baderin (2002) NILR 12.

<sup>42</sup> Rechner (2006) 39 Vand. J. Transnat'l 558-559.

<sup>43</sup> Article 1 UN Charter.

<sup>44</sup> Wokoro "Towards a Model for African Humanitarian Intervention 6 Regent J. Int'l L (2008), 1.

<sup>45</sup> The Lome Declaration (1999).

Thus the reasons behind the failure to prevent and react adequately to African conflicts are threefold:

1. The International community has not always accorded the same attention to conflict management as in other regions<sup>46</sup>;
2. Conflict management and peacekeeping on the continent has not always received adequate financial and logistical support for the UN and the rest of the international community<sup>47</sup>; and
3. The OAU's reliance on the principle of non-intervention and the sanctity of the sovereign<sup>48</sup>.

Ultimately, it was the OAU's structures and approach to conflict management lead to the demise of the organisation.

#### 2.4 The Establishment of the African Union and a new approach to conflict management on the continent

The African Union was launched on 9 May 2002 in Durban, South Africa<sup>49</sup>. The AU was established mainly to address the many shortcomings of its predecessor, the OAU<sup>50</sup>. While the OAU was characterised by indifference, the new African regional organisation promised a change in the way things are approached in Africa.

The African Union Constitutive Act (AU Constitutive Act) was adopted at the in Lome, Togo in 2000<sup>51</sup>. While the AU Constitutive Act restates many of the principle of the OAU, it created some much needed new principle and policies.

The objectives of the AU can be found in article 3 and include:

"f. Promote peace, security, and stability on the continent;"

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<sup>46</sup> The Lome Declaration (1999) and generally Abass & Baderin (2002) NILR 8 -13.

<sup>47</sup> The Lome Declaration (1999) and Abass & Baderin (2002) NILR 12.

<sup>48</sup> Abass & Baderin (2002) NILR 12.

<sup>49</sup> The Durban Summit (2002).

<sup>50</sup> See 1.1 *supra*.

<sup>51</sup> The Lome Summit (2000).

Article 4 enacts the principle whereby the AU is to achieve its proposed purposes and include:

Article 4:

“The Union shall function in accordance with the following principles:

- a. Sovereign equality and interdependence among Member States of the Union;
- b. Respect of borders existing on achievement of independence;
- c. ...
- d. Establishment of a common defence policy for the African Continent;
- e. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f. Prohibition of the use of force or threat to use force among Member States of the Union;
- g. Non-interference by any Member State in the internal affairs of another;
- h. 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;
- i. Peaceful co-existence of Member States and their right to live in peace and security;
- j. The right of Member States to request intervention from the Union in order to restore peace and security;

...<sup>52</sup>

It is clear from the above that while many of the principles of the OAU remained African leaders recognised that African armed conflicts needed to be addressed and that human rights had to be protected. For the purpose of this contribution the most significant change brought on by the establishment of the AU is the right of the AU to intervene in the internal affairs of a member state in grave circumstances. Although the AU Constitutive Act restated the principle of the protection of sovereignty and territorial integrity the approach is more balanced and less rigid. Article 4(h) has brought about a major shift in the way sovereignty and territorial integrity is approached<sup>53</sup>.

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<sup>52</sup> For the full text of article 3 & 4 of the AU Constitutive Act, see Annexure “A”.

<sup>53</sup> Rechner (2006) 39 Vand. J. Transnat'l 562.

While the OAU was crippled by its institutional and normative limitation, the AU now has the institutional capability and the normative structure to intervene in grave circumstances. The AU Constitutive Act places more emphasis on the protection and promotion of human rights and less on the protection of sovereignty and territorial integrity.

## 2.5 Conclusion

The OAU was established on the principle of sovereignty and territorial integrity but it was these principles that crippled it and led to the establishment of the AU.

Ultimately the leaders of Africa realised that while the protection of sovereignty and territorial integrity was important ambitions for the African continent, it was just as important that African conflicts are resolved more effectively. While the AU Constitutive Act restates the commitment of the AU to the principles of sovereignty and territorial integrity, the AU Constitutive Act also provides for protection of human rights and, most significantly, for the limited intervention by the AU in grave circumstances.

# Chapter 3

## The African Unions Right to Intervention: Legal or not?

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### 3.1 Introduction

In the previous chapter the road to the establishment of the AU was discussed. The OAU was founded on the principles of sovereign equality, respect for territorial integrity and non-intervention. The establishment of the AU brought about a major shift in the way these principles are to be approached. While the OAU was significantly crippled by the reliance on absolute sovereignty and non-intervention, the AU has claimed a right to intervene in the internal affairs of a member state in “grave circumstances”, while still recognising the principle of sovereignty, equality and independence among member states. In this chapter the legality of the right to intervention under current international law will be discussed, particularly the relationship between the right to intervention and the ban on the use of force contained in the UN Charter.

### 3.2 The Right to Intervention: Article 4(h) of the African Union Constitutive Act

The right to intervene is enacted in article 4(h) of the African Union Constitutive Act which provides:

“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”

The AU Constitutional Act provides that the Assembly may decide that the AU may collectively intervene<sup>54</sup> in a member state in which such grave circumstances arise by consensus or at the least by a two-thirds majority<sup>55</sup>. The Protocol relating to the establishment of Peace and Security Council further provides that the Peace and Security Council may recommend intervention to the Assembly.

This mandate and the institutional structure of the AU provide a great opportunity to improve the effectiveness of conflict management on the African continent. However, the self-proclaimed right to intervention poses some gripping legal questions such as what the relationship between the AU and the UN is, relating to the use of force and whether the AU could intervene without SC authorisation?

The UN was established in 1945 after the end of World War II with the purpose of maintaining international peace and security<sup>56</sup>. The Charter of the UN contains many provisions prohibiting member states and the UN itself from interfering in the internal affairs of other member states. Article 2(4) prohibits the “threat or use of force against the political independence and territorial integrity of any state, or in any way inconsistent with the Purposes of the United Nations”<sup>57</sup>. This article is considered to be the cornerstone of the UN Charter. Furthermore, article 2(7) states that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”. Moller argues that if not even the UN may intervene in the domestic affairs of a State, what right would any other entity have<sup>58</sup>. Read together these provisions constitute a ban on any form of intervention in the domestic affairs of any state. In the face of this apparent ban the proposed right to intervention in article 4(h) is prima facie a violation of international law.

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<sup>54</sup> Art 4(g) of the African Union Constitutive Act prohibits a member state from interfering in the affairs of another.

<sup>55</sup> Art 7(1) of the AU Constitutive Act.

<sup>56</sup> Art 1(1) of the UN Charter.

<sup>57</sup> Art 2(4) of the UN Charter.

<sup>58</sup> Moller (August 2009) “The African Union as Security Actor: African Solutions for African Problems” 9. Crisis States Research Centre Working Paper no. 57: Regional and Global Axes of Conflict available at <<http://eprints.lse.ac.uk/28485/1/WP57.2Moller.AU.pdf>> (last visited 9 August 2012).

### 3.3 The Prohibition on the Use of Force as envisaged in Article 2(4) of the UN Charter

Before you can answer any question relating to the legality of use of force, it is important to first examine the scope and exceptions provided in relation to the prohibition of the use of force. Article 2(4) of UN Charter represents a statutory ban on the use of force with some exceptions. The scope of prohibition on the use of force contained in article 2(4) has been subject to much debate. Article 2(4) reads that

“All Members shall refrain in their international relations from the threat or *use of force* against the *territorial integrity or political independence* of any state, or in *any other manner inconsistent with the Purposes of the United Nations*” (emphasis added).

It is agreed by most commentators that force referred to in article 2(4) is limited to *armed or military* force while arguments for economic and political force or sanction has generally been dismissed<sup>59</sup>. While enough certainty exists concerning the meaning of the term force there is still a lot of debate surrounding the scope of the prohibition on the use of force and exceptions provided thereto and the *ius cogens* nature thereof. The only statutory exceptions to the prohibition of the use of force still relevant today is the right to self-defence contained in article 51 and the collective use of force with the authorisation of the SC under Chapter VII of the UN Charter. There are, however, those that argue that the prohibition on the use of force is subject to even more exceptions both inside and outside the scope of the UN Charter.

While most commentators consider the prohibition on the use of force contained in article 2(4) to represent a comprehensive ban on the use of force, there are those that argue that the phrases “territorial integrity or political independence” and “any other manner inconsistent with the Purposes of the United Nations” limit the scope

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<sup>59</sup> Aneme (2008) A Study of the African Union Right of Intervention against Genocide, War Crimes and Crimes against Humanity, 184; Randelzhofer “Article 2(4)” in Simma (ed) (2002) The Charter of the United Nations (2<sup>nd</sup> edition), 117 (hereinafter Randelzhofer (2002) “Article 2(4)”).

of the ban<sup>60</sup>. Thus, in their opinion, if force is used not with intention to violate the territorial integrity or political independence of the state or is not in any way inconsistent with the purposes of the UN, then the use of force under those circumstances would not be a violation of article 2(4) of the UN Charter<sup>61</sup>.

The dominant view, however, does not support this very limited approach to the prohibition on the use of force. Randelzhofer states that the phrases were never intended to limit the scope of the prohibition of the use of force<sup>62</sup>. Rather it was intended to make the ban on the use of force watertight<sup>63</sup>.

First, the phrase “territorial integrity or political independence” was not included to qualify the ban on the use of force but rather to emphasise the protection of smaller states<sup>64</sup>. This is made clear by the *travaux prepatatoires* to the UN Charter<sup>65</sup>. This is also the view of Randelzhofer who argues that the phrase was intended to cover any possible kind of incursion into the territory of another state even if such an incursion is not directed against that state’s territory or political independence<sup>66</sup>. Furthermore, in the *Corfu Channel* Case the International Court of Justice (ICJ) rejected the argument by England that its use of force was not contrary to article 2(4) as it was not directed against territorial integrity or political independence of the other state<sup>67</sup>.

Secondly, the phrase “or in any manner inconsistent with the Purpose of the United Nation” must once again not be interpreted to mean that use of force is legal as long as it is consistent with the purposes of the UN. In the context of human rights abuses, this interpretation would open the door to possible humanitarian

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<sup>60</sup> See Abass & Baderin (2002) NILR 16; Kunschak “The African Union and the Right to Intervention: Is there a need for UN Security Council Authorisation?” (2006) 31 SAYIL 195, 202; Aneme (2008) 185-186; Kuwali (2010), 105-106.

<sup>61</sup> Kuwali (2010), 106.

<sup>62</sup> Randelzhofer (2002) “Article 2(4)” 123.

<sup>63</sup> Simma “NATO, the UN and the Use of Force: Legal Aspects” (1999) 10 EJIL 1,4; Rytter “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo- and Beyond” (2001) Nordic J. Int’l L. 121, 132.

<sup>64</sup> Kunschak (2006) 31 SAYIL 202; Kuwali (2010), 107.

<sup>65</sup> Kunschak (2006) 31 SAYIL 202, Randelzhofer (2002) “Article 2(4)” 123; Kuwali (2010), 113.

<sup>66</sup> Randelzhofer (2002) “Article 2(4)” 123.

<sup>67</sup> The *Corfu Channel* Case (United Kingdom v Albania)(merits) 1949 ICJ Reports 4; Aneme (2008), 186.

intervention. However, this approach is open to too many interpretations as long as it serves one of the purposes of the UN<sup>68</sup>. As Rytter rightly points out the use of force on social, economic or cultural grounds would not be compatible with the fundamental character of the prohibition on the use of force<sup>69</sup>. In my opinion such an interpretation of the scope of article 2(4) would negate the prohibition on the use of force completely as states would mould the purposes of the UN to suit their own political agendas.

Thus the phrases “against the territorial integrity or political independence” or “in any manner inconsistent with the Purposes of the United Nations” has to be interpreted as not only prohibiting classic aggression but any type of use of armed force against another state<sup>70</sup>. Any other interpretation does not take proper account of the *travaux préparatoires* of the UN Charter and the decision of the ICJ in the *Corfu Channel* case.

### 3.4 Consent and the Use of Force

In light of the above it seems that the right to intervention provided for in article 4(h) of the AU Constitutive Act is inconsistent with international law, particularly article 2(4) of the UN Charter and is thus illegal. In fact, in terms of article 103 of the UN Charter the obligation to refrain from the use of force in terms of article 2(4) will prevail as the member states’ obligations under the UN Charter is conflicted by the obligations under the AU Constitutive Act. There are, however, those who argue that the right to intervene is indeed legal regardless of the prohibition of the use of force. Firstly, some commentators argue that by signing the AU Constitutive Act the member states consented to the possibility of the use of force by the AU. Secondly, it is argued by some that a norm is emerging whereby intervention based on humanitarian grounds is legal or at least legitimate. This last argument finds considerable support in the notion of Responsibility to Protect (R2P)<sup>71</sup>.

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<sup>68</sup> Rytter (2001) *Nordic J Int'l L.* (n63) 132; Aneme (2008), 186.

<sup>69</sup> *Ibid* 132.

<sup>70</sup> *Ibid* 129.

<sup>71</sup> See Chapter 4 *infra*.

In this section this enquiry focuses on whether consent is a valid ground for justifying intervention and whether by signing of the AU Constitutive Act the member states indeed agree to any possible intervention by the AU in grave circumstances.

### 3.4.1 Consent as a Valid Ground for Intervention

Seeing as all AU member states are also UN member states, these states are bound by the prohibition on the use of force contained in article 2(4) of the UN Charter<sup>72</sup>. The question arises whether the AU member states can consent to intervention by the AU regardless of the prohibition on the use of force. This is indeed a view offered by many commentators<sup>73</sup>.

Firstly, generally speaking, consent by the targeted state will validate an otherwise illegal intervention<sup>74</sup>. Furthermore, there is nothing in article 2(4) that prohibits the member states of an international organisation from empowering the international organisation to undertake, on their behalf, action which they could individually undertake<sup>75</sup>. Thus if the member states could individually consent to intervention, there is no reason why these individual states cannot collectively consent to intervention by the AU.

It is generally accepted that use of force based on consent of the state involved is a valid exception to the prohibition on the use of force<sup>76</sup>.

The validity of consent to the use of force given by the individual state concerned enjoys popular support from publicists, the international courts, state practise and

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<sup>72</sup> Aneme (2008), 181; Abass & Baderin (2002) NILR 17.

<sup>73</sup> See generally Aneme (2008) Chapter 4; Kuwali "Art 4(h) + R2P: Towards a Doctrine of Persuasive Prevention to End Mass Atrocity Crimes" (2008) 3 Interdisc. J. Hum. Rts. L. 55 & Kuwali (2010); Kunschak (2006) 31 SAYIL 195; Wippman "Pro-Democratic Intervention in Africa" (2002) 96 Am. Soc'y Int'l L. Proc. 143, 144.

<sup>74</sup> Wippman (2002) 96 Am. Soc'y Int'l L. Proc. 143, 144; Wippman "Military Intervention, Regional Organizations and Host-state Consent" (1996) 7 Duke J. Comp'l & Int'l L. 209, 209.

<sup>75</sup> Abass & Baderin (2002) NILR 17.

<sup>76</sup> Wippman (1996) 7 Duke J. Comp'l & Int'l L. 209 & 237; Aneme (2008), 189-190.

codified international law. The UN General Assembly in 1974 confirmed this exception with the acceptance of the definition of Aggression<sup>77</sup>. The resolution states the use of force by agreement and in contravention of the condition provided for in the agreement is aggression<sup>78</sup>. The definition thus makes provision for use of force based on consent. Furthermore, this view is also supported by the SC. In a resolution by the SC issued in 1976, after the intervention of South African forces in Angola, the SC stressed that states have the inherent right to consent to the use of force on their territory<sup>79</sup>.

States have also shown general acceptance of this view through their practice. During the Cold War states did not oppose the validity of use of force based on consent, rather it was the source of the consent that was a concern<sup>80</sup>. Many States did not recognise the authority or capacity of the governments calling for the intervention. It is generally accepted that states acting through a government exercising effective control over the territory and people of the state possesses the exclusive authority to express the will of the state in its international affairs<sup>81</sup>. However, with that concern out of the way, states still generally accept that consent is a valid ground for the use of force.

In 1986 the International Court of Justice confirmed the right of a state to consent to the use of force on its territory<sup>82</sup>. In the *Case Concerning Armed Activities on the territory of the Congo*<sup>83</sup>, Uganda argued that its use of force in the Democratic Republic of the Congo was lawful as it was based on consent. The Court did not question the validity of the use of force based on consent; rather the Court

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<sup>77</sup> Aneme (2008), 188-189.

<sup>78</sup> Art 2(e) of "Definition of Aggression" UNGA Resolution 3314 (XXIX) (1974).

<sup>79</sup> UNSC Resolution 384 (1976) Preamble; Aneme (2008), 189.

<sup>80</sup> See generally Aneme (2008), 188.

<sup>81</sup> Wippman (1996) 7 Duke J. Comp'l & Int'l L. 211,212 For a comprehensive discussion of the authority and capacity of a government to give and withdraw consent to intervention see Wippman (1996) 7 Duke J. Comp'l & Int'l L 209.

<sup>82</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua vs. United States of America)(merits) 1986 ICJ Reports 14, par 246 (hereinafter the Nicaragua Case (1986))

<sup>83</sup> See generally the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of Congo vs. Uganda) (Armed activities Judgement) 2005 ICJ Reports 168.

concerned itself with the existence, limitations and withdrawal of the consent<sup>84</sup>. Thus even if the source of the consent is not persuasive, the principle that consent from the proper state authority can validate intervention is not disputed<sup>85</sup>.

Article 20 of the Articles on Responsibility of States for International Wrongful Acts (the Articles) that was developed by the International Law Commission in 2001, provides for intervention based on consent as legal and proclaims consent as one of the grounds precluding wrongfulness.

“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”<sup>86</sup>

Wippman states that consent is a clear alternative to SC authorisation for intervention.<sup>87</sup> He further states that intervention based on consent is valid whether the intervening state acts unilateral or states act collectively under the auspices of the SC or a regional organisation<sup>88</sup>.

Thus, consent given by the targeted state to the use of force in its territory by another state or international organisation is sufficient to preclude the wrongfulness of the use of force and therefore, it is also fair to conclude that where consent is given, the use of force will not violate article 2(4) of the UN Charter.

### 3.4.2 State Consent and the right to intervention under article 4(h)

It is widely accepted that the intervention proposed by article 4(h) is based on

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<sup>84</sup> Aneme (2008), 190.

<sup>85</sup> Wippman (1996) 7 Duke J. Comp'l & Int'l L. 211.

<sup>86</sup> Art 20 of the International Law Commission “Articles on the Responsibility of States for International Wrongful Acts” (2001) (hereinafter Articles on State Responsibility (2001)). Available at < [http://untreaty.un.org/ilc/text/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/text/instruments/english/draft%20articles/9_6_2001.pdf) > (last visited on 9 August 2012)

<sup>87</sup> Wippman (1996) 7 Duke J. Comp'l & Int'l L. 209.

<sup>88</sup> *Id.*

consent. Kunschak states that the permission to the use of force can be inferred from the language and arrangement of the AU Constitutive Act.<sup>89</sup>

Abass & Baderin states that as the AU Constitutive Act does not allow for unilateral use of force and only provides a collective basis for intervention, consent must be interpreted as precluding the operation of article 2(4)<sup>90</sup>. They argue that the right to intervention in article 4(h) is not intended to provide for the use of force against the territorial integrity or political independence of the concerned member state and is therefore legal. However, this argument is flawed as it does not take proper account of the scope of article 2(4) and in particular the reason for the inclusion of the phrase “territorial integrity or political independence”. As discussed in the previous section of this Chapter, the inclusion of this phrase was not intended to qualify the prohibition but rather to make the prohibition watertight<sup>91</sup>. Thus, this argument cannot hold<sup>92</sup>. However, Abass and Baderin are correct in stating that the AU member states by ratifying the AU Constitutive Act agreed that the AU may intervene in the internal affairs and thus conceded a quantum of their legal and political sovereignty to the AU<sup>93</sup>.

Although the argument that the intervention under article 4(h) is not inconsistent with article 2(4) because it is not aimed at the territorial integrity or political independence of the target state, should be rejected, Kunschak states that legally, a regional right to intervention can still be justified<sup>94</sup>.

Kuwali agrees with Kunschak who argues that article 4(h) can be interpreted as a *priori* invitation to the AU to intervene in circumstances amounting to genocide, war crimes or crimes against humanity<sup>95</sup>. Thus, the member states of the AU freely

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<sup>89</sup> Kunschak (2006) 31 SAYIL 198.

<sup>90</sup> See generally Abass & Baderin (2002) NILR 17.

<sup>91</sup> See 2.2 *supra*.

<sup>92</sup> Kuwali (2010), 113.

<sup>93</sup> Abass & Baderin (2002) NILR 17.

<sup>94</sup> Kunschak (2006) 31 SAYIL 207.

<sup>95</sup> Kuwali (2008) 3 Interdisc. J. Hum. Rts. L. 67 -70; Kunschak (2006) 31 SAYIL 207; Kuwali (2010) 114,131.

consented to possible intervention<sup>96</sup>. The dominant argument by publicists is that by signing the AU Constitutive Act the member states of the AU declared themselves ready and willing to surrender a part of their sovereignty to a supranational institution to intervene in cases of mass atrocity<sup>97</sup>.

Kindiki agrees when he states that

“the provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories.”<sup>98</sup>

While Aneme agrees with this argument, he points out that in order for consent to be a ground justifying intervention in terms of article 4(h) it needs to be valid<sup>99</sup>. Firstly, the AU Constitutive Act was adopted with a legitimate and legal process and as such is valid. Secondly, the government exercising effective control is regarded as the proper authority from which consent is to be obtained. The requirement of validity gives rise to two important questions. Firstly, is consent given in advance valid and secondly, can this valid consent be withdrawn?

### 3.4.3 State consent and future interventions

It is clear that any consent given by state parties to the AU Constitutive Act to intervention under article 4(h) was done in advance. It can be argued that consent given in advance is not valid and that consent to intervention has to be contemporaneous. Aneme, however, argues that this is not the case and that

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<sup>96</sup> Kuwali (2010), 130: “All the 53 Members of the AU have signed and, therefore, consented to the adoption of the AU act that embodies the right of the AU to intervene in a Member State under prescribed circumstances”.

<sup>97</sup> Kuwali (2008) 3 Interdisc. J. Hum. Rts. L. 69; Kunschak (2006) 31 SAYIL 207; Kuwali (2010), 114 & 131.

<sup>98</sup> Kidinki “The Normative and Institutional framework of the African Union relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal” (2003) 3 Afr. Hum. Rts. L.J. 97, 107.

<sup>99</sup> Aneme (2008), 199; Commentaries to the Draft Articles on the Responsibility of States for International Wrongful Acts, 72 (hereinafter Commentaries on the ASR (2001)) available at <[http://untreaty.un.org/ilc/text/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/text/instruments/english/commentaries/9_6_2001.pdf)> (last visited on 9 August 2012)

consent given in relation to future intervention is just as valid as consent given on an *ad hoc* basis<sup>100</sup>.

Therefore, by signing the AU Constitutive Act the member states consented, in advance, to the use of force inside their territory should circumstances of genocide, war crimes and crimes against humanity arise and the AU is not required to get the contemporaneous consent of the target state before taking a decision to act in terms of article 4(h)<sup>101</sup>.

There are, however, some reservations pertaining to this statement. It might be argued that advance consent contradicts state sovereignty. Aneme rightly argues that any argument that advanced consent contradicts the sovereignty of a state is an argument against a state's sovereign right to restrict their powers within the bounds of international law<sup>102</sup>. In the *SS Wimbledon* case the court also advanced this view by stating that the conclusion of an agreement between states whereby a state undertakes, in the future, to do or not do something, is not an abandonment of its sovereignty but rather that the right to enter into such an agreement is an attribute of its sovereignty<sup>103</sup>. Furthermore, the Commentaries to article 20 of the Articles explicitly states that consent to an otherwise wrongful act can be given in advance or at the time of its occurrence<sup>104</sup>.

Thus while such an undertaking might place a restriction on the exercise of the sovereign rights of that state, it is the right of a state to choose to do so.

Therefore, Aneme concludes and I agree that the AU member states are within the bounds of international law when consenting to the use of force on their territories, even if such consent is given in advance<sup>105</sup>.

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<sup>100</sup> Aneme (2008), 200.

<sup>101</sup> Kuwali (2008) 3 Interdisc. J. Hum. Rts. L. 70; Aneme (2008), 200 & 202; Kuwali (2010), 132; Abass & Baderin (2002) NILR 16.

<sup>102</sup> Aneme (2008), 200 Kuwali (2010), 131: "Article 2(4)... does not take away the sovereign right of States to permit other states to use force on their territory".

<sup>103</sup> *SS Wimbledon* (judgement) PCIJ Report Series No. 1, 25.

<sup>104</sup> Commentaries on ASR (2001), 72.

<sup>105</sup> Aneme (2008), 202.

Furthermore, the change of government of a state does not effect a change in the responsibilities of a state. Thus, a commitment under a treaty is not only valid for however long the signatory government is in office. Therefore, a new government is deemed to have also consented to possible future intervention by the AU. It is a generally accepted principle in international treaty law that treaties concluded by a government continue to bind its successor government<sup>106</sup>. This is because a change in government does not bring about a change in the international personality of the state as an entity separate from its government<sup>107</sup>.

Thus, by signing the AU Constitutive Act the member state validly consented to intervention by the AU even if such intervention is not contemporaneous but might take place at a time in the future. This consent embodied in a treaty is of a continuing nature and will thus keep binding the state despite a change in government<sup>108</sup>.

#### 3.4.4 Can consent to intervention be validly withdrawn?

Seeing as a state can legally consent to the use of force on its territory it stands to reason that a state would also be allowed to withdraw such consent at any time. If consenting to the use of force is indeed a sovereign act of a state the same must be true of an act to restore its sovereignty<sup>109</sup>.

The general accepted position is that when a state consents to intervention on its territory but thereafter wishes to formally withdraw its consent, the interveners must withdraw<sup>110</sup>. If the forces of the intervening states are not withdrawn, the intervention would amount to prohibited use of force<sup>111</sup>. Unfortunately, not all cases are this simple e.g. consent given by way of a treaty<sup>112</sup>. International treaty law

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<sup>106</sup> Dugard (2005) *International Law: A South African Perspective* (3<sup>rd</sup> edition) 420; Aneme (2008), 200

<sup>107</sup> Dugard (2005), 420.

<sup>108</sup> Aneme (2008), 202-203.

<sup>109</sup> Wippman (2002) 96 *Am. Soc'y Int'l L. Proc.* 144: "but military intervention agreements differ from others; they go to the heart of the values associated with state sovereignty..."

<sup>110</sup> Wippman (1996) 7 *Duke J. Comp'l & Int'l L.* 234; Aneme (2008), 203.

<sup>111</sup> Wippman (1996) 7 *Duke J. Comp'l & Int'l L.* 234.

<sup>112</sup> Wippman (2002) 96 *Am. Soc'y Int'l L. Proc.* 144: "The issue comes to head if the target state

prescribes certain rules regarding the right of a state party to withdraw from or renounce its membership to a treaty<sup>113</sup>.

Firstly, a specific treaty may prescribe its own procedure for withdrawal. The treaty may allow for partial withdrawal or provide only for withdrawal from the treaty in its entirety. The AU Constitutive Act does not allow a state only to withdraw from some of the provisions, thus if a member state wishes to withdraw its consent to intervention under article 4(h) it will have to withdraw from the treaty as a whole and would then in effect be renouncing its membership to the AU<sup>114</sup>. Article 31 of the AU Constitutive Act prescribes the procedure to be followed if a state party wishes to renounce its membership. In terms hereof the state must notify the Chairperson of the AU Assembly of its intention to renounce its membership and the Chairperson will then inform the other state parties of such a notice<sup>115</sup>. Furthermore, article 31(2) provides for a one year waiting period before the State renouncing its membership will be free of the rights and duties associated with AU membership. Thus, during this waiting period the AU is free to intervene in the state renouncing its membership.

These provisions were, however, repealed by article 12 of the Protocol on the Amendments to the Constitutive Act. This means that the specific treaty no longer makes provision for a withdrawal procedure and one would have to look to general international treaty law for guidance.

The Vienna Convention on the Law of Treaties (VCLT) is a blend of codification and progressive development of International Law and is viewed as the definitive statement on the law of treaties<sup>116</sup>. The VCLT makes provision for two possibilities for withdrawal from a treaty by a member state. First, the VCLT provides for

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refuses consent at the moment of intervention.”

<sup>113</sup> See generally Vienna Convention on the Law of Treaties (1969) (hereinafter the Vienna Convention (1969)) available at <[http://untreaty.un.org/ilc/text/instruments/english/conventions/1\\_1\\_1969](http://untreaty.un.org/ilc/text/instruments/english/conventions/1_1_1969)> and Aneme (2008), 204-212.

<sup>114</sup> Aneme (2008), 211.

<sup>115</sup> Art 31(1) of the AU Constitutive Act.

<sup>116</sup> Dugard (2005), 406.

withdrawal by agreement or consent whereby a state may withdraw from the treaty at any time is after consultation with all the contracting parties, all parties consent to the withdrawal<sup>117</sup>. Where consent is absent, the VCLT provides that a treaty is not subject to withdrawal or denunciation unless

- “(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or  
(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.”<sup>118</sup>

Thus if either of the above conditions are present, a state party may withdraw from the treaty. Once again a twelve month notice period is required before the withdrawal would take effect<sup>119</sup>. After the conclusion of the twelve month period, the renouncing state is deemed to have withdrawn its consent to intervention in terms of article 4(h)<sup>120</sup>.

In the context of the AU it would be difficult to show that the AU Constitutive Act was intended to be subject to withdrawal as the right to withdraw was deliberately removed by the Protocol. Furthermore, the nature of the AU Constitutive Act does not support the conclusion that withdrawal was implied. However, should a conclusion to the contrary be reached that the AU Constitutive Act is indeed subject to withdrawal, the withdrawal would still be subject to the twelve month notice period. During this period the AU could still validly intervene under the provision of article 4(h). Should the notice period lapse any continued presence on the territory of the target state would be a breach of international law.

It should, however, be noted that if a member state were to reject the right of the AU to intervene in terms of article 4(h) or in any way hamper the intervention, the

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<sup>117</sup> Art 54(b) of the Vienna Convention

<sup>118</sup> *Ibid* art 56(1).

<sup>119</sup> *Ibid* art 56(2).

<sup>120</sup> Aneme (2008), 211.

member state would be in breach of its commitment to the AU and subject to sanctions<sup>121</sup>. Article 23(2) of the AU Constitutive Act states

“Furthermore, 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”

Moreover, it is important to note that intervention being undertaken in terms of article 4(h) is subject to certain limits and conditions and the AU does not pose an open mandate to intervene on the territory of a member state.

#### 3.4.5 The operational and substantive conditions of intervention under article 4(h)

When the AU Assembly takes a decision to intervene on the territory of a member state, it should take care not to overstep its authority<sup>122</sup>. Therefore, not only must the Assembly comply with the proper procedure (substantive limits) provided for in the AU Constitutive Act when making a decision to intervene, but also the Assembly’s decision should set out a clear mandate for the intervention (operational limits)<sup>123</sup>.

In regards to the substantive limits of the intervention, the Assembly should be guided by the AU Constitutive Act. Article 4(h) sets out certain conditions that have to be met before the AU can consider intervention. When the Assembly is considering an intervention it has to be convinced that circumstances amounting to genocide, war crimes or crimes against humanity exist<sup>124</sup>. Although the AU Constitutive Act does not contain any definitions for these crimes, these crimes have been defined in the International Criminal Court Statute. Furthermore, the Assembly will have to take the decision by consensus or at least by a two-thirds majority

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<sup>121</sup> *Ibid* 203-204.

<sup>122</sup> See Commentaries on ASR (2001), 74.

<sup>123</sup> See generally Aneme (2008), 213-219.

<sup>124</sup> See art 4(h) of the AU Constitutive Act.

vote<sup>125</sup>. Thus the decision would have to comply with all the procedural requirements set out by the AU Constitutive Act.

Secondly, the operational limits set out by the mandate decided on by the Assembly when making the decision to intervene, has to be complied with<sup>126</sup>. For instances the Assembly might decide only to intervene in a certain area of the member state. Any activity outside that area would be outside the scope of the mandate and would be a breach of international law. The same would apply in the case where the mode of military force mandated is not complied with.

The consequences of any violation of the substantive or operational conditions of the intervention are wide. Firstly, the violation would amount to a breach of international law as consent is no longer present. The use of force in violation of the substantive and operational conditions might even amount to an act of aggression<sup>127</sup>. Furthermore, a violation might bring about state responsibility in terms of the Articles on State responsibility.

In conclusion, a state may legally consent to the use of force on its territory despite the prohibition contained in article 2(4). The intervention in article 4(h) is intervention based on advanced consent and is thus legal. Seeing as article 4(h) is not a violation of article 2(4), article 103 will not be an obstacle for the right to intervention of the AU. Furthermore, consent will also preclude a violation of article 2(7) of the UN Charter since consent by one state to another to intervene in its domestic affairs is also valid. I submit that just as in the case of the prohibition on the use of force, consent is sufficient to preclude the violation of article 2(7). However, there are those who argue that any use of force is illegal despite state consent as it is a violation of a *ius cogens* norm.

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<sup>125</sup> Art 7 of AU Constitutive Act.

<sup>126</sup> Aneme (2008), 213.

<sup>127</sup> *Ibid* 215.

### 3.5 The *ius cogens* nature of the Prohibition on the Use of Force

As discussed previously, the fundamental rule governing the use of force between states is article 2(4) of the UN Charter. This article embodies a prohibition on the use of force which is often seen as the archetypal example of an *ius cogens* norm.<sup>128</sup> The Charter, however, allows for certain exception to the prohibition and as discussed in the previous section, so does other parts of the body of international rules and laws. In particular, the international law allows a state to consent or invite the use of force by another state on its territory<sup>129</sup>. The Vienna Convention on the Law of Treaties (VCLT) article 53 provides that consent given in a treaty is *ab initio* void if it conflicts an *ius cogens* norm. In this section the validity of consent given to actions that violates an *ius cogens* norm such as the prohibition on the use of force will be examined.

The *ius cogens* nature of the prohibition on the use of force has been open to much debate. Some argue that the prohibition on the use of force has *ius cogens* status in its entirety thereby any act of use of force, outside the exception provided for in the UN Charter would be a violations of a *ius cogens* norm<sup>130</sup>. Others argue that only some acts of use of force have achieved *ius cogens* status<sup>131</sup>.

The most reliable definition for an *ius cogens* norm of peremptory norm can be found in the VCLT. Article 53 defines a peremptory norm as

“a norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation* is permitted and which can be modified only by a subsequent norm of general international law having the same character.” (emphasis added)

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<sup>128</sup> Green “Questioning the Peremptory Status of the Prohibition of the Use of Force” (2010) 32 Mich. J. Int’l L. 215, 216. See also Kuwali (2010), 131 & Aneme (2008), 195: “Generally, States, judicial tribunals and publicists accepts and recognize that the prohibition of the use of force under international law has achieved the status of peremptory norm.”

<sup>129</sup> *Supra*.

<sup>130</sup> Simma (1999) 10 EJIL 4.

<sup>131</sup> See generally Aneme (2008), 195 -199.

Although there is no clear list of norm that has achieved *ius cogens* status, it is generally accepted that the prohibition on the use of force is one such norm<sup>132</sup>. In the *Nicaragua* case the Court confirmed the *ius cogens* status of the prohibition on the use of force<sup>133</sup>.

It is an accepted fact that a *ius cogens* norm cannot be contracted out<sup>134</sup>. Thus, if it is accepted that the prohibition on the use of force is a *ius cogens* norm and can therefore not be contracted out, the right to intervention as embodied in article 4(h) is void as it is in conflict with a *ius cogens* norm.

However, Kuwali argues and Kunschak agrees that while the use of force has *ius cogens* status and cannot be contracted out, the AU member states waived their right to be free of intervention by consenting to possible intervention and therefore article 4(h) does not violate an *ius cogens* norm<sup>135</sup>. This interpretation is in line with the Commentaries to article 26 of the Article on State Responsibility<sup>136</sup>.

Furthermore, some publicists are doubtful about the scope of the *ius cogens* status of the prohibition on the use of force. Green is one of the commentators who question the peremptory status of the prohibition on the use of force. He is critical of many aspects of the prohibition that might not comply with the corresponding elements in the definition as set out in article 53 of the VCLT<sup>137</sup>. I will only address one of the arguments offered by Green. He argues that while the definition refers to a peremptory norm as a norm from which no derogation is permitted, there are clear exceptions to the prohibition on the use of force<sup>138</sup>. These exceptions are the exceptions provided for in the Charter article 51 and article 42. Therefore, the prohibition on the use of force is a norm from which derogation is explicitly and

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<sup>132</sup> Simma (1999) 10 EJIL 5.

<sup>133</sup> See Separate Opinion of Judge Sette-Camara, *Nicaragua Case* (1986), 199 – 200.

<sup>134</sup> Aneme (2008), 194; Simma (1999) 10 EJIL 4; Kuwali (2008) 3 *Interdisc. J. Hum. Rts. L.* 69.

<sup>135</sup> Kuwali (2008) 3 *Interdisc. J. Hum. Rts. L.* 69; Kunschak (2006) 31 *SAYIL* 207; Abass & Baderin (2002) *NILR* 17.

<sup>136</sup> *Infra*.

<sup>137</sup> See generally Green (2010) 32 *Mich. J. Int'l L.* 215.

<sup>138</sup> *Ibid* 227.

uncontrovertibly permitted<sup>139</sup>. Green admits that these exceptions might not pose a problem if the norm was formed in such a way as to include the exceptions as an integral part of the norm, thereby preserving the peremptory status of the prohibition on the use of force.<sup>140</sup> Simma offers a similar interpretation of the peremptory status of the prohibition on the use of force<sup>141</sup>. He argues that the Charter as a whole has gained peremptory status.

“any offensive self-help by threats or use of armed force without a basis in Chapter vii has been outlawed by the *ius cogens* of the Charter.”<sup>142</sup>

From this it might be argued that Simma sees the exceptions provide in Chapter VII as an integral part of the prohibition on the use of force.

However, it would be extremely difficult to even attempt to define the prohibition on the use of force with reference to the rules associated with the prohibition that has peremptory status<sup>143</sup>. In other words it would be difficult to select the rules that form part of the prohibition on the use of force and is therefore *ius cogens*, since many of the rules traditionally associated with the prohibition have not achieved *ius cogens* status<sup>144</sup>. An easier argument would be that the only certain acts of use of force have achieved *ius cogens* status. In the *Nicaragua* case the Court conceded that some uses of force are more serious than others<sup>145</sup>.

Aneme takes the argument a step further by arguing that only the prohibition on the act of aggression is a norm having peremptory status<sup>146</sup>. He points out that if a treaty is void that conflicts a peremptory norm, such as the prohibition on the use of force, but it is an accepted rule of international law that states can modify the prohibition amongst each other, then it does not follow that the prohibition on the use of force as a whole is peremptory in nature. As discussed earlier in this Chapter,

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<sup>139</sup> *Ibid* 229.

<sup>140</sup> *Ibid* 230 & 232.

<sup>141</sup> Simma (1999) 10 EJIL 4.

<sup>142</sup> *Id.*

<sup>143</sup> Green (2010) 32 Mich. J. Int'l L. 231, 233-236.

<sup>144</sup> *Ibid* 231-232.

<sup>145</sup> Nicaragua Case (1986), par 191.

<sup>146</sup> See generally Aneme (2008), 196-199.

states may legally consent or invite another state to use force on its territory. The question that ensues is what part of article 2(4) or the prohibition on the use of force in general is peremptory?

Aneme argues that only aggression, “the most serious and dangerous form of illegal use of force”<sup>147</sup>, is a peremptory norm<sup>148</sup>. The argument that only an act of aggression has reached peremptory status is supported by the International Law Commission’s Commentaries on the Article on State Responsibility. Article 26 deals with compliance with peremptory norms and states that:

“Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”<sup>149</sup>

In the commentaries to this provision the author explains that this provision means that one state cannot release another from the obligations under a peremptory norm<sup>150</sup>. In this regard the author lists norms that are clearly accepted as peremptory. One of those norms is the “prohibitions on aggression”<sup>151</sup>. Furthermore, the author continues by pointing out that valid consent by one state might be relevant when applying certain peremptory norm<sup>152</sup>. This is the argument brought by Kuwali and Kunschak where they state that by consenting to possible intervention, the AU member states waived their right to be free of intervention<sup>153</sup>. This does not mean that all violations of *ius cogens* norms based on consent are valid. For example, consent to commit aggression or genocide will not be excused under article 26 but consent to help defend the people of a state in grave circumstances such as genocide, war crimes and crimes against humanity, certainly will<sup>154</sup>.

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<sup>147</sup> UNGA Resolution 3314 (XXIX) (1974) Preamble.

<sup>148</sup> Aneme (2008), 199.

<sup>149</sup> Articles on State Responsibility (2001) art 26.

<sup>150</sup> Commentaries on ASR (2001), 85.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* See also Kuwali (2008) 3 Interdisc. J. Hum. Rts. L. 68 – 70.

<sup>153</sup> Kunschak (2006) 31 SAYIL 207; Kuwali (2010), 131.

<sup>154</sup> Kuwali (2010), 131.

“But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose.”<sup>155</sup>

Then the question begs, what is aggression? In 2010 the Kampala Review Conference finally delivered a definition of the crime of aggression for the purposes of the ICC. The crime of Aggression was defined as “the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression”<sup>156</sup>. An act of aggression was defined as “the use of armed force by one State against another State without justification or authorisation by the Security Council”<sup>157</sup>. This definition was influenced by the 1974 UNGA Resolution on the Definition of aggression.

The definition of aggression provided for in this Resolution remains the most widely accepted definition of aggression<sup>158</sup>. In article 1 of the Resolution aggression is defined as “the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.” This definition is similar if not almost identical to the wording in article 2(4). The Resolution, in article 3, also provides some example of act that would constitute aggression. With regard to the question of whether the use of force based on consent is aggression, article 3(e) is particularly relevant;

“Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

...

(e) The use of armed force of one State which are within the territory of another State with the agreement of the receiving State, *in contravention of the conditions provided for in the*

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<sup>155</sup> Commentaries on ASR (2001), 85.

<sup>156</sup> Art 8bis (1) of the ICC Statute (2002) as amended by ICC RC – Res 6(2010) available at <[www.icc-cpi.int/iccdocs/csp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/csp_docs/Resolutions/RC-Res.6-ENG.pdf)> (last visited 6 August 2012).

<sup>157</sup> *Ibid* art 8bis (2).

<sup>158</sup> Aneme (2008), 196.

*agreement or any extension of their presence in such territory beyond the termination of the agreement.” [Emphasis added]<sup>159</sup>*

From this it can be concluded that as long as use of force stays within the bounds of the agreement between the targeted state and the intervening state, the use of force based on the agreement would not constitute aggression.

Based on the wording of article 3 of the Definition of Aggression and the exclusion of consent from the effects of article 26 of the Articles, it is fair to conclude that the use of force based on consent is not aggression. Therefore the right to intervention in article 4(h) is legal firstly, as it is based on valid consent and secondly it is not in conflict with an *ius cogens* norm.

Aneme summarises the position as follows<sup>160</sup>:

1. Aggression rather than the prohibition on the use of force as a whole that is a peremptory norm of international law;
2. State consent is part of the definition of aggression and so the use of force based on consent and which is within the bounds of the agreement, is not aggression; and
3. General state consent expressed through a treaty is a valid base for the use of force among the state parties despite the prohibition of the use of force under international law.

### 3.6 Conclusion

The new African regional organisation, the African Union, has made history by including a right to intervention in its Constitutive Act. This right is given to the AU in grave circumstances amounting to genocide, war crimes and crimes against humanity. While this new approach to African human security could go a long way in addressing the serious human rights abuses on the African Continent, the legality of this right of intervention is questionable.

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<sup>159</sup> UNGA Resolution 3314 (XXIX) (1974).

<sup>160</sup> See generally Aneme (2008), 199.

Firstly, the right of intervention as enacted in article 4(h) of the AU Constitutive Act is *prima facie* in conflict with the provisions of the UN Charter. Article 2(4) prohibits the use of force against another state. This conflict is easily avoided if the right of intervention contained in the AU Constitutive Act is construed as a right to intervention based on consent. It is generally accepted that states may validly consent to the use of force on its territory and that such consent may be given in advance. Therefore, there is no conflict between the right to intervention and the prohibition on the use of force and intervention in terms of article 4(h) is legal. Secondly, some argue that the right to intervention is void as it is in conflict with a peremptory norm. It is generally accepted that the prohibition on the use of force is a peremptory norm. The issue at hand is what part of the prohibition on the use of force, if not the entire norm, has achieved peremptory status. Some argue that only the prohibition use of force that amounts to aggression is peremptory. Furthermore, the commentaries to the Article on State Responsibility concede that even though nothing can preclude the wrongfulness of a violation of a peremptory norm, consent may be relevant despite the *ius cogens* nature of the norm violated.

I therefore submit that the consent given by member states of the AU precludes the wrongfulness of intervention undertaken in terms of article 4(h) as long as the force used stays within the pre-set limits decided by the Assembly. Thus the right of intervention as enacted in article 4(h) of the AU Constitutive Act is not a violation of international law and is therefore legal.

# Chapter 4

## The African Union's and the Responsibility to Protect

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### 4.1 Introduction

In 1999 the debate surrounding the legality of intervention by a regional body became central as NATO intervened in Kosovo stating humanitarian reasons. This intervention was done without prior SC authorisation, and therefore many believed that the intervention was illegal. Aside from the obvious problem of the prohibition on the use of force, many commentators raised the equally important notion of sovereignty. In the end the Independent International Commission on Kosovo concluded in its report that the intervention in Kosovo was “illegal but legitimate”<sup>161</sup>

Similarly, the AU's right to intervention can be seen to be an infringement of the sovereignty of the Member State in which intervention is contemplated. Sovereignty implies the right of a state to do as it sees fit within the borders of that state without outside interference. As shown in Chapter 2, the notion of state sovereignty has in the past been an absolute or almost absolute concept. Therefore, very little interference from outside the state was tolerated and indeed the sovereignty of states is enshrined and protected in many international instruments including the UN Charter and the AU Constitutive act.

However, with the increased international focus on human rights and human security, the way in which the notion of absolute sovereignty or non-interference is understood has changed significantly.

In this Chapter I discuss the evolution of human rights and human security and the impact it has had on international law especially on the notion of state sovereignty. I

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<sup>161</sup> See generally The Independent International Commission on Kosovo “The Kosovo Report: Conflict, International Response and Lessons Learned” (2000) available at < <http://reliefweb.int/report/albania/kosovo-report>>

submit that the newly formed concept, the responsibility to protect, has added considerable legitimacy to an intervention in terms of article 4(h).

## 4.2 The Responsibility to Protect

After the intervention by NATO in Kosovo, Secretary-General, Kofi Annan, challenged members of the UN to find “common ground” on the issue of the protection of human beings from gross and systematic violations of human rights<sup>162</sup>.

The challenge was accepted and the International Commission on Intervention and State Sovereignty (ICISS) was established with the mandate to build a broader understanding of the problem of reconciling intervention for human protection purposes with sovereignty and to try to develop a global political consensus on how to increase action within the international system<sup>163</sup>. The result was the 2001 Report by the ICISS entitled the Responsibility to Protect, or as it is more commonly referred to the R2P.

The R2P can be summarised as follow<sup>164</sup>:

1. Sovereignty implies not only a right but a responsibility of a state to protect its population from gross human rights abuses;
2. If a state fails in its responsibility to protect, the responsibility then falls on the international community acting primarily through the SC; and
3. The R2P has 3 key pillars: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild.

The R2P introduces a new understanding of the sovereignty of states: a move away from sovereignty as control to Sovereignty as a Responsibility<sup>165</sup>.

In the following section the shift from traditional understanding to a more modern understanding of sovereignty will be discussed. It is this modern understanding of sovereignty that forms the very foundation of the R2P.

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<sup>162</sup> Kofi Annan, Address to the 54<sup>th</sup> Session of the UN General Assembly (1999).

<sup>163</sup> The ICISS Report (2001).

<sup>164</sup> See generally The ICISS Report (2001).

<sup>165</sup> The ICISS Report (2001), 13.

### 4.3 Sovereignty as a Responsibility

The traditional understanding of sovereignty implies the capacity of an individual state to make authoritative decisions with regard to the people and resources within the territory of the state, the right to exercise exclusive and total jurisdiction within its territorial boundaries<sup>166</sup>. The principle of sovereign equality of states is enshrined in many international instruments, most significantly, the UN Charter and the AU Constitutive Act.

Article 2(1) of the UN Charter proclaims sovereign equality to be the basis of the organisation whilst article 4(a) on the AU Constitutive Act recognises sovereign equality amongst members as one of the principles on which the African Union was founded. But just as states are entitled to sovereignty, the traditional understanding of sovereignty also implies a corresponding obligation to respect the sovereignty of other states<sup>167</sup>. This obligation is also referred to as the non-intervention principle. This principle is enshrined in article 2(7) of the UN Charter;

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

This principle has enjoyed tremendous support and protection over the years following the establishment of the UN, but with the international environment constantly evolving the principle of non-intervention and its status in international relations has also changed. The most significant impact on the principle of non-intervention and sovereignty as a whole has been the increasing focus on international human rights as well as increased discussion on human security<sup>168</sup>.

Also in recent years the international security system has been challenged more by the increasing number of internal conflicts. In internal conflicts it is very likely that

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<sup>166</sup> The ICISS Report (2001), 12; Evans and Sahnoun “The Responsibility to Protect” (2002) 81.6 Foreign Affairs 99, 102.

<sup>167</sup> *Id.*

<sup>168</sup> See generally The ICISS Report (2001), 3 -8.

the people suffering most are the innocent civilians trapped in the violence or displaced because of the violence. And what is even more disgraceful is that in some cases it is their own governments that launch violent attacks on rebellious populations. This is a trend that has rocked Africa and the Middle East in the last couple of years.

The international community, not only states but also individuals within other states, have increasingly been made aware of the plight of individuals in states far away from their own by the evolution of information technology and the more hands-on approach of journalism. News headlines are dominated by stories showing visual images of individuals suffering gross human right abuses<sup>169</sup>.

It is now widely accepted that human rights violations do not fall essentially within the domestic jurisdiction of a state<sup>170</sup>. This has been confirmed by, inter alia, the Vienna Declaration and Programme of Action<sup>171</sup> and in the *Barcelona Traction* case the Court pronounced that certain human rights had *erga omnes* status and is as such the concern of the entire international community and not only the state in which human rights violations were being committed<sup>172</sup>. The effect hereof is that states can no longer rely on article 2(7) of the UN Charter to shield them from intervention.

Many scholars believe that the development of human rights and humanitarian law has eroded or diminished the concept of sovereignty<sup>173</sup>. This is, however, not entirely accurate; just as with most international norms the notion of sovereignty develops as international law evolves. Sovereignty has not been eroded or diminished; it is now simply understood in a different context brought about by a changing international environment and the development of other norms that might qualify the applicability of sovereignty in certain circumstances. Donnelly states that the reshaping of sovereignty by human rights has left states no less sovereign than

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<sup>169</sup> *Id* 7.

<sup>170</sup> See generally Nolte "Article 2(7)" in Simma (*ed*) (2002) *The Charter of the United Nations* (2<sup>nd</sup> edition), 117 (hereinafter Nolte (2002) "Article 2(7)"), 160 -162.

<sup>171</sup> Adopted by the World Conference on Human Rights at Vienna on 25 June 1995, par 4-5.

<sup>172</sup> *The Barcelona Traction, Light and Power Co. (Second Phase) (Belgium v Spain)* 1970 ICJ, 3. 32 – 34. Obligations *erga omnes* may be defined as obligations which a state owes to the international community as a whole and in the enforcement of which all states have an interest.

<sup>173</sup> Kuwali (2011), 123; Sarkin (2009) 53 *Journal of African Law*, 4.

they were before<sup>174</sup>. He believes that sovereignty has changed in content and substance but is in no serious way subordinate to or eroded by human rights, human rights are not a challenger to but deeply embedded within state sovereignty<sup>175</sup>.

Kuwali is thus correct in stating that it is inaccurate to say that the principle of non-intervention and respect for state sovereignty is still fully in effect as far as human rights are concerned,<sup>176</sup> but it is not correct to state that sovereignty has been eroded. Sovereignty is still very much a central part of current international law and international relations.

This increased focus on individuals rather than states has slowly but surely evolved as the years since the establishment of the UN passed and human rights took a more prominent position in international relations.

“Sovereignty is increasingly ceding moral ground to the rights and needs of groups and individuals within states, particularly in cases where gross human rights violations are being committed.”<sup>177</sup>

The ICISS has also accepted that human rights have now become a mainstream part of international law but also that sovereignty still matters<sup>178</sup>.

“Evolving international law has set many constraints on what states can do, and not only in the realm of human rights. The emerging concept of human security has created additional demands and expectations in relation to the way states treat their own people. ... All that said, sovereignty does still matter.”<sup>179</sup>

The task is then to develop a system that creates an acceptable compromise between these two norms. A system that recognises that international security does not stop with states but extends to people within those states also.

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<sup>174</sup> Donnelly “State Sovereignty and Human Rights” available at <[http://mysite.du.edu/jdonnell/papers/hrsov\\_v4a.htm](http://mysite.du.edu/jdonnell/papers/hrsov_v4a.htm)> (last visited 23 October 2012)(hereinafter Donnelly(2004)) 1; 12.

<sup>175</sup> See generally Donnelly (2004).

<sup>176</sup> Kuwali (2011), 124.

<sup>177</sup> Sarkin (2009) 53 *Journal of African Law*, 9.

<sup>178</sup> The ICISS Report (2001), 6-7.

<sup>179</sup> *Id* 7.

In answering the question of intervention for human protection the ICISS took into account the evolution of international law and accepted a modern understanding of sovereignty; Sovereignty as a Responsibility.

In 1995, Francis Deng, recognised that in order to protect and assist the masses of people affected by internecine internal conflicts requires reconciling the possibility of intervention with the traditional concept of state sovereignty. He states that sovereignty is qualified by a states' responsibility to assist and protect its people, the so-called "responsibilities of sovereignty". Should a state not meet these responsibilities, it risks forfeiting its legitimacy. According to Deng the guiding principle for reconciling the possibility of intervention with the concept of sovereignty is that under normal circumstances, a state would provide its people with adequate protection and assistance, and if unable to do so, will invite outside intervention. However, when the government of the state concerned, itself, is the cause of the violation, it is unlikely to invite or welcome intervention. In these circumstances, it would be the responsibility of the international community to respond. Deng recognises that the UN would be the ideal authority through which intervention should be undertaken. However, when the power structures and processes of the UN result in the paralysis of their actions, bilateral or multilateral action by other capable power could be justified<sup>180</sup>.

Sovereignty as a Responsibility signals a move away from sovereignty as control<sup>181</sup>. This implies a dual responsibility: externally to respect the sovereignty of other states and internally to protect its own population from gross human rights abuses<sup>182</sup>. The R2P proposes a system where the primary responsibility to protect individual in a state falls on the State concern, but if a State is unwilling or unable to protect its populations, the responsibility then falls on the international

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<sup>180</sup> See generally Deng "Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action" *in* Harbeson *et al* (1995) *Africa in World Politics: Post-Cold War Challenges*, 295.

<sup>181</sup> Evans & Sahnoun (2002), 101.

<sup>182</sup> The ICISS Report (2001), 8.

community<sup>183</sup>. Thus, in certain cases sovereignty, how important it might be, must yield to intervention for human protection.

If states uphold and respect fundamental human rights, it should have no concern about possible military intervention but if a state violates the human rights of their citizens then the state opens itself to the possibility of outside intervention. Intervention can come in many forms but the ICISS report emphasises that military intervention must only be used as a last resort<sup>184</sup>. Thus only when peaceful means prove inadequate, the international community may intervene in a state that is failing to protect its own population.

#### 4.4 The International Community and the Responsibility to Protect

It is an express condition of the R2P that if a State fails to execute its responsibility to protect its citizens, the responsibility falls on the International Community. It is therefore important that the R2P enjoys wide international support, otherwise the R2P would amount to nothing.

In 2005 the General Assembly of the United Nations held the World Summit resulting in one of the largest gathering of heads of States in the history of the UN. During this World Summit the delegates debated many issues including the R2P. In the World Summit Outcome document the nations of world unanimously accepted the notion of Sovereignty as a Responsibility and the R2P in general<sup>185</sup>.

The acceptance of the R2P is considered the most important achievement, however, the R2P was discussed in only two brief paragraphs:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international

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<sup>183</sup> *Id* 17.

<sup>184</sup> *Id* 27.

<sup>185</sup> Kuwali (2011), 89-95.

community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity...<sup>186</sup>

Three pillars of the R2P can be identified from this text. Firstly, that every sovereign state has the responsibility to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity. This implies not only the responsibility to protect but also the responsibility to prevent. The GA members accepted this responsibility and agreed to act accordingly. Secondly, the GA member agreed that the international community should support states in fulfilling its responsibility and thirdly, the international community has to take appropriate action to protect populations under threat when peaceful means prove inadequate and the state has manifestly failed to protect their population<sup>187</sup>.

An important difference between the ICISS report and the World Summit Outcome document is that the document specifies the four crimes for which the R2P applies. Eaton believes that this would enhance the predictability of the R2P in its application<sup>188</sup>.

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<sup>186</sup> World Summit Outcome, 60<sup>th</sup> Session of UN General Assembly (2005) available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>> (last visited on 25 November 2012).

<sup>187</sup> See generally Ban Ki-Moon Implementing the Responsibility to Protect 63<sup>th</sup> Session of the UN General Assembly (12 January 2009) available at <<http://responsibilitytoprotect.org/SGRtoPEng%20%284%29.pdf>> (last visited 24 November 2012) (hereinafter Implementing the R2P (2009)); Kuwali (2008), 73.

<sup>188</sup> Eaton An Emerging Norm? Determining The Meaning And Legal Status Of The Responsibility To Protect 32 Mich. J. Int'l L.765 (2010), 781

The World Summit Outcome document has however also been met with some criticism. Kuwali identified two important issues: firstly, the lack of guidelines to govern the potential use of force in situations that meet the stated threshold. Secondly, the document emphasises that any action taken in enforcement of the R2P must be done through the UN and particularly the SC<sup>189</sup>. The question that arises is what should be done if one of the Permanent Members of the SC vetoes the intervention. In this regard the document is subject to some criticism. Eaton believes that the omission of many prescriptive elements of the ICISS report, such as the non-use of the veto, is important point of criticism<sup>190</sup>. The ICISS report made the suggestion that in circumstances of grave human rights violations, the five permanent members of the SC should refrain from using the veto<sup>191</sup>. By insisting that the R2P should be enforced by the UN does not place enough pressure on the SC to act. Despite the criticism, the World Summit Outcome provides basis for the progressive development of the notion of “Sovereignty as a Responsibility” and the R2P<sup>192</sup>.

In 2006 the SC reaffirmed the World Summit Outcome commitment to the R2P on two occasions<sup>193</sup>.

In 2009 the new Secretary General, Ban Ki-Moon, published his own report on the R2P: Implementing the Responsibility to Protect. This report was not as well accepted as the World Summit Outcome document. This report, while recalling the 2005 World Summit document, returns to the language of the ICISS report by urging the five permanent members of the SC not to use or threaten to use the veto<sup>194</sup>. Unfortunately the GA only noted this report<sup>195</sup>.

The acceptance by the international community of the Responsibility to Protect adds considerable weight to any argument regarding the legitimacy of intervention for human protection.

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<sup>189</sup> Kuwali (2011), 91 -92; Kuwali(2008), 72-73.

<sup>190</sup> Eaton (2010) 32 Mich. J. Int'l L., 782.

<sup>191</sup> The ICISS Report (2001), 51.

<sup>192</sup> Kuwali(2011), 93; Kuwali (2008), 74.

<sup>193</sup> UNSC Resolution 1674 (2006); UNSC Resolution 1706 (2006).

<sup>194</sup> Implementing the R2P (2009), 27.

<sup>195</sup> UN General Assembly Resolution 63/308 (2009).

#### 4.4.1 The continuing role of the SC

A prominent feature of the R2P is the continuing involvement of the SC<sup>196</sup>. The ICISS report stated that there is “no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes.”<sup>197</sup> The 2005 World Summit Outcome document also states that the international community, acting “through the United Nations” and in the case of collective action, “through the Security Council”, has the responsibility to populations in a state that is manifestly failing to fulfil its responsibility to protect<sup>198</sup>. The 2009 report by the Secretary General of the UN affirmed the principles set out in the 2005 Outcome document<sup>199</sup>. He recognises that some less robust measures can be undertaken by the GA, the Secretary-General or regional bodies but insists on authorisation by the SC where more coercive measures are required<sup>200</sup>.

It is clear that while the ultimate R2P protects populations from grave human rights abuses lays with the state concerned, the secondary responsibility falls on the international community and in particular the SC. The call by the ICISS report and the 2009 Report by the SG to the five permanent members of the SC not to use or threaten to use the veto, adds considerable pressure on the SC to act decisively in cases of grave human rights abuses. Unfortunately, the SC has not always decisively and consistently fulfilled its responsibility to maintain international peace and security.

The Security Council was established as the only international organ that may authorise collective military intervention<sup>201</sup>. The intention behind the structure of the SC was to minimise the use of force and to ensure that the use of force is a result of collective, ideally consultative and impartial decision-making<sup>202</sup>. Unfortunately, by its very nature the SC is politically constituted. This unfortunate characteristic of the SC

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<sup>196</sup> See generally Evans & Sahnoun (2002), 106 – 108.

<sup>197</sup> The ICISS Report (2001), 49.

<sup>198</sup> World Summit Outcome (2005), par 139.

<sup>199</sup> See generally Implementing the R2P (2009)

<sup>200</sup> *Id.*; He also recognises the power of the GA to authorise such coercive action under the “Uniting for Peace” resolution but such action would not be binding and possibly ineffective and time consuming.

<sup>201</sup> Kuwali (2011), 148.

<sup>202</sup> *Id.*

has resulted in SC paralysis in times when decisive and timeous response was paramount. Somalia, Rwanda, Bosnia-Herzegovina and most recently Syria is just some of the examples of when SC paralysis has resulted in serious loss of life.

Since the revision of the SC would be almost impossible to even imagine, the ICISS report suggested some alternatives to the SC authorisation<sup>203</sup>. Firstly, the GA may recommend collective military intervention under the “Uniting for Peace” resolution. However, the process of getting to a stage where the GA could make such a decision is very time-consuming, a luxury that cannot be afforded in times of grave violations of human rights<sup>204</sup>. Secondly, the ICISS report suggests that regional organisations can assume the responsibility to intervene in order to stop mass atrocities but as a condition it would have to obtain *ex post facto* authorisation from the SC<sup>205</sup>. The first obvious problem with the suggestion is Article 53(1) of the UN Charter that prohibits a regional organisation from intervening without SC authorisation. However, recently the precedent emerged that the SC would often give *ex post facto* authorisation, but this is not a sound solution as any of the five permanent members of the SC may still veto the authorisation of the intervention already undertaken. The question that arises is that if SC authorisation is an unassailable condition to military intervention, what happens when the SC fails to reach a decision on intervention or when a majority decision to intervene is vetoed?

It is exactly for this reason that the AU enshrined the right to intervene in article 4(h). The African Leaders recognised that African people were being failed not only by the lack of interest by the SC but also by its own belief in the non-intervention principle.

#### 4.5 The AU and the R2P

One of the major considerations behind the establishment of the AU was a proposed shift away from the principle of non-intervention, supported by the jealous

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<sup>203</sup> The ICISS Report (2001), 53-55.

<sup>204</sup> Kuwali (2011), 149.

<sup>205</sup> The ICISS Report (2001), par 6.31 – 6.35, 53 -55. See also note 185.

protection of sovereignty, towards a policy of non-indifference<sup>206</sup>. The aim was that sovereignty may no longer serve as a shield against international scrutiny when a state is violating the human rights of the citizens, especially when these violations amount to international crimes.

This new approach to sovereignty resembles that brought forth by the ICISS report on the R2P<sup>207</sup>. The R2P and the establishment of the AU were parallel events in the international arena that reflects the change in the way state sovereignty and human security is approached. Many commentators consider the AU's right to intervention to reflect a commitment by the AU and its member states to the R2P.

Article 3(b) of the AU Constitutive Act determines that the objectives of the AU includes defending the sovereignty, territorial integrity and independence of member states and article 4(g) provides for the principle of non-interference. But article 4(h) gives the right to the AU to intervene in a member state in grave circumstances. The submission is that under the AU system, the R2P a state's population falls on the state first and foremost and that sovereignty is subject to states' ability and willingness to protect its citizens from grave human rights abuses<sup>208</sup>. Should a state be unable or unwilling to protect its citizens, then the responsibility or right falls on the AU.

The right to intervene does however differ from the concept of R2P in that the R2P calls for action through the SC while the AU's right to intervene is a not reliant on SC authorisation. The ICISS report does, however, refer to the responsibility of a regional organisation to act should the SC fail, but emphasises that such intervention would be subject to *ex post facto* SC authorisation. And although the language of the AU's right to intervene and that of the R2P differs quite substantially, they are both rooted in the same school of thought<sup>209</sup> and seek the same outcome: To protect vulnerable populations from grave human rights abuses<sup>210</sup>.

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<sup>206</sup> See Chapter 2.

<sup>207</sup> Powell (2005) "The AU's Emerging Peace and Security Regime" 10.

<sup>208</sup> Kuwali (2011), 83; Powell (2005) "The AU's Emerging Peace and Security Regime" 10.

<sup>209</sup> *Id.*, 7.

<sup>210</sup> Murithi "The Responsibility to Protect, as enshrined in article 4 of the Constitutive Act of the African Union" 16.3 African Security Review (2009) 14, 94.

Kuwali believes that similar to the R2P the right to intervene in terms of article 4(h) implies a legal definition incompatible with the traditional notion of sovereignty but is rather based on the notion of Sovereignty as a Responsibility<sup>211</sup>. He states that, even though the R2P predates the AU, the incorporation of the right to intervene in the AU Constitutive Act reflects the AU member states' acknowledgement of the notion of Sovereignty as a Responsibility and reflects the political and moral commitment of the AU member states' to the R2P<sup>212</sup>.

Similarly, Murithi submits that the AU had effectively enshrined the R2P into the AU Constitutive Act and that this signals a commitment by the AU of a policy of non-indifference even before the term was popularised by the 2005 World Summit Outcome<sup>213</sup>.

Kuwali is also of the opinion that the endorsement of the R2P in the GA, the SC and by other international bodies together with other factors such as the inconsistency of the SC to discharge its responsibility towards Africa and its people, adds considerable weight to arguments in favour of a regional right to intervene, such as the AU's right to intervene<sup>214</sup>.

By incorporating the right to intervene into its security framework the AU is not intending to replace the SC but the right to intervene should be understood as being complementary to the UN<sup>215</sup>. If the UN were to fail to act in situations that meet the threshold set out in Art 4(h), then the AU have a right to intervene. And based on the international commitment shown for the notion of Sovereignty as a Responsibility and the R2P, the AU does not only have a right to intervene but also a responsibility<sup>216</sup>. This is endorsed by the international recognition of the *erga omnes* status of international human rights.

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<sup>211</sup> Kuwali (2001), 6.

<sup>212</sup> *Id* 54.

<sup>213</sup> Murithi (2009), 93.

<sup>214</sup> Kuwali (2011), 89.

<sup>215</sup> See generally Powell (2005) "The AU's Emerging Peace and Security Regime" from 17.

<sup>216</sup> Murithi (2009), 93,

## 4.6 Conclusion

The R2P has brought about a major shift in international thinking regarding intervention and state sovereignty. The notion of Sovereignty as a Responsibility should be embraced by all states in the way it governs its peoples but should a state manifestly fail to protect the human rights of its populations, the international community should intervene.

In the context of the AU, the AU has embraced this concept by incorporating a right to intervene into its founding document. While many may question the validity of intervention based on consent, as discussed in Chapter 3, it is my submission that the international support shown to the R2P and the accompanying notion of Sovereignty as a Responsibility together with the constant paralysis of the SC especially when it comes to Africa, adds considerable legitimacy to the argument in favour of the right to intervene.

# Chapter 5

## Conclusion

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The mandate given by article 4(h) to the AU provides a great opportunity to improve the effectiveness of conflict management on the African Continent. This research was undertaken to examine the circumstances that lead to the establishment of the AU and the right to intervention, and in particular the legality of the right to intervene.

### 5.1 The establishment of the AU and the right to intervene

The AU was established in 2000 as the successor to the OAU. The tenure of the OAU was characterized by an inability and unwillingness to effectively manage the many inter and intra state conflicts. The strict adherence to the principle of non-interference meant that the OAU was almost powerless to prevent and effectively manage conflicts in Africa and the rest of the international community was mostly unwilling and uninterested in the African conflicts. As a result the sub-regional bodies such as ECOWAS and SADC took matters into their own hands, thereby further contributing to the irrelevance of the OAU.

The AU officially replaced the OAU as the regional organisation for the African continent in 2003. The AU Constitutive Act, while still retraining many of the core principles and objectives of the OAU, incorporated the so called right to intervene<sup>217</sup>.

Article 4(h) of the AU Constitutive Act proclaims that the AU has the right to intervene in a member state in respect of grave circumstances, namely genocide, war crimes and crimes against humanity.

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<sup>217</sup> See generally article 3 and 4 of the AU Constitutive Act.

## 5.2 The legality of the right to intervene

Article 2(4) of the UN Charter prohibits the use of force against any state and article 2(7) prohibits interference in the internal affairs of a state. Read together these provisions constitute a ban on any form of intervention in the domestic affairs of a state. In the light of this ban, the AU's right to intervene would be a *prima facie* violation of international law. In this research I analysed whether the AU's right to intervention might be legal despite the prohibition on the use of force. My submission is that the right to intervene is indeed legal or at least legitimate despite the apparent ban on inter-state interference.

Firstly, I found that by signing the AU Constitutive Act, AU member states did not only agree to join the AU but also consented to the possibility of the AU intervening on their territories should circumstances of genocide, war crimes or crimes against humanity exist.

## 5.3 Consent as valid ground for intervention.

It is generally accepted that consent or invitation by the state concerned precluded any wrongfulness of the *prima facie* violation of international law and in particular a valid exception to the prohibition on the use of force<sup>218</sup>. This view is supported by publicists, courts and codified international law alike and also finds precedent in the practice of states.

It is my submission that by signing the AU Constitutive Act the member states of the AU consented in advance to the possibility of intervention by the AU in terms of article 4(h) and consequently there is no conflict between the right to intervene and the prohibition of the use of force.

Furthermore, I found that it is not a requirement of valid consent for the consent to be given contemporaneous to the proposed intervention<sup>219</sup>. Consent may be given in advance and it is indeed a sovereign act of a state to, in advance, limit its

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<sup>218</sup> See note 76 *supra*.

<sup>219</sup> See note 100 - 105 *supra*.

sovereignty by agreement. Also, while a state would generally be permitted to withdraw its consent at any time, withdrawal of consent to intervention undertaken in terms of article 4(h) constitutes a withdrawal from the whole of the treaty and will only take effect after 12 months<sup>220</sup>. Therefore, member states cannot simply withdraw consent in order to avoid the proposed intervention as was done in the past and any interference by the member state in the actions of the AU would constitute a violation of the AU Constitutive Act.

Nevertheless, the AU is obligated to at all times, when applying the right to intervene, to remain within the bounds set out in the AU Constitutive Act and the succeeding mandate given by the Assembly. Thus, the AU has to adhere to its own rules and procedures when electing to intervene in terms of article 4(h) but also has to adhere to the operational limits set by the mandate of the Assembly. Should the AU fail to do so, it would be violating international law and the intervention in the member state would be unlawful<sup>221</sup>.

The prohibition on the use of force is considered one of the few peremptory or *ius cogens* norms. It is widely accepted that a *ius cogens* norm cannot be contracted out and that any agreement to this effect is void. In answering the question if intervention in terms of article 4(h) is a violation of a peremptory norm and thus unlawful, I considered two arguments. Firstly, while Article 26 of the Articles on State Responsibility proclaims that the wrongfulness of any act which violates a peremptory norm cannot be precluded, the commentaries to this article state that consent may be relevant when applying such a peremptory norm<sup>222</sup>. The commentaries give the example of a state consenting to military intervention in its territory. Secondly, Aneme argue (and I agree) that it is only the act of aggression that has peremptory status. The Commentaries to article 26 lists only the prohibition on aggression as a peremptory and not use of force in general<sup>223</sup>. The definition of aggression states *inter alia* that aggression is the use of armed force on the territory

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<sup>220</sup> Article 56 of the Vienna Convention (1969).

<sup>221</sup> See generally note 122 -127 *supra*.

<sup>222</sup> Commentaries on ASR (2001), 85.

<sup>223</sup> *Id.*

of another in contravention of an agreement between the parties concerned<sup>224</sup>. Thus, use of force undertaken in the territory of a state within the bounds of the agreement between the parties is not aggression and thus not a violation of a peremptory norm.

Therefore, in answering the principle question of the legality of intervention undertaken by the AU in terms of article 4(h) of the AU Constitutive Act, I submit that by signing the AU Constitutive Act the member states of the AU consented to possible intervention by the AU in their territories based on the right to intervention and that such an intervention would not be a violation of international law and would therefore be legal.

#### 5.4 The African Union and the Responsibility to Protect

The AU's right to intervention is further supported by the concept of the responsibility to protect. The increased international focus on human rights and human security has influenced the way the notion of sovereignty and the principle of non-interference are understood, however it was only in 2001 that the ICISS undertook the task to develop a system that creates an acceptable compromise between sovereignty and the protection of human rights within sovereign states. The result was the ICISS report "The Responsibility to Protect"<sup>225</sup>. The report introduced the twin norms of sovereignty as a responsibility and the Responsibility to Protect. The notion of sovereignty as a responsibility implies that every state has the responsibility to protect its people from gross human rights abuses, while the Responsibility to Protect (R2P) refers to the responsibility of the international community to act should a state be unwilling or unable to fulfil its responsibilities towards its citizens<sup>226</sup>.

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<sup>224</sup> Article 3 of UNGA Resolution 3314 (XXIX) (1974).

<sup>225</sup> The ICISS Report (2001).

<sup>226</sup> See generally The ICISS Report (2001).

These concepts have been endorsed internationally by the UN General Assembly and other international bodies<sup>227</sup>. This endorsement adds considerable weight in favour of intervention for humanitarian purposes.

Although the ICISS report proposes action is taken by the international community acting principally through the Security Council<sup>228</sup>, the inconsistency of the SC to fulfil its responsibility to maintain international peace and security means that the R2P would have to be undertaken by the rest of the international community. I submit that the General Assembly would not be the appropriate alternative as the process is long and action might be too late. The Report by the ICISS also suggests that regional bodies, such as the AU may assume the responsibility with ex post facto authorization from the SC<sup>229</sup>. I found that this does not solve the issues with the inconsistency of the SC and that regional bodies should be allowed to act should the SC fail to take appropriate action.

It is my submission that by incorporation of the right to intervention in its Constitutive Act, the AU has embraced the concept of responsibility to protect. Furthermore, the international endorsement of this concept and the constant paralysis of the SC, especially in respect of Africa, adds considerable legitimacy to possible intervention by the AU in terms of article 4(h).

Thus, the conclusion of this research is that the right to intervene as incorporated by the AU in its Constitutive Act is legal as it is based on the advanced consent of the state concerned. Furthermore, the international support shown for the Responsibility to Protect together with the ineffectiveness of the SC, legitimises intervention in terms of article 4(h) should the SC fail in its responsibility to protect.

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<sup>227</sup> See 3.2 *supra*.

<sup>228</sup> The ICISS Report (2001), 49.

<sup>229</sup> The ICISS Report (2001) par 3.31 -3.35, 53 -55.

# **Annexure A**

## **Article 3 of the African Union's Constitutive Act**

"The objectives of the Union shall be to:

- a. Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- b. Defend the sovereignty, territorial integrity and independence of its Member States;
- c. Accelerate the political and socio-economic integration of the continent;
- d. Promote and defend African common positions on issues of interest to the continent and its peoples;
- e. Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- f. Promote peace, security, and stability on the continent
- g. Promote democratic principles and institutions, popular participation and good governance;
- h. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- i. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- j. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- k. Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- l. Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- m. Advance the development of the continent by promoting research in all fields, in particular in science and technology;

- n. Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.”

#### **Article 4 of the African Union’s Constitutive Act**

“The Union shall function in accordance with the following principles:

- k. Sovereign equality and interdependence among Member States of the Union;
- l. Respect of borders existing on achievement of independence;
- m. Participation of the African peoples in the activities of the Union;
- n. Establishment of a common defence policy for the African Continent;
- o. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- p. Prohibition of the use of force or threat to use force among Member States of the Union;
- q. Non-interference by any Member State in the internal affairs of another;
- r. 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;
- s. Peaceful co-existence of Member States and their right to live in peace and security;
- t. The right of Member States to request intervention from the Union in order to restore peace and security;
- u. Promotion of self-reliance within the framework of the Union;
- v. Promotion of gender equality;
- w. Respect for democratic principles, human rights, the rule of law and good governance;
- x. Promotion of social justice to ensure balanced economic development;
- y. Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- z. Condemnation and rejection of unconstitutional changes of governments.”

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