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STATUS OF ARTICLE 4(h) OF THE CONSTITUTIVE ACT OF THE AFRICAN
UNION**

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FROM NON-INTERFERENCE TO NON-INDIFFERENCE: THE ORIGIN AND STATUS OF ARTICLE 4(h) OF THE CONSTITUTIVE ACT OF THE AFRICAN UNION

Lornah Afoyomungu Olum*

Abstract

This article examines the historical, legal and political context within which Article 4(h) of the Constitutive Act of the African Union was formulated. It also considers the place of Article 4(h) in the contemporary international legal order. In the main, it is considered that, as recognized by Principle 11 of the Pretoria Principles, Article 4(h) is envisaged and validated by Article 53 of the UN Charter. More affirmatively, it is suggested that the place of Article 4(h) as a feature of the normative legal framework on intervention is secured by the emergence of the Responsibility to Protect (R2P) doctrine, which has been broadly endorsed under the UN framework.

1. Introduction

Under Article 4(h) of its Constitutive Act,¹ the African Union (AU or ‘the Union’) has the right to intervene in a member state to avert mass atrocities or address a serious threat to legitimate order for the restoration of peace and stability. This provision empowers the AU to ‘intervene in a member state pursuant to a decision of the

* LLB (Hons) (MUK). This article is based on a chapter within my LLB dissertation titled, “The status of Article 4(h) of the Constitutive Act of the African Union in international law,” written in 2017 under the supervision of Dr. Busingye Kabumba. I am deeply grateful to Dr. Kabumba for the guidance, encouragement and insight provided during the course of the writing of that thesis as well as the modification of this article for publication. I am also most grateful to the African Development Law Institute (ADLI) for the institutional support provided during the final stages of writing the article. Finally, I am greatly indebted to the editors of the Makerere Law Journal, for their most helpful comments, which have greatly improved the arguments presented. All errors and omissions, however, remain my sole responsibility.

¹ Adopted in the year 2000 at Lomé, Togo. Last accessed at: http://www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf on 29 April 2019.

Assembly in respect of grave circumstances, namely; war crimes,² genocide,³ and crimes against humanity'.⁴

In July 2003, the scope of Article 4(h) intervention was expanded by the Protocol on Amendments to the Constitutive Act⁵ to include situations involving 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council'. On the other hand, Article 2(4)⁶ of the United Nations (UN) Charter prohibits the threat or use of

² Article 8(2)(a) of the Rome Statute of the International Criminal Court, defines 'war crimes' as '[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) wilful killing; (ii) torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) unlawful deportation or transfer or unlawful confinement; and (viii) taking of hostages'.

³ Under Article 6 of the Rome Statute, 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group'.

⁴ According to Article 7 (1) of the Rome Statute, a crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; and (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

⁵ See the Protocol on Amendments to the Constitutive Act, available at: https://au.int/sites/default/files/treaties/35423-treaty-0025_-_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_f.pdf (Last accessed 29 March 2019).

⁶ Charter of the United Nations, Article 2; 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. (4) 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'. Available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> Also see HA Gebeyehu 'Sovereignty and Intervention under the Constitutive Act of the African Union' *Central European University*, 7. Available at: https://www.academia.edu/23242852/Sovereignty_and_Intervention_under_the_Constitutive_Act_of_the_African_Union

force against the territorial integrity and political independence of any state. The principles of non-intervention and state sovereignty, espoused by this provision, thus seem mutually inclusive.

Although Article 53⁷ of the UN Charter envisions enforcement action by regional arrangements such as the AU, those actions require the authorisation of the Security Council. The Constitutive Act of the AU is, however, silent on seeking the UN Security Council's prior authorisation before engagement in Article 4(h) intervention. It only conditions intervention on the existence of grave circumstances, namely; war crimes, genocide and crimes against humanity, and serious threats to the legitimate order, peace and stability of a Member State of the Union.⁸

When the OAU was formally dissolved, the AU took over its rights, powers and obligations, including conflict management.⁹ Since the Constitutive Act did not initially provide for any mechanism for conflict prevention, management and

⁷ Charter of the United Nations, Article 53; 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state'.

⁸ Upon the recommendation of the AU's Peace and Security Council.

⁹ I.O. Albert (2007), 'The African Union and Conflict Management,' Vol. XXXII, No. 1 *Africa Development*, 41-68, stating that, according to Marc Ross: 'The way conflict is managed depends on whether the society has a reinforcing as opposed to cross-cutting social structure. In societies with reinforcing social structure, conflict is expansive and difficult to resolve for several reasons: the mobilization of others in one's core group is relatively easy, there are few people whose interests hinge on the resolution of the dispute, and conflict may persist unless a common external foe forces disputants to resolve their differences. In contrast, individuals in cross-cutting ties societies cannot count on a large, loyal core group who share the same interests, because people mobilized on the basis of one shared characteristic, like kinship, can oppose each other over another, such as residence or ritual affiliation. Ties among members of same community and among different communities limit the severity of overt conflict and promote dispute settlement through shared interests'.

resolution, the AU adopted a Protocol Relating to the Establishment the Peace and Security Council of the African Union (PSC).¹⁰

This article examines the history of the right of intervention within the framework of the African Union. This history is critical to the debate on whether Article 4(h) intervention is compatible with the traditional norms or principles of non-intervention and non-interference with the territorial integrity of states.

The article also seeks to answer a number of questions that have been raised in relation to Article 4(h)¹¹ such as what its rationale was, how it was understood, why the Assembly of Heads of State and Government thought it necessary to include it within the AU's Constitutive Act—the only international treaty to include such a right,¹² and whether it has a place in the traditional international legal order today.

An analysis is made of Africa's stance on intervention in the past decades, and how the Organisation of African Unity (OAU), the AU's predecessor, responded to

¹⁰ The 15-member Peace and Security Council was established in May 2004. It was modelled after the UN Security Council, designed to address regional conflicts. The objectives of the PSC (as contained in Article 3 of the Protocol Establishing the Peace and Security Council of the African Union) are: (a) to promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development; (b) to anticipate and prevent conflicts. In circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts; (c) to promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence; (d) to co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects; (e) to develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act and f) to promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts. The PSC establishes an operational framework 'for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction'.

¹¹ Also see D. Kuwali and F. Viljoen (2014), 'Africa and the Responsibility to Protect,' and B. Kabumba (2018), 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act' in O. Shyllon (ed.) (2018), 'Model law on access to information for Africa and other regional instruments: Soft law and human rights in Africa,' Pretoria University Law Press, available at: http://www.pulp.up.ac.za/images/pulp/books/edited_collections/access_to_information/Chapter%209%20Kabumba%20Access.pdf (Last accessed 29 March 2019).

¹² B. Kioko (2003), 'The right to intervention under the AU's Constitutive Act: From non-interference to non-intervention,' 85 *International Review of the Red Cross* 808. Available at: http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union_8217s_Constitutive_Act_From_non-interference_to_non-intervention.pdf (Last accessed 23 April 2019).

the matters for which intervention is now envisaged and whether Article 4(h) is an embodiment of the lessons learnt from that experience.

The article commences by discussing non-intervention under the OAU regime before considering the establishment of the AU and its new approach to intervention and conflict management on the continent. Thereafter, the tensions between the AU's intervention framework and the international legal order represented by the UN Charter are discussed, with an analysis as well of the Pretoria Principles and the doctrine of the Responsibility to Protect (R2P).

2. The Organisation of African Unity (OAU) and Intervention

The OAU originated from the Union of African states, a short lasting union of three West African states,¹³ before being formally established in Ethiopia on May 25, 1963. It was in existence until 2002 when the AU wholly succeeded it.¹⁴ Its intended purpose was to promote unity and solidarity of African States in a time of independence movements.¹⁵ Other important objectives for the OAU were to ensure that all Africans enjoyed human rights, that the standards of living of its people improved, and that there was effective settlement of disputes between its member states.¹⁶

In the Charter of the OAU,¹⁷ African States pledged to work together to coordinate and intensify their cooperation and efforts for the attainment of a better life for the peoples of Africa.¹⁸ However, the initial 32 independent member states of the OAU were regarded as bureaucratic and with limited power.¹⁹ As a consequence, the OAU struggled to enforce its decisions. Another major limitation was the OAU's lack of

¹³ African Unification Front (2002), *Brief overview of the history of the African Union, towards national sovereignty*.

¹⁴ African Union, (2007) *African Union in a nutshell*, 1.

¹⁵ Organisation of African (1996) *Unity Purposes and Principles*, 2-3.

¹⁶ As above. See, also, Exploring Africa: The birth of the African Union. Available at: <http://exploringafrica.matrix.msu.edu/the-birth-of-the-african-union/> (Last accessed 23 April 2019).

¹⁷ OAU Charter adopted in Addis Ababa, Ethiopia, 25 May 1963. Abrogated and replaced by the Constitutive Act. Available at: https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf. (Last accessed 29 April 2019).

¹⁸ Organisation of African Unity (2003), *The Organisation of African Unity (OAU) Charter*, 1.

¹⁹ A. Bujra (2002), *Africa: Transformation from the OAU to the AU* 1.

an army to intervene in civil wars and countries still grappling with colonialism.²⁰ Its adoption of non-interference in the affairs of Member States further restricted the achievement of its goals.²¹

Consensus was also difficult to attain within the OAU given that the different factions—pro-capitalists and pro-socialist factions during the Cold War—had divergent agenda.²² However, the OAU endured this difficulty and was able to provide a forum that enabled member states to adopt coordinated positions on matters of common concern.²³ For instance, through the Coordinating Committee for the Liberation of Africa, the OAU worked tirelessly and succeeded in creating consensus in support of the liberation struggle and fight against apartheid in South Africa.²⁴ The idea of attempting to unify Africa into a United States of Africa was also re-introduced in the mid-1990s under the leadership of Muammar al-Qaddafi.²⁵

The OAU may thus be considered to have been successful, considering its goals as set out within its Charter.²⁶ Created in 1963 during a period when some African states had recently become independent and others were still fighting for independence, the OAU established purposes and principles corresponding to its

²⁰ As above. Also see G Laporte and J Mackie (eds) (2010) 'An assessment of past progress and future prospects for the African Union's institutional architecture'. (*ECDPM Policy and Management Report 18*). Available at:

<https://ecdpm.org/wp-content/uploads/2013/10/PMR-18-African-Union-Past-Progress-Future-Prospect.pdf> (Last accessed 23 April 2019).

²¹ Boddy-Evans (2006), *Biography: Idi Amin Dada*, 1.

²² Thompson (1969) *Africa and Unity: The evolution of pan-Africanism* 41-47.

²³ As above. Also see OAU Population Newsletter: Issued by the economic research, planning and cooperation department OAU (1994) Vol 1 No. 2. Available at:

<https://www.un.org/popin/oau/popnews/popnwv12.htm>. (Last accessed 23 April 2019).

²⁴ As above. See, also J.O. Iguē (2010), 'A new generation of leaders in Africa: What issues do they face?' 1 *International Development Policy*. Available at:

<https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf> (Last accessed 23 April 2019).

²⁵ Organisation of African Unity Department of Foreign Affairs Profile: *The Organisation of African Unity* 2000, 1.

²⁶ V.O. Edo and M.A. Olanrewaju (2012), 'An assessment of the transformation of the Organisation of African Union (O.A.U) to the African Union (A.U) 1963 -2007,' 21 *Journal of the Historical Society of Nigeria*, 41-69.

time.²⁷ Article II of its Charter contained five purposes.²⁸ Two of these required the organisation to defend the sovereignty, territorial integrity and independence of African states, and to eradicate all forms of colonialism in Africa.²⁹ Thereafter, the first three principles contained in Article III were '(1) the sovereign equality of all member states; (2) non-interference in the internal affairs of states; and (3) respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence'.³⁰

However, the OAU's strong commitment to the national sovereignty of each member state meant that it was not able to intervene in civil wars or conflicts that devastated a number of African countries, thus leading to the birth of the AU which aspires to be more involved to protect member states' citizens.³¹

The principle of non-intervention is part of customary international law and is founded upon the concept of respect for the territorial sovereignty of states. Intervention is prohibited by Article 2(4) of the UN Charter in deference to the principle of state sovereignty.³²

The most recent mass atrocity to have happened on the African continent is the Rwandan genocide of 1994³³ in which more than 800,000 people lost their lives.³⁴

²⁷ See also, M. Sharpe (2017), 'From non-interference to non-indifference: The African Union and the Responsibility to Protect,' *International Refugee Rights Initiative*. Available at <https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf> (Last accessed 23 April 2019)

²⁸ OAU Charter, Article II: 'The Organization shall have the following purposes: (a) To promote the unity and solidarity of the African States; (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; (c) To defend their sovereignty, their territorial integrity and independence; (d) To eradicate all forms of colonialism from Africa; and (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. Available at: https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf (last accessed 23 April 2019).

²⁹ Also see J.A.A. Ayoade, 'African peer review: Towards casa-rovio doctrine' *African Studies Center-University of Pennsylvania*, available at: https://www.africa.upenn.edu/Articles_Gen/ayoade-casa.html.

³⁰ OAU Charter, available at: https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf (last accessed 23 April 2019)

³¹ Exploring Africa - The birth of the African Union, available at: <http://exploringafrica.matrix.msu.edu/the-birth-of-the-african-union/>.

³² M.N. Shaw (2008), *International law* 1282.

³³ The State of the World's Refugees 2000: The Rwandan genocide and its aftermath, available at: <https://www.unhcr.org/3ebf9bb60.pdf> (last accessed 23 April 2019).

³⁴ Rwanda: The preventable genocide, International Panel of eminent personalities, available at: <https://www.refworld.org/pdfid/4d1da8752.pdf> (last accessed 23 April 2019).

But despite the peacekeeping efforts by the OAU and UN,³⁵ and in spite of the reports that were submitted to the UN indicating that the genocide was imminent, there was nothing substantial done to prevent this genocide.³⁶ This failure to act effectively was also caused by the OAU's institutional and logistical limitations which rendered it powerless in stopping the genocide.³⁷

Evidently, inadequate attention was paid to conflict management and peacekeeping in Africa³⁸ in terms of financial support from the UN and the rest of the international community. This, coupled with the OAU's rigid adherence to the principle of non-intervention and the sanctity of sovereignty,³⁹ gradually created an attitudinal shift on the part of African leaders and more broadly the international community as a whole.⁴⁰ Furthermore, the growing involvement of sub-regional

³⁵ The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness. This lack of political will affected the response by the Secretariat and decision-making by the Security Council, but was also evident in the recurrent difficulties to get the necessary troops for the United Nations Assistance Mission for Rwanda (UNAMIR). Finally, although UNAMIR suffered from a chronic lack of resources and political priority, it must also be said that serious mistakes were made with those resources which were at the disposal of the United Nations'. Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (1999) Report for the United Nations, available at:

<https://reliefweb.int/report/rwanda/report-independent-inquiry-actions-united-nations-during-1994-genocide-rwanda> (last accessed 23 April 2019).

³⁶ Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (1999) Report for the United Nations, available at:

<https://reliefweb.int/report/rwanda/report-independent-inquiry-actions-united-nations-during-1994-genocide-rwanda> (last accessed 23 April 2019).

³⁷ S.M. Rugumamu, (2002), 'Conflict management in Africa: Diagnosis of current practices and future prospects', 2002, available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.472.5007&rep=rep1&type=pdf> (last accessed 23 April 2019).

³⁸ For instance, the OAU's failure to intervene during conflicts in Somalia, Liberia and Sierra Leone. See, further S Desmidt and V Hauck 'Conflict management under the African Peace and Security Architecture (APSA): Analysis of conflict prevention and conflict resolution interventions by the African Union and Regional Economic Communities in violent conflicts in Africa for the years 2013-2015' (2017) No. 21 *European Centre for Development Policy Management*, 3.

³⁹ F. Achankeng (2013), 'Conflict and conflict resolution: Engaging the colonial factor' 2 *African Centre for the Constructive Resolution of Disputes*, available at:

<https://www.accord.org.za/ajcr-issues/%EF%BF%BCconflict-and-conflict-resolution-in-africa/> (last accessed 23 April 2019).

⁴⁰ V.A.O. Adetula (2014), 'African conflicts, development and regional organisations in post-cold war international system,' 16 *Current African Issues*. Available at:

<http://nai.diva-portal.org/smash/get/diva2:799520/FULLTEXT04.pdf> (last accessed 23 April 2019).

organisations like the Economic Community of African States (ECOWAS) and the Southern African Development Community (SADC) in conflicts proved more effective, thus illuminating the continued irrelevance of the OAU.⁴¹

According to Knutsen,⁴² rational and power-motivated African leaders might have liked, in the short term, to intervene and invade other African countries; but the fear of future intervention in their own country restrained them from acting on such short term interest.⁴³ The OAU Charter's strong focus on sovereignty and territorial integrity was crucial in maintaining an equilibrium.⁴⁴

Upon the failure of the OAU, African leaders decided to establish an African Union in its place, during the Sirte Extraordinary Session (1999).⁴⁵ The Sirte Declaration was then followed by the Constitutive Act of the African Union, 2000.⁴⁶ The Lusaka Summit of 2001 drew the way forward for the operationalisation of the AU,⁴⁷ which was launched shortly thereafter by President Thabo Mbeki on 9 July 2002 in South Africa.⁴⁸ The AU was formed to secure Africa's democracy, human

⁴¹ The Revised Treaty of the Economic Community of Western African States (1993).

⁴² C.H. Knutsen, 'I'll mind my own business if you mind yours: The OAU and the African peace' 1, Department of Political Science, University of Oslo Centre for the Study of Civil War, PRIO, available at: <http://folk.uio.no/carlhk/publications/OAUnamed.pdf> (last accessed 23 April 2019).

⁴³ It should be noted that the OAU occasionally took steps towards intervention for instance the deployment of an 'OAU Neutral Force' in Chad in 1981-82, which was singularly ineffective according to most accounts. Next came the deployment of two small missions to Rwanda, neither of which did anything to prevent the 1994 genocide (Panel of Eminent Personalities 1999). After the Rwanda debacle the OAU fielded Observer Missions in Burundi (1993-96) and in Comoros (1997-99) as well as an OAU Liaison Mission in Ethiopia-Eritrea, none of which seem to have made much of a Difference. 'Its lofty ambitions notwithstanding, the OAU thus did just as little with regard to the security of its members as it did in terms of forging any real unity among them. The best explanation may be that nobody really tried, which in turn may be explained by the absence of any hegemon able and willing to play a leading role' - B Møller, 'The African Union as security actor: African solutions to African problems?' (2009) No. 57 Danish Institute for International Studies, 6-8, available at <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csdc-working-papers-phase-two/wp57.2-african-union-as-security-actor.pdf>

⁴⁴ M.G. Ramuhala, 'Post-cold war military intervention in Africa' 2011 Vol. 39(1) *South African Journal of Military Studies*, 33-55, available at: <https://www.ajol.info/index.php/smsajms/article/viewFile/70513/59117> (last accessed 23 April 2019).

⁴⁵ D.L. Browne (2005), *Pan-Africanism and the African Union 2*.

⁴⁶ African Union (1999), *Sirte Declaration on the AU*, 3.

⁴⁷ African Union (2000), *Constitutive Act of the African Union*, 1.

⁴⁸ Organisation of the African Unity (1996), *Purposes and Principles*, 2-3.

rights, a sustainable continental economy, and to bring an end to intra-African conflict on the continent.⁴⁹

While the OAU was crippled by its institutional and normative limitations, the AU now has the institutional capability and the normative structure necessary to intervene in grave circumstances.⁵⁰ 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.⁵¹

3. The Establishment of the AU and the New Approach to Conflict Management on the Continent

The establishment of the AU was influenced by a number of factors,⁵² the most relevant one to our discussion being the feeling by African leaders that Africa's problems required a new approach to conflict management.⁵³

3.1 The rationale behind the establishment of the African Union

In his Millennium Report in 2000, then UN Secretary General, Kofi Anan, addressed the dilemma of balancing the defence of humanity and the defence of state sovereignty and the question of which principle should prevail when the two conflict. He posed the challenge in these terms:

I also accept the principle of sovereignty and non-interference offer vital protection to small and weak states. But to the crisis I would pose this question: if humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross

⁴⁹ O. Babarinde (2007), *The EU as a model for the African Union: The limits of limitation* 5.

⁵⁰ A. Sesay (2008), 'The African Union: Forward march of about face-turn?' Claude Ake Memorial Papers No.3, available at: <http://nai.diva-portal.org/smash/get/diva2:278874/FULLTEXT01.pdf> (last accessed 23 April 2019)

⁵¹ K. Powell (2005), 'The African Union's emerging peace and security regime: Opportunities and challenges for delivering on The Responsibility to Protect,' *The North-South Institute*, available at: <http://responsibilitytoprotect.org/The%20African%20Union's%20Emerging%20Peace%20and%20Security%20Regime.pdf>

⁵² Some of these factors were the lack of political will of OAU member states and limitations of the OAU's conflict management institutions, the need to form an organization to promote greater cooperation and unity among African states. (Exploring Africa: The birth of the African Union available at: <http://exploringafrica.matrix.msu.edu/the-birth-of-the-african-union/>).

⁵³ Kioko (n 12 above) 852. '.

and systematic violations of human rights that offend every precept of our common humanity?⁵⁴

At the 2001 OAU summit meeting of African presidents in Libya, it was agreed that there was need to promote and consolidate African Unity, and to strengthen and revitalise the continental organisation to enable it have a more active role and keep up with the political, economic and social developments taking place within and outside the continent. It was agreed that there was a need to eliminate the scourge of conflict on the continent and accelerate the process of implementing the Treaty Establishing the African Economic Community.⁵⁵

The AU is an entity that works for the integration of the continent to enable it play a role in the global economy while addressing multifaceted social, economic, and political problems.⁵⁶ This is consistent with the vision for a united and free Africa, laid out in a 1959 speech by Kwame Nkrumah, its ideological father:

...in Ghana we regard our independence as meaningless unless we are able to use that freedom that goes with it to help other African people to be free and independent, to liberate the entire continent of Africa from foreign domination and ultimately to establish a Union of African States.⁵⁷

The AU was thus established by the Constitutive Act of the African Union, 2000 to address the shortcomings of its predecessor, the OAU.⁵⁸

⁵⁴ K. Annan, 'We the peoples: The role of the UN in the twenty-first century', Report of the Secretary General (New York: United Nations, 2000), 48. Full report at: www.unmilleniumpoint.org/documents/wethepeople.pdf (last accessed 21 March 2017).

⁵⁵ Kioko (n 12 above) 812-813.

⁵⁶ African Union (2007), *African Union in a nutshell*, 1.

⁵⁷ D. Birmingham (1998), *Kwame Nkrumah: Father of African nationalism* 2.

⁵⁸ The AU was launched on 9, May, 2002 in Durban, South Africa and the African Union Constitutive Act was adopted at Lomé, Togo in 2000.

3.2 Adoption of the Constitutive Act of the African Union

The provisions of the AU's Constitutive Act suggest that human rights play a greater role in the work of the Union than they did within the OAU.⁵⁹ Some of the shortcomings of the OAU Charter as a normative human rights instrument are now addressed by the Constitutive Act,⁶⁰ which has placed the promotion and the protection of human rights at the centre of the Union's agenda.⁶¹

Thus, the preamble of the Act recalls the heroic struggles waged 'by our peoples and our countries for economic independence, human dignity and economic emancipation'. Human rights are specifically mentioned, with states being determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and ensure good governance and the rule of law.⁶²

While the AU's Constitutive Act restates many of the principles of the OAU, it fills some of the gaps within the OAU Charter with new principles and policies.⁶³ The

⁵⁹ N. Ewumetie and A. Alemayehu (2012), 'The Charter of OAU and Constitutive Act of African Union,' *African Human Rights Law*, 1, available at: <https://www.abysinnialaw.com/about-us/item/359-the-charter-of-oau-and-constitutive-act-of-african-union> (last accessed 23 April 2019).

⁶⁰ A Journal of International law of the African Union Commission on International Law, (2013) No.1, *AUCIL Journal of International Law*. Available at: https://au.int/sites/default/files/documents/32074-doc-aucil_journal_of_international_law_-_issue_1-2013.pdf (last accessed 23 April 2019).

⁶¹ See also J.M. Isanga (2013), 'The Constitutive Act of the African Union, African Courts and the protection of human rights: New Dispensation?' Vol 11(2) *Santa Clara Journal of International Law* available at: <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1140&context=scujil>

⁶² Ewumetie and Alemayehu (n 59 above) 1.

⁶³ See, also, The Constitutive Act of the African Union. Available at: https://au.int/sites/default/files/treaties/7758-treaty-0021_-_constitutive_act_of_the_african_union_e.pdf. (Last accessed 23 April 2019).

objectives of the AU can be found in Article 3 of the Act⁶⁴ and they include the promotion of peace, security, and stability on the continent.

Article 4 contains the principles that the AU is enjoined to function in conformity with, and they include the promotion of sovereign equality among states, peaceful resolution of conflicts among member states, and the prohibition of the threat or use of force.

3.3 The establishment of the Peace and Security Council of the African Union

On July 9, 2002, in Durban, South Africa, the 1st Ordinary Session of the Assembly of the African Union adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union for the purpose of ‘establishing an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction’.⁶⁵

The Peace and Security Council (PSC) represents a recognition by the African Union (AU) that ‘the prevalence of armed conflicts in Africa...has contributed more to socio-economic decline on the Continent and the suffering of the civilian

⁶⁴ Constitutive Act of the African Union, Article 3: ‘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 people’s rights in accordance with the African Charter on Human and People’s 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 co-operation in all fields of human activity to raise the living standards of African peoples; l) coordinate and harmonize the policies between the 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.

⁶⁵ African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002.

population' than any other single internal factor.⁶⁶ In the past fifty years, Africa has seen approximately thirty conflicts, accounting for nearly ten million deaths, and a financial cost of an estimated \$250 billion.⁶⁷

Recent failures by the international peacekeeping system, such as the Rwandan Genocide of 1994, illustrate the need for Africa to assume more responsibility for peace operations on the continent. Through its Peace and Security organ, the AU has taken steps towards international peacekeeping, for instance in Burundi in 2003 through the African Union Mission in Burundi (AMIB) which operated for 14 months before handing over responsibility to the UN.⁶⁸ The UN has worked closely with the OAU, and now the AU, through UN Development Programme (UNDP), support for the Conflict Management Centre, the development of an early-warning and response capacity, and support through the Peace Fund.⁶⁹

The UN is, however, currently not prepared to assist the AU with the deployment of regional peacekeeping forces on an ongoing basis, which raises questions regarding the future of collaborative AU-UN missions.⁷⁰

4. Tensions between the AU Intervention Architecture and the International Legal Order

International law has traditionally been based on a set of rules protecting the sovereignty of states and establishing their formal equality in law. The classical system of international law considered the sovereign state to be the only subject of international law, with an unlimited right to wage war to protect sovereign interests.

⁶⁶ As above. See, also, The 2008 National Model United Nations held between 18-22 March & 22-26 April 2008. Available at: https://www.nmun.org/assets/documents/conference-archives/new-york/2008/AU_08.pdf. (Last accessed 23 April 2019).

⁶⁷ The 2008 National Model United Nations (n 66 above).

⁶⁸ E. Svensson (2004), *The African Mission in Burundi, Lessons Learned from the first African Union Peacekeeping Operation* 10.

⁶⁹ United Nations, General Assembly, 5th Session, Report of the Open-ended Ad Hoc Working Group on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, (A/56/45) 2001 5.

⁷⁰ African Union (2008), Committee Background Guide 16.

The adoption of the UN Charter in 1945 presented a significant change in international law by banning the threat or use of force and setting out a number of fundamental principles by which all member states of the UN were to abide.⁷¹

Additionally, Article 2(1)⁷² of the UN Charter provides for the respect of the principle of state sovereignty. In 1974, the UN General Assembly's Friendly Relations Declaration, a non-strictly-binding resolution, extended the principle of sovereign equality to all states, including states not members of the UN.⁷³

As Cassese has noted, sovereign equality is the 'the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest'.⁷⁴ To describe the general rules of the concept, he divides it into two logically distinct notions—sovereignty and legal equality. Sovereignty includes the right to exercise authority over all individuals living in the territory and to freely use the territory under the state's jurisdiction and perform activities beneficial to the population living there. In addition, state representatives acting in their official capacity and acts performed by the state in its sovereign capacity enjoy immunity from foreign states' jurisdiction. On the other hand, legal equality means that states, irrespective of size or power, share the same juridical capacities and functions. In other words, that all members of the international community must be treated on the same footing.⁷⁵

Sovereignty has come to signify, in the Westphalian context, the legal identity of a state in international law. It is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth.⁷⁶ Internally, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not

⁷¹ B. Lansisyrja (2006), *Finding a Solution for the International Criminal Court- The Crime of Aggression in International Law* 69.

⁷² Article 2 of the UN Charter: 'The Organisation is based on the principle of the sovereign equality of all its Members'.

⁷³ General Assembly Resolution 2625 (XXV), 24 October 1970.

⁷⁴ C. Antonio, *International Law* 88.

⁷⁵ Lansisyrja (n 71 above) 72.

⁷⁶ The principle of sovereign equality of states is enshrined in Art 2(1) of the UN Charter.

regarded as absolute, but constrained and regulated internally by constitutional power-sharing agreements.⁷⁷

According to the 2004 Report by the Secretary General's High Level Panel,⁷⁸ there is a growing recognition that the real issue is not any state's 'right to intervene', but the responsibility of every state to protect people suffering from avoidable catastrophes including mass murder and rape, ethnic cleansing, forcible expulsion, terror, and deliberate starvation and exposure to disease. The position is that while sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community. However, force should only be used as a last resort.

Interestingly in 2002, the African Union initiated what amounted to a 'sea change' in the conceptualisation of state sovereignty in Africa by adding a 'responsibility dimension'. And so while retaining the concept of state sovereignty, the AU also added the dimension that sovereignty imposes responsibility on states as well, especially the requirement that they protect their citizens from heinous acts such as war crimes, crimes against humanity and genocide, under Article 4(h) of the Constitutive Act. Moreover, the AU asserted its legal right to circumscribe the sovereignty of a member state, if the latter failed to perform its 'responsibility to protect' function. Against this background, the violent conflict in Sudan's Darfur region, especially its attendant commission of genocide, war crimes and crimes against humanity, provided a 'litmus test' for the AU's responsibility to protect framework.⁷⁹

It is clear that while the main focus of the traditional Westphalian notion of sovereignty focuses on securing the independence and territorial sovereignty of member states, current concerns in Africa arise from the recognition that intra-state

⁷⁷ The R2P: Report of the International Commission on Intervention and State Responsibility, International Development Research Centre, Ottawa, 2001. The Report is also available at: <http://www.dfait.maeci.gc.ca/iciss-cise/pdf/commission-Report.pdf> (last accessed on 16th May, 2017).

⁷⁸ A More Secure World: Our Shared Responsibility, Report of the Secretary General's High Level on Threats, Challenges and Change (2004) 201.

⁷⁹ G.K. Kieh Jr. (2013), 'The African Union: The Responsibility to Protect and Conflict in Sudan's Darfur Region,' *Michigan State International Law Review* 45.

conflicts pose serious threats to peace and security on the continent and the need for the protection of people from human rights violations and have informed the growing shift from a state-centric perception of sovereignty to a conception of sovereignty that entails the responsibility to protect and assist citizens—especially the vulnerable populations. This shift can be gleaned from the combined provisions of the African Union’s Constitutive Act.⁸⁰

International law scholars such as Dixon,⁸¹ Kioko⁸² and Kuwali⁸³ have debated the legality of Art 4(h) of the Constitutive Act in contemporary international law, considering the fact that it flouts the *jus cogens* norm of prohibition of the use of force in the UN Charter. This is because under Art 4(h), the AU allows for intervention without the UN Security Council’s authorisation.⁸⁴ This subsequently raises the question of whether such enforcement action can be rendered lawful under the UN Charter.⁸⁵

Kuwali further argues that according to Article 53 of the Vienna Convention on the Law of Treaties,⁸⁶ a *jus cogens* rule cannot be set aside by a treaty or acquiescence by States but only by the formulation of a subsequent pre-emptory norm with a contrary effect. Therefore, intervention that takes the form of a threat or use of force presents a direct conflict with the *jus cogens* norm within Article 2(4) of the UN Charter.⁸⁷

For his part, Dixon argues that Article 53 of the UN Charter does not necessarily prevent measures of collective self-defence by regional organisations like the AU but it ensures that they cannot take punitive action against a state without the

⁸⁰ S. Ekpa and N.H. Dahlan, ‘Sovereignty, internal displacement and right of intervention: Perspectives from the African Union’s Constitutive Act and the Convention for the protection and assistance of Internally Displaced Persons,’ 29.

⁸¹ M. Dixon (2011), *Cases and material on international law* 315-317.

⁸² Kioko (n 12 above) 852.

⁸³ D. Kuwali (2011), *The Responsibility to Protect: Implementation of Article 4(h) Intervention* 15.

⁸⁴ Kuwali (n 83 above) 15.

⁸⁵ Kuwali (n 83 above) 15.

⁸⁶ Vienna Convention on the Law of Treaties 1969, Article 53: ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised 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’, available at:

http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁸⁷ Kuwali (n 83 above) 16.

authorisation of the UN Security Council. That if the regional action is with the consent of the state in whose territory it occurs, then there is no difficulty in those circumstances because the military action is on par with other consensual operations and involves no illegality because of the consent of the territorial sovereign; however, there should be evidence of such consent.⁸⁸

An interesting example in this regard is presented by the 1997 ECOWAS intervention in Sierra Leone. In that year, ECOWAS imposed a general and total embargo on Sierra Leone. It was subsequently requested that the Committee of Four 'solicit assistance from the United Nations Security Council to render these sanctions imposed universal and mandatory, in accordance with the United Nations Charter'. The Council was solicited, not to give authorisation, but to render universal the implementation of sanctions that had already been decided upon by a regional organisation. The Security Council responded to that request by adopting Resolution 1132 (1997) in which it extended the sanctions imposed by ECOWAS on Sierra Leone. The Security Council had already responded in the same way in 1992 with the same regional organisation. Then, ECOWAS had imposed a general and complete embargo on all deliveries of weapons and military equipment to Liberia and requested the Council to extend these measures in a letter dated 28th October 1992. By Resolution 788 (1992), the Security Council decided, according to chapter VII of the Charter, that all states should implement that embargo. This confirmed the assertion that authorisation by the Security Council is needed only for military measures.⁸⁹

However, Article 4(h) of the AU Charter corresponds to military action, and cannot therefore be covered by the system of Article 41⁹⁰ of the UN Charter. Nonetheless, some military actions are deployed with the consent of the host state, or with its call for such intervention. This is the case with peacekeeping operations.

⁸⁸ Dixon (n 81 above) 315-317.

⁸⁹ G. Amvane (2015), 'Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation,' *African Human Rights Law Journal*.

⁹⁰ Article 41 of the UN Charter: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

This also applies to the AU intervention pursuant to Article 4(j)⁹¹ of its Constitutive Act.

In the same vein, the Common African Position on the Proposed Reform of the United Nations regime, the 'Ezulwini Consensus',⁹² on the Responsibility to Protect states that authorisation for the use of force by the Security Council should be in line with the conditions and the criteria proposed by the Panel, but the conditions should not undermine the responsibility of the international community to protect.

Since the General Assembly and the Security Council are often far away from the scenes of conflicts and may not be in a position to properly appreciate the nature and development of conflict situations, it is imperative that Regional Organisations that are in close proximity to conflicts are empowered to take action. The African Union agreed with the Panel that the intervention of Regional Organisations should be done with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in matters requiring urgent action.

It is important to reiterate the obligation of states to protect their citizens, but this should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states.

With regard to the use of force, it is important to comply scrupulously with Article 51 UN Charter, which authorises the use of force only in cases of legitimate self-defence. In addition, Article 4(h) of the Constitutive Act of the African Union authorises intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of the UN Charter and Article 4(h) of the AU Constitutive Act should be prohibited. Furthermore, it is important to define the notion of "collective danger" that is meant to justify collective action.

As Amvane (2015)⁹³ points out, Article 4(h) is based on the notion of 'responsibility to protect'. He states that the UN General Assembly itself endorsed

⁹¹ Article 4 of the Constitutive Act: 'The Union shall function in accordance with the following principles: (j) the right of Member States to request intervention for the Union in order to restore peace and security.'

⁹² African Union (Executive Council) 7th Extraordinary Session (March 2005) Ext/EX.CL/2 (VII), 9-10.

⁹³ Amvane (n 89 above).

this notion at the World Summit. Indeed, the General Assembly recognises that should states fail to protect their population, the Security Council could apply Chapter VII to protect populations from genocide, war crimes ethnic cleansing and crimes against humanity. On a case-by-case basis, appropriate regional organisations could intervene.⁹⁴

In 1999, the Secretary General of the UN posed the following thought-provoking question:

To those for whom the greatest threat to the future of international order is the use of force in the absence of Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?⁹⁵

In truth, the correct answer is a 'no'. This shows that the AU is not the only organisation that desires a liberal reading of the Charter. Many others would agree that there could be an intervention pursuant to Article 4(h) without prior authorisation by the Security Council. The reading of the Charter evolves continuously to adapt to the problems of the international community; it was in the same spirit that Resolution 377(V) was adopted to allow the General Assembly to intervene in matters belonging to the competence of the Council when the latter is not able to react in a timely manner.

While discussing the legitimacy of soft law in international law, Kabumba (2018) states that it is important to remember that while the African Union is yet to invoke Article 4(h) as a basis for the use of force, the provision is also yet to be legally challenged. In his view, this suggests that the international community tacitly consents to the newly emerging regional norm, which might be with good reason.⁹⁶

⁹⁴ A/RES/60/1, 2005 World Summit Outcome – Resolution adopted by the General Assembly on 16 September 2005, para 139.

⁹⁵ A/54/PV.4, Statement of the Secretary General, presenting his annual report to the General Assembly, 20 September 1999.

⁹⁶ Kabumba (n 11 above).

4.1 The effect of Article 103 of the UN Charter on the African Union's right of intervention under Article 4(h) of its Constitutive Act

Art 103 of the UN Charter provides, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

In essence, this provision means that a regional organisation cannot, by its own treaty, authorise an otherwise unlawful use of force against a member of the organisation because the Charter and *jus cogens* take precedence over that regional treaty.

Therefore, the position is that regional organisations cannot employ armed force in or against a state without its consent, unless it falls within the ambit of lawful self-defence. Any other action is a violation of Article 2(4) of the UN Charter. This is intended to protect the norms of sovereign equality of states and non-intervention. As such, regional organisations cannot take armed action without the express authorisation of the Security Council, although peacekeeping operations with the consent of the territorial sovereign are lawful.

The position of the law therefore creates tension between Article 4(h) of the Constitutive Act of the AU and the UN Charter because it stipulates that the African Union has the right of intervention in cases of grave violations of human rights in a member state, without the authorisation of the Security Council. This poses a direct violation to the probation against threat or the use of force.

Dixon⁹⁷ relies on Art 103 of the UN Charter to argue that even if the constituent treaty of a regional organisation allows it to take action against a member, that action must still be in conformity with the fundamental obligations of the UN Charter and *jus cogens* norms. He therefore agrees with the outcome of the UN debates over the Dominican Republic and Grenada crises in which the purported right of organisations to take armed coercive action was generally rejected. He asserts firmly that regional organisations cannot employ armed force against a state without its consent, unless it amounts to lawful self-defence (or any other limited

⁹⁷ Dixon (n 81 above) 315-317.

right). Any other action is consequently a violation of Article 2(4) of the UN Charter and is contrary to all norms on non-intervention as well as the sovereign equality of states. He believes that the better view is that apart from self-defence, regional organisations can undertake armed action only with the express authorisation of the Security Council, although regional peacekeeping operations with the consent of territorial sovereignty would be lawful.

The African Union's Peace and Security Council (PSC) has responsibility over peace and security in Africa pursuant to the Protocol Relating to the Establishment of the Peace and Security Council, suggesting that its drafters did not intend to make the UN Security Council's authorisation a prerequisite to Article 4(h) military intervention. Indeed, the PSC is bound to cooperate and work closely with the UN Security Council, but it is not explicitly stated whether or not it requires Security Council approval for military intervention. One would be cautious with this argument, however, considering that Article 103 of the UN Charter provides for the supremacy of the Charter where there is a conflict between UN Charter obligations and obligations arising under other international agreements. The ability of Article 4(h) to be enforced without UN Security Council authorisation thus remains inconclusively settled.

Dixon also states that although certain conditions have been laid down by the International Court of Justice in the *Legality of the Use of Force* Cases (1999 ICJ Rep) for the lawful exercise of the right to humanitarian intervention,⁹⁸ neither the existence of the right itself, nor the conditions for its existence are supported by state practice. As such, in his view, the legitimacy of humanitarian intervention is debatable. According to this argument, humanitarian intervention runs directly counter to the entire purpose of Article 2(4) as well as many General Assembly resolutions adopted in the last 50 years.⁹⁹

⁹⁸ For instance the fact that the intervention must be authorised by a competent international organisation and that the use of armed force is legitimate only in cases of extreme deprivation of fundamental human rights such as genocide.

⁹⁹ Dixon (n 81 above) 315-317.

4.2 Article 24 of the UN Charter and the primary responsibility of the UN to maintain and promote international peace and security

According to Article 24¹⁰⁰ of the UN Charter, the UN Security Council (UNSC) has the ‘primary’ responsibility to maintain and promote international peace and security. Although Chapter VII of the UN Charter confers the responsibility for the maintenance of ‘international peace and security’ on the Security Council, it does not provide a definition of international peace and security. This leaves the authority to determine its significance and scope to the judgment of the Security Council itself.

In order to execute its mandate, the UNSC exercises a wide range of powers, including the power to authorise the use of force in the name of the international community.

According to the established doctrine of implied powers, the Security Council also possesses those powers that are essential for the performance of its duties and that are commensurate with its responsibility for the maintenance of international peace and security. Thus Security Council resolutions imposing obligations to the international community as a whole rather than being restricted to UN members are regarded as a direct emanation of the teleological reading of UN powers in general and Security Council powers in particular.¹⁰¹

Simma¹⁰² asserts that the assignment of a ‘responsibility’ means that the Council is not only entitled to take action in order to maintain peace and security, but that it should fulfil that task and discharge that function properly. Responsibility means that the Council is responsible to another actor—a principal. That predicate of ‘responsibility’ is congruent with accountability and responsiveness. So the term ‘responsibility’ highlights the position of trust which has been given to the Council.

¹⁰⁰ Article 24 of the UN Charter provides that: ‘1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. 3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.’

¹⁰¹ R. Deplano (2015), ‘The use of International Law by the United Nations Security Council: An empirical framework for analysis,’ 29 *Emory International Law Review* 2089.

¹⁰² B. Simma (2012), ‘Article 24 of the UN Charter,’ 766.

In his view, the Council's responsibility for the maintenance of international peace and security includes the 'responsibility to protect' (R2P).

The Heads of State and Government, relying on the novel concept of the R2P have, in the World Summit Outcome Document of 2005, further extended the UN's (and thereby also the Council's) responsibility in the direction of a 'responsibility...to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.¹⁰³

In this sense, the phrasing of Article 24 of the Charter does not concern the allocation of responsibilities between the Security Council and other actors outside the organisation, but only among different organs. In relation to the members, Article 51¹⁰⁴ of the UN Charter also implies a primary 'authority and responsibility' of the Security Council to take measures for the maintenance of international peace and security in the event of an armed attack against a member, which is not affected by the right of self-defence of that member. Because the primary responsibility implies a primary competence too, the phrase in Article 24 of the Charter contains a guideline for the resolution of conflicts of competences among the organs. Indeed, in *Legal Consequences of a Wall in the Occupied Territory* (Advisory Opinion of 9 July 2004),¹⁰⁵ the ICJ emphasized that Article 24 of the Charter refers to a primary but not necessarily exclusive competence. Because it is not exclusive, space for responsibilities of other organs remains and there can be an overlap.

Similarly, Wet¹⁰⁶ observes that the *Certain Expenses of the United Nations*¹⁰⁷ Advisory Opinion reviewed the scope of the powers of the General Assembly and the Security Council and also shed light on their relationship.

¹⁰³ Resolution adopted by the General Assembly, 'World Summit Outcome Document' UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1 para 139.

¹⁰⁴ Article 51, UN Charter: 'Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

¹⁰⁵ ICJ Rep (2004) 136, para 26.

¹⁰⁶ E. Wet (2004), *The Chapter VII Powers of the United Nations Security Council* 30.

¹⁰⁷ ICJ Rep 1962, 151.

The International Court of Justice limited the actions over which the UN Security Council has exclusive competence enforcement actions and allowed the General Assembly to initiate peacekeeping actions. It also gave legitimacy to the concept of peace-keeping which was not explicitly provided for within the Charter.¹⁰⁸ While the Court conceded that in accordance with Article 24 of the Charter, the UN Security Council has the primary responsibility for the maintenance of peace and security, it also found that this primary responsibility was not an exclusive one. The Charter made it clear that the General Assembly was to also be concerned with international peace and security.

4.3 The Responsibility to Protect Principle

Having shed light upon the legal context in which Article 4(h) of the Constitutive Act of the African Union exists and the rationale that led to its inclusion by the African Union, this article now proceeds to assess the extent to which the 'Responsibility to Protect' doctrine might settle the legal tensions that surround the legality and/or legitimacy of Article 4(h) intervention.

As a recent development in international law, the Responsibility to Protect doctrine could act as a justification for the right to intervene under Article 4(h) of the Constitutive Act of the African Union. Indeed, in the 2004 Report of the Secretary General's High Level Panel, it is stated that:

The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and Darfur, Sudan have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community...¹⁰⁹

Although the UN was established to prevent conflicts between states, the end of the Cold War and inter-state aggression largely gave way to war and violence within, rather than between states. When, during the 1990s, horrific violence broke out inside the borders of countries such as Somalia, Rwanda and the former Yugoslavia,

¹⁰⁸ Shaw (n 32 above) 250.

¹⁰⁹ A More Secure World: Our Shared Responsibility, Report of the Secretary General's High Level on Threats, Challenges and Change (2004) 201.

the world was ill-prepared to act and paralysed by disagreement over the limits of national sovereignty.

Throughout the 1990s, the UN was deeply divided between those who insisted on a right of humanitarian intervention and those who viewed such a doctrine as an indefensible infringement upon national sovereignty. At the time, Secretary-General Kofi Annan warned that the UN risked discrediting itself if it failed to respond to catastrophes such as Rwanda and he challenged member states to agree on a legal and political framework for collective international action.

In 1999, the failure of the UN Security Council to authorise action to halt ethnic cleansing in Kosovo provoked NATO to initiate an aerial bombardment on its own. This deeply divided the international community, pitting those who denounced the intervention as illegal against others who argued that legality mattered less than the moral imperative to save lives. This deadlock implied a pair of unpalatable choices; either states could passively stand by and let mass killings happen in order to strictly preserve the letter of international law, or they could circumvent the UN Charter and unilaterally carry out an act of war on humanitarian grounds.¹¹⁰

The 2001 Report by the International Commission on Intervention and State Sovereignty (ICISS)¹¹¹, titled 'Responsibility to Protect' introduced a shift from the traditional understanding of the sovereignty of states as a control to sovereignty as a responsibility. The right to sovereignty is thus predicated upon the state's ability to protect its population. The 2001 ICISS Report formulated the alternative principle of 'the responsibility to protect', focusing not on the legal or moral 'right' of outsiders to intervene but on the responsibility of all states to protect people at risk. The 'responsibility to protect' principle was inserted in General Assembly Resolution 61/1 (2005) at the World Summit Outcome in which states unanimously accepted their 'responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity...' through appropriate and necessary means.

¹¹⁰ Global Centre for Responsibility to Protect: A Background Briefing 2015 1.

¹¹¹ The R2P: Report of the International Commission on Intervention and State Responsibility, International Development Research Centre, Ottawa, 2001. The Report is also available at: <http://www.dfait.maeci.gc.ca/iciss-cise/pdf/commission-Report.pdf> (Last accessed on 16th May, 2017).

The Responsibility to Protect (R2P) concept sought to confront both the Rwanda tragedy and the Kosovo dilemma by stipulating that states have an obligation to protect their citizens from mass atrocities, that the international community will assist them in doing so, and that should the state manifestly fail in its obligations, then the international community would be obliged to act.¹¹²

The position in international law is that the R2P principle is not yet a rule of customary international law, but it builds upon existing legal foundations including Genocide Convention. It can thus be described as an international norm which has gained wide acceptance among states. There could be no better demonstration of that acceptance, in the case of the R2P, than the unanimously adopted language of the 2005 World Summit Outcome Document. Once a norm has gained not only formal acceptance but widespread usage, it can become part of customary international law.

R2P continues to evolve both politically and legally. It has been formally invoked by the UN Human Rights Council, UN General Assembly and the UN Security Council; including through more than 35 resolutions regarding situations such as Central African Republic, Cote d'Ivoire, Libya, Mali, South Sudan and Syria.

According to Kuwali, the R2P and Article 4(h) have the same origins and were both created out of the need to find a way forward from the impasse existing in international law in the 1990s. The rationale of the imperative is moralistic in nature—to protect populations from mass atrocities and move beyond the principle of non-intervention in the domestic affairs of the State.¹¹³

However, the responsibility to protect is not a binding legal principle capable of founding a case for military intervention by itself. This responsibility is fundamentally a political commitment carrying persuasive value. The lack of binding effect is caused mainly by the absence of consensus among states regarding the scope, manifestation and implementation of the responsibility to protect.¹¹⁴

¹¹² Global Centre for the Responsibility to Protect.

¹¹³ Kuwali and Viljoen (n 11 above) 231.

¹¹⁴ J.P. Perez-Leon-Acevedo, 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union,' *African Human Rights Law Journal* 478.

The responsibility to protect is based on three pillars; states' primary responsibility to protect their populations from mass atrocities, the international community's duty to assist states in meeting this responsibility, and the fact that if a state fails to protect its population, then the international community should be prepared to take collective action (in principle, through the UN Security Council) under the UN Charter. Article 4(h) corresponds to or is akin this third pillar and arguably codifies it to an important extent.

The intervention envisioned under Article 4(h) is primarily military in nature, involving the use of force. The responsibility to protect is used as a general framework for article 4(h) which binds state parties to the AU's Constitutive Act. Therefore, the responsibility to protect may be used as persuasive ground for arguing validity military intervention in situations that meet the Article 4(h) threshold.¹¹⁵

4.4 The Ezulwini Conference and proposed UN Reforms

The Common African Position on the Proposed Reform of the United Nations, the *Ezulwini Consensus*,¹¹⁶ is a position on international relations and reform of the United Nations agreed to by the African Union. It calls for a more representative and democratic Security Council in which Africa, like all other world regions, is represented.¹¹⁷ Paragraph (e) of the Document provides for the reforms to be undertaken by the Secretary Council and in particular, full representation of Africa in the Security Council. This 'full representation' is understood to mean 'not less than two permanent seats with all the prerogatives and privileges of permanent membership including the veto power, and five non-permanent seats.

¹¹⁵ Perez-Leon-Acevedo (n 114 above) 478.

¹¹⁶ African Union (Executive Council) 7th Extraordinary Session (March 2005) Ext/EX.CL/2 (VII), 9-10.

¹¹⁷ United Nations General Assembly, Seventieth Session, 43rd & 44th, African Representation, future of veto power, Intergovernmental Process Figure Prominently in General Assembly Annual Debate on Security Council Reform. Available at: <https://www.un.org/press/en/2015/ga11715.doc.htm> (Last accessed 23 April 2019).

The effect of the aforementioned UNSC indifference toward the AU has catalysed African efforts to ensure UN Security Council reform.¹¹⁸ The 7th Extraordinary Session of the AU's Executive Council culminated in the Ezulwini Consensus which specifically critiqued the archaic representation of states in the UNSC and its waning legitimacy in the face of a world order which differs vastly when juxtaposed with the situation in 1945.¹¹⁹ Moreover, the General Assembly released a draft resolution which acknowledged the 'need for the Security Council to reflect present realities and be more responsive to the aspirations of all State Members of the United Nations'.¹²⁰

The resolution also reiterated a prominent assertion reflected in the Ezulwini Consensus, which concerned the fact that upon the formation of the UN, the vast majority of African states were not represented and as a result, Africa remains the only continental region without permanent membership in the UN Security Council.¹²¹ Although Blum contests that the UN Charter was purposively fashioned in a conservative manner, Mahbubani states that the UN Security Council's inability to reflect the current global-power dispositions more thoroughly will 'create real problems for the Council in years to come and that is a problem it has to address in its structure'.¹²²

It can be argued that due to the UN Security Council's conservatism and reluctance to offer greater permanent representation, there is an increased effort¹²³

¹¹⁸ As above. See, also, Security Council: Security Council Commits to Effective Steps to Enhance Relationship with African Union in Conflict Prevention, Resolution, with Unanimous Adoption of 2033 (2012). Available at:

<https://www.un.org/press/en/2012/sc10519.doc.htm>. (Last accessed 23 April 2019).

¹¹⁹ K. Mahbubani (2003), 'Does the United Nations Security Council enhance or undermine international law?' 23 *Singapore Law Review* 39-40.

¹²⁰ UN General Assembly 'Reform of the Security Council' 16th Session Draft Res A/60/L41, 2 and UN General Assembly 'Report of the Secretary General's High Level Panel on Threats, Challenges and Change' (2 December 2004) 79-83.

¹²¹ See MMBLD Silva (2015), 'United Nations Security Council Reform: An African Perspective,' 3 African Centre for the Constructive Resolution of Disputes. Available at: <https://www.accord.org.za/conflict-trends/united-nations-security-council-reform/> (Last accessed 23 April 2019).

¹²² Y. Blum (2005), 'Proposals for UN Security Council reform,' 99 *American Journal of International Law* 647-648.

¹²³ D. Chandler (2004), 'The Responsibility to Protect? Imposing the 'Liberal Peace,' Vol.11, No.1 *Peace Operations and Global Order*, 59-81. Available at: <http://www.ijl.org/wp-content/uploads/2016/08/Chandler-The-Responsibility-to-Protect.-Imposing-a-%E2%80%99Liberal-Peace%E2%80%99-2004.pdf> (Last accessed 23 April 2019).

by the AU to ensure at least two permanent seats on the Council with all the prerogatives and privileges of permanent membership. Interestingly, the Ezulwini Consensus goes as far as requesting veto power for its proposed members, a principle which the AU has been fundamentally opposed to.¹²⁴

A culmination of the conservative (UNSC-dominated) legal framework of the UN Charter and the UNSC's politicization of the ICC through Articles 13 and 16 of the Rome Statute has led to tense, and at times stressed, relations between the AU and the UNSC.¹²⁵ However, the effects of the aforementioned 'tense' disposition on international law in general and international criminal law in particular may bear contrary results.¹²⁶

Therefore, in providing for the right of intervention, Africa has moved away from non-interference to 'non-indifference'. According to Kioko (2003),¹²⁷ this shift is in conformity with the idiom in most African countries that 'you do not fold your hands while your neighbour's house is on fire'. As Maluwa (2001) noted:

In an era in which (independent) Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes and crimes against humanity.¹²⁸

This is in keeping with the philosophy of Pan-Africanism and continental solidarity. The principles of non-indifference, continental solidarity, and collective security are

¹²⁴ Also see Report of the Chairperson of the Commission on the African Union-United Nations partnership: The need for greater coherence (2018). Available at: <http://www.peaceau.org/en/article/report-of-the-chairperson-of-the-commission-on-the-african-union-united-nations-partnership-the-need-for-greater-coherence>.

¹²⁵ ICC: Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005). Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=29-06-15-otp-report-unscc>. (Last accessed 23 April 2019).

¹²⁶ B. Aregawi (2017), 'The politicisation of the International Criminal Court by the United Nations Security Council Referrals,' *2 African Centre for the Constructive Resolution of Disputes*. Available at: <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>.

¹²⁷ Kioko (n 12 above) 813.

¹²⁸ T. Maluwa, (2001), 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union (2002),' *9 African Yearbook of International Law* 38.

now indispensable.¹²⁹ No single African country in isolation can address the issues of conflict, refugee flows, the conscription of child soldiers, bonded labour, forced prostitution, the massacre of civilian populations, drug trafficking, money laundering, the illicit small arms trade, and underdevelopment.¹³⁰

The Indicative Work Program of the Peace and Security Council states that the AU will endeavour to be present on the ground where there is need for a peace operation.¹³¹ Whether as a standalone AU operation or in partnership with the UN or Regional Economic Communities (RECs)¹³² such as ECOWAS, SADC, the East African Community (EAC), and the Intergovernmental Authority for Development (IGAD), the AU has indicated its commitment to being active in peace making and building.¹³³

4.5 The Pretoria Principles and Article 4(h) of the Constitutive Act of the African Union

On the 6th and 7th of December 2012 at a conference by the Centre for Human Rights in collaboration with the Department of Political Sciences, University of Pretoria, a group of interdisciplinary academics, policymakers and practitioners in the area of international peace and security with a special focus on Africa considered and affirmed the Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union.

These Principles are intended to provide greater clarity and inform action by the African Union, sub-regional actors, governments and practitioners on how to enhance their respective roles in ending mass atrocities in Africa pursuant to Article 4(h). The Article also mentions intervention in respect of grave circumstances also mentioned in Article 4(j) of the PSC Protocol.

¹²⁹ T. Murithi (2005), 'The African Union: Pan-Africanism, peace building and development,' 3, 9-11.

¹³⁰ Annan (n 54 above) 48.

¹³¹ African Union: The Peace & Security Council, available at: <https://au.int/en/psc> (Last accessed 23 April 2019).

¹³² Desmidt and Hauck (n 38 above) 3-8.

¹³³ See, also, Secretary-General's Initiative on Action for Peacekeeping available at: <https://www.un.org/en/A4P/>

The Pretoria Principles recognise that Article 4(h) is triggered by 'grave circumstances', which involve the serious violation of human rights and International Humanitarian Law through the perpetration of genocide, war crimes and crimes against humanity (Principles 8 and 9).

Principle 11¹³⁴ deals with the contentious issue of UN Security Council authorisation and provides for a situation where the AU can intervene without such authorisation—in cases where the UN Security Council is unwilling to act. As Perez-Acevedo (2016)¹³⁵ has noted, although neither Article 4(h) of the Constitutive Act nor Article 4(j) of the PSC Protocol explicitly require that the target state must be unwilling or unable to stop mass atrocities as a condition for the AU to authorise military intervention, the Pretoria Principles and international law scholars have referred to such a requirement (Principles 4 and 9). The target state is primarily responsible for protecting its population. Its unwillingness or inability to fulfil this responsibility is a condition for Article 4(h) intervention, 'in which case such responsibility shifts to the AU'.¹³⁶ Accordingly, when an AU member state is unable or unwilling to protect its population within its borders from mass atrocities, the AU should assume this responsibility.¹³⁷

Additionally, the Pretoria Principles require the AU to 'exert pressure on AU member states to end violations where systematic patterns of human rights and humanitarian law violations are revealed' and to 'encourage member states to enact laws to prevent mass atrocity crimes and punish the perpetrators of these crimes in the domestic group' (Principle 15).

Generally, when a state is unable or unwilling to protect its nationals, the international community is expected to take charge under a residual responsibility

¹³⁴ Principle 11, Pretoria Principles provides that: 'As a matter of legal requirement, the AU requires the authorisation of the UN Security Council for Article 4(h) intervention. The UN Security Council has the responsibility to authorise the use of force in the implementation of Article 4(h) intervention. Where the UN Security Council is unwilling or indecisive in authorising intervention, the conferment of the right to intervene on the AU by Member States of the AU provides greater space for the AU to act in the face of war crimes, genocide and crimes against humanity'.

¹³⁵ Perez-Leon-Acevedo (n 114 above) 478.

¹³⁶ C.B. Murungu, 'International crimes that trigger article 4(h) intervention,' in D. Kuwali and F. Viljoen (n 11). Also see Perez-Leon-Acevedo (n 114 above) 71.

¹³⁷ D. Kuwali (2015), 'From stopping to preventing mass atrocities: Actualisation of article 4(h),' 24 *African Security Review* 243-249.

to protect. The responsibility to protect populations from mass atrocities is primarily placed on the territorial state, but permits collective external intervention as a last resort in case that territorial state fails in its duty. Sovereignty entails responsibility and thus, non-intervention is subject to the target state's non-fulfilment of its duty to protect its own population.¹³⁸

The Pretoria Principles clarify the fact that there should be authorisation by the United Nations Security Council unless the Council is unwilling or indecisive. The Principles also suggest that 'should peaceful means be inadequate and should national authorities manifestly fail to protect their populations from mass atrocities, the international community should help the African Union to intervene [and stop them]'.¹³⁹ The legal foundation of this principle is found in Article 53 of the UN Charter. Although it may be argued that Article 4(h) requires no Security Council authorisation, Art 53 seems to subject AU military intervention to it. Additionally, Article 103 of the UN Charter provides that in case of a conflict between states' obligations under the UN Charter and their obligations under any other treaty (in this case the AU Constitutive Act), the UN Charter shall prevail.

Article 4(h) recognises that there are limitations to non-violent means of stopping mass atrocities, and that in some instances the only realistic means are military intervention. Thus according to the Principles, the military intervention under Article 4(h) should be used as the last available measure, in circumstances 'where diplomacy and other peaceful means have failed' (Principles 4, 5 and 7).

Regarding the nature of the Pretoria Principles, they neither constitute formal sources of international law nor generate international obligations. The Principles have no legal effect. However, they do have persuasive value in the invocation of Article 4(h). Whether the Pretoria Principles could be considered as part of the 'teachings of the most highly-qualified publicists of the various nations, as

¹³⁸ Perez-Leon-Acevedo (n 114 above) at 478.

¹³⁹ Principle 30.

subsidiary means for the determination of rules of law' under Article 38(1) (d)¹⁴⁰ of the Statute of the International Court of Justice is debatable.

It may be argued that the Pretoria Principles represent the opinions of only a handful of scholars.¹⁴¹ Nevertheless, the Principles indeed resulted from a conference that brought together a significant number of scholars and experts on Article 4(h), including several prominent legal scholars.¹⁴² It may be also argued that the Pretoria Principles constitute soft law. Although they are not hard law, the Principles are legally relevant because they seek to provide greater clarity and to inform action by a variety of regional, sub-regional, state and non-state actors on how to enhance their roles concerning Article 4(h).

It is also important to consider the legitimacy of the Pretoria Principles on the international law scene in order to determine whether African states and the wider international law community will be guided by them. Kabumba (2018) discusses the elements of legitimacy of soft law in international law, particularly the Pretoria Principles and in his view, the Pretoria Principles:

...demonstrate the potential role as well as pitfalls of soft law, particularly non-state and quasi state generated soft law. On the one hand, soft law instruments can be powerful tools for advancing normative claims and building systemic consent in the direction of important positions. At the same time, they can serve to diminish and undermine nascent forms of resistance and bold action attempted by weaker actors in the international community. There is real and 'hard' power—economic, ideational, reputational, institutional and otherwise—often at play in the formulation of 'soft' law; and, like all power, this power should be wielded with great introspection'.¹⁴³

5. Conclusion

Article 4(h) of the Constitutive Act of the African Union does have a place in the contemporary international law legal system. In the first place, as a regional body,

¹⁴⁰ Article 38(1) (d) of the International Court of Justice provides: 'The Court, whose function is to decide in accordance international law such disputes as are submitted to it, shall apply, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various, as subsidiary means for the determination of rules of law'.

¹⁴¹ Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Centre for Human Rights, Pretoria, 2012.

¹⁴² Perez-Leon-Acevedo (n 114 above) 478.

¹⁴³ B. Kabumba (n 11 above).

the AU's enforcement action is envisioned under Article 53 of the UN Charter—although as noted in Principle 11 of the Pretoria Principles, this requires UN Security Council authorization. Nonetheless, as Principle 11 recognizes, the African Union may act without the authorization of the Security Council where the Council is unwilling to act or is indecisive in this respect.

Secondly, and more affirmatively, Article 4(h)'s place in the international legal system is buttressed by the Responsibility to Protect principle, which was endorsed by the United Nations at the World Summit. It will be recalled that Article 4(h) was premised on the foundation of the responsibility of a state to protect its nationals. As shown above, the intention of the African Union was to protect human rights over rigid adherence to the concept of sovereignty—a departure from the OAU where the prerogatives of member states prevailed over the rights of their peoples. The fact that the R2P principle has formally been invoked by the organs of the United Nations as a persuasive ground for military intervention is a clear indication that Article 4(h) of the Constitutive Act occupies a critical position in the contemporary international legal system.

Bibliography

A Journal of International law of the African Union Commission on International Law, (2013) No.1, AUCIL Journal of International Law. Available at:

https://au.int/sites/default/files/documents/32074-doc-aucil_journal_of_international_law_-_issue_1-2013.pdf (Last accessed 23 April 2019).

A More Secure World: Our Shared Responsibility, Report of the Secretary General's High Level on Threats, Challenges and Change (2004).

A. Bujra (2002), 'Africa: Transformation from the OAU to the AU.'

A. Sesay, 'The African Union: Forward march of about face-turn?' (2008) *Claude Ake Memorial Papers* No.3. Available at: <http://nai.diva-portal.org/smash/get/diva2:278874/FULLTEXT01.pdf> (Last accessed 23 April 2019).

A/54/PV.4, Statement of the Secretary General, presenting his annual report to the General Assembly, 20 September 1999.

A/RES/60/1, 2005 World Summit Outcome – Resolution adopted by the General Assembly on 16 September 2005.

African Unification Front (2002), 'Brief overview of the history of the African Union, towards national sovereignty.'

African Union (2008) Committee Background Guide.

African Union, (1999) Sirte Declaration on the AU.

African Union, (2000) Constitutive Act of the African Union.

African Union, (2007) African Union in a nutshell.

African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002.

African Union: The Peace & Security Council. Available at <https://au.int/en/psc> (Last accessed 23 April 2019).

B. Aregawi (2017), 'The politicisation of the International Criminal Court by the United Nations Security Council Referrals,' 2 African Centre for the Constructive Resolution of

Disputes. Available at: <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>

B. Kabumba (2018), 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act,' in O. Shyllon, (ed.) (2018), 'Model law on access to information for Africa and other regional instruments: Soft law and human rights in Africa,' Pretoria University Law Press. Available at:

http://www.pulp.up.ac.za/images/pulp/books/edited_collections/access_to_information/Chapter%209%20Kabumba%20Access.pdf (Last accessed 29 March 2019).

B. Kioko (2003), 'The right to intervention under the AU's Constitutive Act: From non-interference to non-intervention,' 85 *International Review of the Red Cross*. Available at: http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union_8217s_Constitutive_Act_From_non-interference_to_non-intervention.pdf (Last accessed 23 April 2019).

B. Lansisyrja (2006), 'Finding a Solution for the International Criminal Court- The Crime of Aggression in International Law.'

B. Møller (2009), 'The African Union as security actor: African solutions to African problems?' No. 57 *Danish Institute for International Studies*. Available at <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp57.2-african-union-as-security-actor.pdf>

B. Simma (2012), 'Article 24 of the UN Charter.'

Boddy-Evans, (2006) *Biography: Idi Amin Dada*.

C. Antonio *International Law* 88.

C.H. Knutsen (2011), 'I'll mind my own business if you mind yours: The OAU and the African peace,' *Department of Political Science, University of Oslo Centre for the Study of Civil War, PRIO*. Available at <http://folk.uio.no/carlhk/publications/OAUnamed.pdf> (last accessed 23 April 2019).

Charter of the United Nations Available at:

<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

Constitutive Act of the African Union. Available at:

http://www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf (Last accessed 29 April 2019).

D. Birmingham (1998), 'Kwame Nkrumah: Father of African nationalism.'

D. Chandler (2004), 'The Responsibility to Protect? Imposing the 'Liberal Peace'', Vol.11, No.1 Peace Operations and Global Order, 59-81. Available at: <http://www.iilj.org/wp-content/uploads/2016/08/Chandler-The-Responsibility-to-Protect.-Imposing-a-%E2%80%98Liberal-Peace%E2%80%99-2004.pdf> (Last accessed 23 April 2019).

D. Kuwali (2011), *The Responsibility to Protect: Implementation of Article 4(h) Intervention*.

D. Kuwali and F. Viljoen (2014), *Africa and the Responsibility to Protect*.

D.L. Browne (2005), *Pan-Africanism and the African Union*.

E. Svensson (2004), 'The African Mission in Burundi, Lessons Learned from the first African Union Peacekeeping Operation.'

E. Wet (2004), 'The Chapter VII Powers of the United Nations Security Council.'

Exploring Africa: The birth of the African Union. Available at:

<http://exploringafrica.matrix.msu.edu/the-birth-of-the-african-union/> (Last accessed 23 April 2019).

F. Achankeng (2013), 'Conflict and conflict resolution: Engaging the colonial factor,' 2 African Centre for the Constructive Resolution of Disputes. Available at:

<https://www.accord.org.za/ajcr-issues/%EF%BF%BCconflict-and-conflict-resolution-in-africa/> (Last accessed 23 April 2019).

G. Amvane (2015), 'Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation,' *African Human rights Law Journal*.

G. Laporte and J. Mackie (eds.) (2010), 'An assessment of past progress and future prospects for the African Union's institutional architecture'. (ECDPM Policy and Management Report 18). Available at: <https://ecdpm.org/wp-content/uploads/2013/10/PMR-18-African-Union-Past-Progress-Future-Prospect.pdf> (Last accessed 23 April 2019).

G.K. Kieh Jr. (2013), 'The African Union: The Responsibility to Protect and Conflict in Sudan's Darfur Region,' *Michigan State International Law Review* 45.

Global Centre for Responsibility to Protect: A Background Briefing (2015).

H.A. Gebeyehu, 'Sovereignty and Intervention under the Constitutive Act of the African Union,' Central European University, 7. Available at:

https://www.academia.edu/23242852/Sovereignty_and_Intervention_under_the_Constitutive_Act_of_the_African_Union

I.O. Albert (2007), 'The African Union and Conflict Management,' Vol. XXXII, No. 1 *Africa Development*, 41-68.

International Coalition for the Responsibility to Protect. Available at:

<http://www.responsibilitytoprotect.org/index.php/africa> (Last accessed 23 April 2019).

J.A.A. Ayode, 'African peer review: Towards casa-rovia doctrine,' *African Studies Center-University of Pennsylvania*. Available at:

https://www.africa.upenn.edu/Articles_Gen/ayode-casa.html

J.M. Isanga (2013), 'The Constitutive Act of the African Union, African Courts and the protection of human rights: New Dispensation?' Vol 11(2) *Santa Clara Journal of International Law*. Available at:

<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1140&context=scujil>

J.O. Iguë (2010), 'A new generation of leaders in Africa: What issues do they face?' 1 *International Development Policy*. Available at:

<https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>

(Last accessed 23 April 2019).

J.P. Perez-Leon-Acevedo, 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union,' *African Human Rights Law Journal*, 478.

K. Annan (2000), 'We the peoples: The role of the UN in the twenty-first century', Report of the Secretary General (New York: United Nations, 2000), 48. Full report at:

www.unmilleniumproject.org/documents/wethepeople.pdf Last accessed 21 March 2017).

K. Mahbubani (2003), 'Does the United Nations Security Council enhance or undermine international law?' 23 *Singapore Law Review* 39-40.

K. Powell (2005), 'The African Union's emerging peace and security regime: Opportunities and challenges for delivering on The Responsibility to Protect,' *The North-South Institute*. Available at:

<http://responsibilitytoprotect.org/The%20African%20Union's%20Emerging%20Peace%20and%20Security%20Regime.pdf>

M. Dixon (2011), *Cases and material on international law*.

M. Sharpe (2017), 'From non-interference to non-indifference: The African Union and the Responsibility to Protect,' *International Refugee Rights Initiative*. Available at:

<https://reliefweb.int/sites/reliefweb.int/files/resources/AU%20R2P%20-%20final.pdf>

(Last accessed 23 April 2019).

M.G. Ramuhala (2011), 'Post-cold war military intervention in Africa,' Vol. 39(1), *South African Journal of Military Studies*, 33-55. Available at:

<https://www.ajol.info/index.php/smsajms/article/viewFile/70513/59117> (Last accessed 23 April 2019).

M.N. Shaw (2008), *International law*.

MMBLD Silva (2015), 'United Nations Security Council Reform: An African Perspective,' 3 *African Centre for the Constructive Resolution of Disputes*. Available at:

<https://www.accord.org.za/conflict-trends/united-nations-security-council-reform/> (Last accessed 23 April 2019).

N. Ewumetie and A. Alemayehu (2012), 'The Charter of OAU and Constitutive Act of African Union,' *African Human Rights Law*. Available at:

<https://www.abysinnialaw.com/about-us/item/359-the-charter-of-oau-and-constitutive-act-of-african-union> (Last accessed 23 April 2019).

O. Babarinde (2007), 'The EU as a model for the African Union: The limits of limitation.'

OAU Charter. Available at: https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf (Last accessed 23 April 2019).

OAU Population Newsletter, issued by the economic research, planning and cooperation department OAU (1994) Vol 1 No. 2. Available at:

<https://www.un.org/popin/oau/popnews/popnvw12.htm> (Last accessed 23 April 2019).

Organisation of African Unity (1996), *Purposes and Principles*.

Organisation of African Unity (2003), 'The Organisation of African Unity (OAU) Charter.'

Organisation of African Unity Department of Foreign Affairs Profile: The Organisation of African Unity 2000.

Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union. Available at https://www.up.ac.za/faculty-of-law/news/post_1640894-pretoria-principles-on-ending-mass-atrocities-pursuant-to-article-4h-of-the-constitutive-act-of-the-african-union

R. Deplano (2015), 'The use of International Law by the United Nations Security Council: An empirical framework for analysis,' 29 *Emory International Law Review*.

Report of the Chairperson of the Commission on the African Union-United Nations partnership: The need for greater coherence (2018). Available at: <http://www.peaceau.org/en/article/report-of-the-chairperson-of-the-commission-on-the-african-union-united-nations-partnership-the-need-for-greater-coherence>

Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (1999) Report for the United Nations. Available at <https://reliefweb.int/report/rwanda/report-independent-inquiry-actions-united-nations-during-1994-genocide-rwanda> (Last accessed 23 April 2019).

Resolution adopted by the General Assembly, 'World Summit Outcome Document' UNGA Res 60/1 (16 September 2005) UN Do A/RES/60/1 para 139.

Rome Statute of the International Criminal Court.

Rwanda: The preventable genocide, International Panel of eminent personalities. Available at <https://www.refworld.org/pdfile/4d1da8752.pdf> (Last accessed 23 April 2019).

S. Desmidt and V. Hauck (2017), 'Conflict management under the African Peace and Security Architecture (APSA): Analysis of conflict prevention and conflict resolution interventions by the African Union and Regional Economic Communities in violent conflicts in Africa for the years 2013-2015,' No. 211 European Centre for Development Policy Management.

S. Ekpa and N.H. Md Dahlan, 'Sovereignty, internal displacement and right of intervention: Perspectives from the African Union's Constitutive Act and the Convention for the protection and assistance of Internally Displaced Persons.'

S.M. Rugumamu (2002), 'Conflict management in Africa: Diagnosis of current practices and future prospects,' Available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.472.5007&rep=rep1&type=pdf>

(Last accessed 23 April 2019).

Secretary-General's Initiative on Action for Peacekeeping. Available at

<https://www.un.org/en/A4P/>

Security Council: Security Council Commits to Effective Steps to Enhance Relationship with African Union in Conflict Prevention, Resolution, with Unanimous Adoption of 2033 (2012). Available at <https://www.un.org/press/en/2012/sc10519.doc.htm>. (Last accessed 23 April 2019).

Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (2018). Available at <https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat>

T. Maluwa, (2001) 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union (2002)', 9 *African Yearbook of International Law* 38.

T. Murithi (2005), 'The African Union: Pan-Africanism, peace building and development.'

The 2008 National Model United Nations held between 18-22 March & 22-26 April 2008. Available at: https://www.nmun.org/assets/documents/conference-archives/new-york/2008/AU_08.pdf (Last accessed 23 April 2019).

The Durban Summit (2002).

The Lomé Declaration (1999).

The Lomé Summit (2000).

The Protocol on Amendments to the Constitutive Act. Available at

[https://au.int/sites/default/files/treaties/35423-treaty-0025 -](https://au.int/sites/default/files/treaties/35423-treaty-0025_-_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_f.pdf)

[_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_f.pdf](https://au.int/sites/default/files/treaties/35423-treaty-0025_-_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_f.pdf) (Last accessed 29 March 2019).

The R2P: Report of the International Commission on Intervention and State

Responsibility, International Development Research Centre, Ottawa, 2001. The Report is

also available at <http://www.dfait.maeci.gc.ca/iciss-cise/pdf/commission-Report.pdf>

(Last accessed on 16th May, 2017).

The Revised Treaty of the Economic Community of Western African States (1993).

The State of the World's Refugees 2000: The Rwandan genocide and its aftermath. Available at <https://www.unhcr.org/3ebf9bb60.pdf> (Last accessed 23 April 2019).

Thompson (1969), 'Africa and Unity: The evolution of pan-Africanism.'

UN General Assembly 'Reform of the Security Council' 16th Session Draft Res A/60/L41, 2 and UN General Assembly 'Report of the Secretary General's High Level Panel on Threats, Challenges and Change' (2 December 2004).

United Nations General Assembly, Seventieth Session, 43rd & 44th, African Representation, future of veto power, Intergovernmental Process Figure Prominently in General Assembly Annual Debate on Security Council Reform. Available at <https://www.un.org/press/en/2015/ga11715.doc.htm> (Last accessed 23 April 2019).

United Nations, General Assembly, 5th Session, Report of the Open-ended Ad Hoc Working Group on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, (A/56/45) 2001 5.

United Nations: Uphold International Law. Available at: <https://www.un.org/en/sections/what-we-do/uphold-international-law/> (Last accessed 23 April 2019).

V.A.O. Adetula (2014), 'African conflicts, development and regional organisations in post-cold war international system,' 16 *Current African Issues*. Available at <http://nai.diva-portal.org/smash/get/diva2:799520/FULLTEXT04.pdf> (Last accessed 23 April 2019).

V.O. Edo and M.A. Olanrewaju (2012), 'An assessment of the transformation of the Organisation of African Union (O.A.U) to the African Union (A.U), 1963 -2007,' 21 *Journal of the Historical Society of Nigeria*, 41-69.

Vienna Convention on the Law of Treaties 1969, Available at http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Y. Blum (2005), 'Proposals for UN Security Council reform,' 99 *American Journal of International Law*.