



ART. 4(H) + R2P: TOWARDS A DOCTRINE OF PERSUASIVE PREVENTION TO END MASS ATROCITY CRIMES

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I. INTRODUCTION

The fundamental foundation for the African Union (AU) institutional structure is laid down in Article 4 of the Constitutive Act of the African Union (AU Act), which *inter alia* includes sovereign equality and interdependence among member states; prohibition of the use of force or threat to use force; non-interference by any state in the internal affairs of another; peaceful co-existence of states and their right to live in peace and security; respect for democratic principles, human rights, the rule of law, and good governance as well as respect for the sanctity of human life, and condemnation and rejection of impunity. A member state failing to observe those standards could be subject to political and economic sanctions under Article 23(2) of the AU Act. On the one hand, Article 3(b) of the Act pledges to defend the sovereignty, territorial integrity, and independence of its member states. On the other hand, however, Article 4(h) of the AU Act gives member states the prerogative to intervene in a member state on prescribed grounds. In this context, Articles 4(h) and 23(2) of the Act are the cornerstones for the vision of saving civilians from the scourges of armed conflicts in Africa. The pertinent part of Article 4 provides for:

(h) [T]he right of the [AU] to intervene in a Member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

The 2003 Protocol on Amendments to the AU Act amends and further extends the scope of Article 4(h) by adding at the end of the sub-paragraph the words “as well as a serious threat to legitimate order to restore peace and stability to the Member state of the [AU] upon the recommendation of the Peace and Security Council.” Meanwhile, Article 23(2) provides that “any Member state that fails to comply with the decisions and policies of the [AU] may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.” Thus, the scope of intervention under Article 4 of the AU Act is multi-tiered. The first tier concerns the intervention in the event of grave circumstances (intervention to protect population from serious international crimes). The second tier, albeit not as yet operative, relates to the amendment to Article 4(h) regarding inter-

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vention to restore peace and stability (intervention to restore order).¹ The third tier is intervention upon request by a member state (intervention upon invitation). For purposes of this inquiry, it is the first and second tiers that present formidable legal problems, as they do not require consent of the target state. Article 4 does not spell out the means of intervention, although Article 23(2) of the AU Act gives a possibility of political and economic sanctions and denial of transport and communication. The establishment of the African Standby Force (ASF) also suggests that military action should not be ruled out in such interventions. As a matter of logic, war crimes, genocide, and crimes against humanity can hardly be stopped without the use of military force.

Intervention under the AU is “essentially solidarist,” whereby sovereignty is qualified by obligations that should be respected by member states.² Mass atrocity crimes against citizens by a member state, as well as a lack of peace and stability in a member state, will make intervention by the AU justified. Intervention in such cases implies the option to use force by the AU if it is necessary to stop mass atrocity crimes and provide space for resolving the conflicts. Thus, apart from the obvious financial and institutional problems, there are legal challenges facing the right to intervene by the AU. The main problem concerns how to reconcile Article 4(h) of the AU Act with the provisions of the UN Charter, where the use of force is contemplated differently.

To be sure, Article 2(4) of the UN Charter prohibits the threat or use of force by any state “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes” of the UN. Similarly, Article 2(7) of the UN Charter stipulates the principle of “non-interference” in “matters essentially within the domestic jurisdiction of any state.” As a result, Article 53 proscribes “enforcement action” without authorization of the Security Council. Although it can be argued that Article 4(h) of the AU Act constitutes enforcement action by consent, such argument is weakened by Article 103 of the UN Charter, which provides juridical supremacy of obligations under the UN Charter over obligations under international treaties in case of conflict of obligations.

These concerns are borne from the fact that the prohibition of threat or use of force is a peremptory norm of international law (*jus cogens*). In addition, Article 53 of the Vienna Convention on the Law of Treaties (VCLT) stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.³ Thus, the right of interven-

¹ See Protocol on Amendments to the Constitutive Act of the African Union. Adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003. This protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by a two-thirds majority of the member states (i.e., 36 ratifications). There are 21 ratifications as of 17 December 2008. Thus, the Protocol on Amendment is not yet in force.

² See Girmachew Alemu, Untitled Article, available at: <http://www.ossrea.net/publications/newsletter/oct05/article8.htm>.

³ A peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of

tion under Article 4(h) of the AU Act raises concerns about infringing the prohibition of force under the UN Charter. Save in self-defense, any enforcement action requires the authorization of the Security Council under the UN Charter. Hence, there is need to explore whether there is a right to humanitarian intervention in international law, because if there is, then the AU is entitled to act without the Security Council's prior authorization.⁴

Since the controversial issue of humanitarian intervention is hotly contested in international legal debate, it must therefore be resolved within the primary norms of international law, whether treaty law (UN Charter) or general customary law.⁵ The central questions are whether the AU right to intervene is a codification of customary international law, and, if not, whether it evinces evidence of an emerging norm of the right of humanitarian intervention in international law. In this scenario, a preliminary question is whether under pre-UN Charter law humanitarian intervention was legal. The starting point is that until the adoption of the League of Nations Covenant in 1919, no general multilateral treaties regulated the lawfulness of resort to force by states. These are the issues that this paper seeks to address.

II. IS ARTICLE 4(H) OF THE A.U. ACT A CODIFICATION OF CUSTOMARY INTERNATIONAL LAW ON HUMANITARIAN INTERVENTION?

The UN Charter is the starting point for an evaluation of the legality of a particular use of force, yet, the Charter co-exists with elements of treaty and customary law that are independent of it, and some are even older than the Charter itself. For example, the Charter does not create but rather implicitly recognizes "the inherent right of individual or collective self-defense" in Article 51. In light of the lacuna in the Charter system concerning the use of force, we must rely upon other sources of the law to resolve this issue.⁶ Some commentators contend that the doctrine of humanitarian intervention was clearly established in state practice prior to 1945 and that it is its parameters, not its existence, that are open to debate.⁷ Those who reject this claim point at the inconsistency of state practice, particularly that in the first half of the 20th

Treaties 1969, Vienna, 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331 [hereinafter "VCLT"], Art. 53.

⁴ See Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 Oct. 1945 [hereinafter "UN Charter"], arts. 2(4), 51, 39 and 42; see also Martin Kunschak, *The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorization?* 31 S. AFR. YRBK. INT'L LAW 195, 202 (2006); see also UN General Assembly's Declaration 2625 on Principles of International Law Concerning Friendly Relations among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 Oct. 1970 [The Friendly Relations Declaration]; see also UN GA Declaration 2131, 21 Dec. 1965; see Article 1(3) of the Declaration on the Threat or Use of Force.

⁵ Jens E. Rytter, *Humanitarian Intervention without the Security Council: From San Francisco to Kosovo—and Beyond*, 70 NORDIC J. INT'L L. 121, 149 (2001).

⁶ See *The Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, ICJ REPORTS 92-97 (1986).

⁷ Terry D. Gill, *Humanitarian Intervention: Legality, Justice and Legitimacy*, 24(65) UTRECHT J. INT'L & EUR. L. 8, 15 (2007),

Century instances of states' purported humanitarian intervention diminished.⁸ Other lawyers go as far as to read a humanitarian exception to the ban on force into the text of the UN Charter, arguing that if the Security Council functioned as originally intended, it would have enforced a basic minimum of human rights and taken action against states that committed genocide, mass murder, or ethnic cleansing. Critics of the existence of any right to humanitarian intervention contend that if the drafters of the Charter had really intended to include humanitarian intervention as a legitimate exception to the main principle of non-use of force, they would have said so.⁹

The thrust of this contention is that any possibly extant customary right to humanitarian intervention was, without question, extinguished by the "unambiguous wording" of Article 2(4) of the Charter, which is clear in its *travaux préparatoires*.¹⁰ Considering that the Security Council failed to do this, it is therefore argued that part of the justification for the ban on force was eroded, creating a right for states to take unilateral humanitarian action when necessary. The argument goes that "humanitarian intervention" is not forbidden because it violates neither a state's "territorial integrity" nor its "political independence," the two conditions set out in Article 2(4) of the UN Charter.¹¹

In the absence of a credible self-defense argument, the UN Security Council is the only source of non-consensual military intervention. While the 1999 *Legality of Use of Force* case following the NATO bombings could have provided the ICJ with the opportunity to elucidate further the scope of Articles 2(4) and 53 of the Charter in relation to humanitarian intervention, the Court declined to indicate provisional measures in each of the ten cases on jurisdictional grounds.¹² The ICJ, in the words of Lepard, "whose opinions are at least entitled to persuasive weight in any evaluation of the evolution of the new shared understandings of parties to the Charter, has not squarely ruled on the scope of Article 2(4), but has at least implied that it precludes unauthor-

⁸ See Ian Brownlie, *Humanitarian Intervention*, in J.N. Moore (ed.), *LAW & CIVIL WAR IN THE MODERN WORLD* 338 (Johns Hopkins University Press, 1947); see Rytter, *supra* note 5, at 126–128.

⁹ For views among leading publicists see Frederik Harhoff, *Unauthorised Humanitarian Interventions: Armed Violence in the Name of Humanity?* 70 *NORDIC J. INT'L L.* 65, 100–101 (2001).

¹⁰ In a legalist view, the preparatory work of the Charter provides no justification for entertaining any other interpretation than the exact meaning of Art. 2(4); see the *Travaux Préparatoires* of the UN Treaty (UNCIO Doc. 382, 1/1/19 of 17 May 1945), at 2. It says that "force should not be used by any Member state except by direction of the World Organization." Further, "No State has a right to intervene, directly or indirectly, and whatever the reason, in the domestic or foreign affairs of another." According to UNCIO Doc. 2 G/7, 23 April 1945, 11–12: The rationale is to curtail the risk of abuse since the sure way of containing international conflicts is to stand firm on the prohibition against the use of armed force, save for the explicit exceptions outlined in the UN Charter.

¹¹ See Alex J. Bellamy & Paul D. Williams, *The UN Security Council and the Question of Humanitarian Intervention in Darfur*, 5(2) *J. MIL. ETHICS*, 144, 147 (2006).

¹² See generally *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures 8, Order of June 2, 1999, ICJ REPORTS 124 (1999).

ized humanitarian intervention.”¹³ There is no one-word answer to the seemingly clear question as to whether there is a right of intervention in customary international law.¹⁴ In the absence of black-letter law or a clear judicial pronouncement on the legality of humanitarian intervention, the focus shifts to two alternative locations: state practice and scholarly writings. Generally, the doctrine of customary international law is based on the premise that it is what states say they do that counts. To the extent that the internal motives of a state for its actions can be revealed, these are irrelevant when assessing whether a corresponding norm of customary law has emerged.¹⁵

The starting point is that humanitarian interventions by the European great powers in the era of colonialism and imperialism cannot be taken into account as relevant evidence, since they occurred prior to the entry into force of Article 2(4) of the UN Charter.¹⁶ Therefore, first we note the post-UN Charter interventions by which a right of humanitarian intervention was invoked and the response thereto by the international community (*usus*). Second, we note the general statements and declarations expressing the legal opinion of states regarding the use of force and humanitarian intervention (*opinion juris*). From examination of a multitude of cases of authorized humanitarian intervention, the general picture that is painted is that a humanitarian rationale is occasionally offered as a complementary justification for such action.

Despite the existence of widespread and well documented violations of human rights, neither the intervening states, such as India in Pakistan, Tanzania in Uganda, and Vietnam in Cambodia, nor the international community invoked a right to humanitarian intervention.¹⁷ If you ask Franck, for example, whether the NATO intervention in 1999 was unlawful, the answer is “yes and no” in the sense that it “violated Article 2(4) of the Charter; but the consequences were not bad since the action led to a result consistent with the intention of the law.”¹⁸ This is utilitarian argument that an end justifies the means. But then:

[A]ct-utilitarians argue that a humanitarian intervention is just if it saves more lives than it costs, and that Tanzania’s in-

¹³ Brian D. Lepard, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* 354 (Pennsylvania State University Press, 2002).

¹⁴ Adam Roberts, *The So-called “Right of Humanitarian Intervention,”* in H. Fischer & Avril McDonald (eds.), 3 *Y.B. INT’L HUM’N L.* 3, 51 (2000).

¹⁵ For an in-depth analysis see Lepard, *supra* note 13, at 342-343; Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in 4 *COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW* 153-216 (Academy of European Law, 1995).

¹⁶ Hanspeter Neuhold, *Human Rights and the Use of Force*, in Stephan Breitenmoser *et al.* (eds.), *LIBER AMICORUM LUZIUS WILDHABER* (St. Gallen/Baden-Baden, 2007) 479, 484 (2000).

¹⁷ Matthias Falk, *THE LEGALITY OF HUMANITARIAN INTERVENTION: A REVIEW IN LIGHT OF RECENT UN PRACTICE* 51 (Juristförlaget, 1996).

¹⁸ J.L. Holzgrefe, *Introduction*, in J.L. Holzgrefe & Robert O. Keohane, *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 1, 6 (Cambridge University Press, 2003).

tervention in Uganda was just because, by overthrowing the Amin dictatorship, it saved more lives than it cost. For the same reason, an act-utilitarian could argue that India's intervention in Bangladesh was unjust because more people died in Bangladesh during the two or three weeks when the Indian army was liberating the country than had been killed previously.¹⁹

The comprehensive ban on the use of force by Article 2(4) of the Charter, coupled with the ICJ's interpretation in the *Corfu Channel* case, made arguments in favor of humanitarian intervention much more difficult to sustain.²⁰ Given the clear wording of Article 2(4), those arguing that states, even under the Charter, could use force to protect human rights therefore deliberately relied on the *status quo ante* before the Charter. Following their main argument, a customary rule authorizing humanitarian intervention in the pre-Charter era continued to exist alongside Article 2(4) of the Charter. Of course, the subsequent jurisprudence, in the *Nicaragua* case, casts doubts on whether customary international law could have survived the adoption of Article 2(4).²¹

Although the UN Charter does not expressly proscribe humanitarian intervention, most jurists would agree that the general prohibition on the use of force under Article 2(4) of the UN Charter is incompatible with any notion of humanitarian intervention.²² This position was reaffirmed by the Friendly Relations Declaration, a consensual interpretation of the principles of the UN Charter, which asserts that "no State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State."²³ Thus, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.

However, international law is not confined to treaties, and some jurists maintain that the right of humanitarian intervention has a basis in customary law. Nonetheless, state practice demonstrated that there are very few cases since the adoption of the UN Charter in 1945 where states have invoked humanitarian justification for an intervention. Although the interventions of India in East Pakistan, Vietnam in Cambodia, and Tanzania in Uganda had the effect of putting an end to massive human rights violations in each case, the intervening states relied ultimately on arguments of self-defense to justify their actions, even if reference was also made to the humanitarian situation.

¹⁹ J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in Holzgrefe & Keohane, *id.* at 15, 21.

²⁰ ICJ REPORTS 35 (1949). Apart from dismissing the UK's more liberal interpretation of Art. 2(4), the Court implicitly rejected claims that humanitarian interventions could be compatible with Art. 2(4). See also Christian J. Tams, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 93 (Cambridge Studies in International & Comparative Law, 2005).

²¹ *Id.* at 93-94.

²² Richard Caplan, *Humanitarian Intervention: Which Way Forward?* 17 ETHICS & INT'L AFF. 23, 25-27 (2000).

²³ The Friendly Relations Declaration, United Nations, GA Resolution 262S (XXV), 24 October 1970.

These states were understandably reluctant to advance a doctrine of humanitarian intervention for which they knew there would be little international support.²⁴ Not even the more recent cases, such as the interventions in northern Iraq and Kosovo, reflect an acceptance of such a right by state practice. They rely not only on the objections to the legality of the actions by significant parts of the international community, but also on the justifications advanced by the acting states. These hardly included a right to unilateral humanitarian intervention at all; only the UK and to some extent the Netherlands came to argue in favor of such a right in some instances.²⁵

In 1984 the reasoning of some states was that humanitarian intervention “cannot be said to be unambiguously illegal.”²⁶ Even after the 1994 genocide, the question remained that if intervention is indeed an assault on sovereignty, how can the international community respond to situations such as Rwanda or Srebrenica?²⁷ Therefore, the logical conclusion is that “the normative scene for the right of humanitarian intervention is still cloudy.”²⁸ While in the earlier cases states referred primarily to self-defense in order to justify their use of force, in the 1990s the acting states emphasized a multitude of factors, prominent among them an “implied authorization” by the UN Security Council. However, for a right to unilateral humanitarian intervention to emerge, it requires its positive assertion by the actors as well as its acceptance by other states. The mere fact that states are hesitant to rely on a right to humanitarian intervention reflects the persisting weakness of the claim to it, or at least its extremely controversial status.²⁹ Although there are examples suggesting that there might be an emerging right of humanitarian intervention, it is baseless to argue that such a norm has been established. States may choose to support a practice for all manner of reasons, particularly political considerations. According to Caplan:

But unless that support is accompanied by an expression of belief on the part of states that the practice reflects a new rule of law—in this case a right of humanitarian intervention—it cannot be said that a customary legal basis for such a right exists. In any event, the objections of China, Russia, and India, among others, to NATO’s actions over Kosovo can hardly be said to offer evidence of the general recognition of such a norm.³⁰

²⁴ Caplan, *supra* note 22, at 23-36.

²⁵ Christine Gray, *The Use of Force and the International Legal Order*, in Malcom D. Evans, *INTERNATIONAL LAW* 589, 589-622 (Oxford University Press, 2003).

²⁶ See UK Foreign Policy Document No. 148, *supra* note 270; Roberts, *supra* note 14, at 14.

²⁷ Kofi Annan, *United Nations Millennium Declaration*, General Assembly Res. 55/2, 8 September 2000.

²⁸ Penelope C. Simons, *Humanitarian Intervention: A Review of Literature*, Ploughshares Working Paper 01-2 (2000), at 21.

²⁹ Nico Krisch, *Legality, Morality, and the Dilemma of Humanitarian Intervention after Kosovo*, 13(1) EUR. J. INT’L L. 323, 325-326 (2002).

³⁰ Caplan, *supra* note 13, at 28.

States have responded to the challenge in two related ways: the first has been to reinterpret existing law so as to demonstrate that the actions taken by them, as demonstrated by NATO members in support of the Kosovo campaign, were in fact consistent with international law governing the use of force. However, these same states have been divided as to whether the Kosovo campaign represents an exceptional case or a template for future interventions. The second response has been to seek to build political consensus in the international community in support of general principles of humanitarian intervention that can facilitate such interventions in the future.³¹

In this sense, the right of intervention under the AU Act is rooted in the same school of thought as R2P.³² On its part, the Independent International Commission on Kosovo concluded that under existing international law the NATO intervention was “illegal, yet legitimate.” It also noted that its conclusion was “related to the controversial idea that a ‘right’ of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may, depending on context, nevertheless, reflect the spirit of the Charter as it relates to the overall protection of people against gross abuse.”³³ It may be inaccurate to equate the AU right of intervention without Security Council authorization with the NATO intervention in Kosovo in 1999. The reason being that:

It is one thing to recognize the authority of States to limit their sovereignty through treaties in which each licenses all of the others to intervene in defined circumstances through prescribed procedures [where] diminution of sovereign rights is a prerogative immanent in sovereignty. It is another thing to provide a rationale for intervention by one group of states in another state that is not party to their reciprocal agreement and presumably to their common values, shared interests, and mutual respect.³⁴

Generally, the analysis of the literature on the doctrinal debate between state sovereignty and humanitarian intervention gives the impression that although there is no right of humanitarian intervention in international law, there is room for the emergence of such a right, more precisely, to stop or prevent mass atrocities in the form of war crimes, genocide, and crimes against humanity. This view is supported by the international community’s general acceptance of the twin norms of “sovereignty as a responsibility” and R2P, as well as the codification of the right of intervention by the AU. The decisive endorsement came at the World Summit itself, where 154 heads of state and government embraced the notion of R2P.³⁵ The concept of R2P has obviously

³¹ *Id.*, at 28.

³² Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101(1) *AJIL* 99, 114 (2007).

³³ See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) [hereinafter “The Kosovo Report”].

³⁴ Tom J. Farer, *Humanitarian Intervention before and After 9/11: Legality and Legitimacy*, in Holzgrefe & Keohane, *supra* note 18, at 53, 74.

³⁵ See also Maria Banda, *THE RESPONSIBILITY TO PROTECT: MOVING THE AGENDA FORWARD 11* (United Nations Association in Canada, 2007).

gained ground and has been endorsed at the highest international level. The UN General Assembly, as the world's most representative forum, is typically seen as the organization's norm-setting body.

The World Summit was a formative moment for R2P in that the text of the Outcome Document does not only represent the will of the peoples of the UN but also soft law on the law relating to international intervention to stop mass atrocities. The Outcome Document is nonbinding, but it has the potential to develop into a rule of customary international law, which may be binding on states, as several landmark General Assembly resolutions have in the past.³⁶ Although General Assembly resolutions are not legally binding, the World Summit Outcome Document is of special character in that it seems to affirm the prevailing paradigm of sovereignty as a responsibility and articulate the parameters of the emerging notion of responsibility to protect populations against mass atrocity crimes.

Certainly, when large numbers of heads of state and government, along with foreign ministers, congregate and solemnly declare their responsibility to protect populations at risk, as they did in the World Summit Outcome Document, "there would seem to be good reason to assume that they meant what they said and that they had thereby undertaken a form of obligation which should have some legal consequences."³⁷ Given the legal significance of the R2P, and due to the fact that the resolution was adopted by proclamation, it is often said that the declaration can be regarded as an authoritative document reflecting the understanding of the UN members of their obligations under the Charter.³⁸ However, Banda notes that:

[T]he political wrangling produced a weakened text that was open to *mis*interpretation. As the opposing states saw it, this was not the end, but the beginning of much more complicated discussions yet to come. The future debate will thus revolve around those issues which the Declaration failed to elucidate: When does a situation give rise to R2P? When does a state's responsibility pass on to the international community? When are coercive measures warranted? And, who inherits R2P when the state manifestly fails, or when the UNSC is deadlocked? These ambiguities in the Declaration underline a continued need to advocate, refine, and implement the version of R2P which will truly make a difference

³⁶ See, e.g., United Nations G.A. Resolution 2625 (Friendly Relations Declaration, 1970) is often quoted as a legal source of authority by countries defending the principle of sovereignty; *id.* at 24.

³⁷ The argument adopted from Philip Alston, *A Human Rights Perspective on the Millennium Development Goals*, paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, 2004, ¶35, cited in Andrew Clapham, *Rights and Responsibilities: A Legal Perspective*, in Oliver Jütersonke & Keith Krause (eds.), *FROM RIGHTS TO RESPONSIBILITIES: RETHINKING INTERVENTIONS FOR HUMANITARIAN PURPOSES* 61, 69 (PSIS, 2006).

³⁸ Falk, *supra* note 17.

in the lives of millions of people in need of international protection.³⁹

It is now generally accepted that the international intervention by external actors, preferably through the UN, is justifiable in a state that is unwilling or unable to stop genocide, massive killings, and other massive human rights violations. Along with globalization has come the pressure of states to protect the human rights of people in states other than their own. R2P informs that if a particular state is unwilling or unable to carry out its responsibility to prevent such abuses, that responsibility must be transferred to the international community, which will solve problems primarily via peaceful means such as diplomatic pressure, dialogue, even sanctions, or, as a last resort, through the use of military force. At the same time, an emerging trend from recent state practice is that of hybridization of intervention where there is task-sharing between the AU and UN, in which the AU will deploy a military mission to respond to immediate crises and to create conditions sufficiently stable for the Security Council to authorize deployment. This is confirmed by the Communiqué of the PSC of 19 January 2007 to the UN Security Council on the intention to deploy the AU Mission to Somalia (AMISOM), as well as Security Council Resolution 1769 (2007) regarding the AU/UN hybrid operation in Darfur (UNAMID).

The overlap between the thresholds for intervention under Article 4(h) and R2P are *delicta juris gentium*, which are subject to universal jurisdiction. It is thus reasonable to suggest that Article 4(h) of the AU Act can be interpreted as a general *a priori* invitation to intervene in the face of grave human rights violations. As a consequence, it follows that when a state cannot accept the help from competent external organs to protect its citizens, it will ultimately be held accountable without being able to invoke Article 2(7) of the Charter. The AU was created in accordance with the principles of the UN Charter and it recognizes the primary responsibility of the Security Council for maintaining peace and international security. Thus, the AU right of intervention is a useful mechanism to fill critical gaps in the UN's human security protection regime on the African continent. In fact, the AU right of intervention can be seen as an increase in the range of instruments available to African states for responding to mass atrocities in Africa.

Article 4(h) is, therefore, a complement and a valuable contribution to, not a substitute for, the existing structures and instruments obtaining under the Charter. The merit of this view is derived from the AU's PSC Protocol, which articulates that the UN has primary responsibility for maintaining international peace and security; but it also notes the AU has primary responsibility for peace, security, and stability in Africa, thereby subtly staking its claim to the continent. It follows that a functioning AU should not be viewed as a replacement for the UN fulfilling its responsibilities of protecting civilians in crisis situations.⁴⁰ As to the question whether a new rule that may gain universal acceptance is emerging in Africa, the answer is that this statutory right in Article 4(h) is bound to help catalyze the crystallization of the claim

³⁹ *Id.*, at 12 (original emphasis omitted).

⁴⁰ *Cf.* Thelma Ekiyor, *Implementing the Responsibility to Protect Doctrine in Africa*, FES BRIEFING PAPER 6 (Friedrich Ebert Stiftung, 2007).

for the right of intervention to stop mass atrocities in international law as heralded by the general normative commitment of R2P.

While a regional approach itself lacks universality, it could be one way of taking the issue forward in the hope of wider agreement in the international legal order.⁴¹ Depending on how one weighs and interprets the emerging practices of regional organizations and the Security Council's response to such practices, it may be argued that R2P "has already attained normative status."⁴² To support this claim, Levitt adduces the trend of intervention by African states, predominantly ECOWAS member states coupled with the right of intervention under the AU Act, as pointing to the existence of the doctrine of humanitarian intervention.⁴³ On this score, going by the *Asylum* case, a tribunal may duly recognize a local custom or regional customary law of intervention in Africa where the AU states invoking the right of intervention could prove it was binding on the target member state.⁴⁴

Even the ICJ in the *Nicaragua* case did not deny that, in principle, a rule of customary international law might develop, allowing a state to intervene by the use of armed force within the territory of another state. The ICJ noted, however, that for such a rule to develop, it would constitute a fundamental modification of the customary law principle of non-intervention.⁴⁵ Although the notion of R2P was endorsed in a General Assembly resolution, it has been asserted that resolutions are important instances of state practice that are potentially creative, or at least indicative, of rules of customary international law.⁴⁶ Even the ICJ reinforced this view in the *Nicaragua* case by accepting that a series of General Assembly resolutions played a role in the development of customary rules prohibiting international aggression.

According to Evans, "[i]n just five short years, a remarkably brief time in the history of ideas, the responsibility to protect concept evolved from a gleam in an international commission's eye, to what now has the pedigree to be described as a broadly accepted international norm, and one with the potential to evolve further into a rule of customary international law."⁴⁷ Now, the question is, how?⁴⁸ The next step is to find a place for the notion of R2P

⁴¹ Roberts, *supra* note 14, at 45-46.

⁴² Jellemy I. Levitt, *The Responsibility to Protect: A Beaver Without a Dam*, 25(1) MICH. J. INT'L & COMP. L. 153, 160 (2003).

⁴³ *Id.*, at 160.

⁴⁴ The *Asylum Case (Colombia v. Peru)*, ICJ REPORTS 266 (1950); see also Levitt, *supra* note 42, at 131.

⁴⁵ *Nicaragua* case, Merits, *supra* note 6, at 106-110.

⁴⁶ Rosalyn Higgins, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5-7 (Oxford University Press, 1963); Michael Byers & Simon Chesterman, *Changing the Rules about the Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in Holzgrefe & Keohane, *supra* note 18, at 177, 189.

⁴⁷ See Gareth Evans, speech in Sri Lanka, 2007, available at <http://www.crisisgroup.org/home/index.cfm?id=4967>.

⁴⁸ International Human Rights Law Clinic, Human Rights Center, *The Responsibility to Protect (R2P): Moving the Campaign Forward*, University of California, Berkeley, October 2007 [hereinafter "University of California on R2P"], at 3, available at <http://www.hrcberkeley.org/pdfs/R2P-Final-Report.pdf>.

in the international legal framework.⁴⁹ There are myriad recent developments that have ushered in a new wave of optimism regarding the potential for making R2P a new paradigm for stopping mass atrocities. For example, the UN has begun to incorporate R2P into its thinking and practice. In addition to prioritizing R2P, UN Secretary-General Ban Ki-Moon has already made two key appointments in relation to R2P, namely, a Special Advisor for the Prevention of Genocide, and a newly created Special Advisor for the Responsibility to Protect.⁵⁰ However, the UN has yet to adopt a more detailed official definition of R2P. As it stands, R2P “is a relatively oblique concept for which it is almost impossible to establish hard international law.”⁵¹ However, Luck has distinguished R2P from the related but distinct notions of humanitarian intervention and human security, thus:

In terms of tools, R2P is much broader than the former. In terms of scope, it is much narrower than the latter. As noted above, the concept of humanitarian intervention, which was widely discussed in the late 1980s and the 1990s, lacked the critical second pillar—international assistance in helping the state meet its core protection responsibilities—that is so essential to the principle of R2P. R2P envisions a much wider spectrum of tools or instruments, including for prevention, protection, capacity-building, and rebuilding, that do not entail coercive action.⁵²

AU member states “moved the furthest towards endorsing R2P,”⁵³ where sub-regional groups codified a legal right of humanitarian intervention and intervened in the region on this basis. In recognition that chronic human insecurity had been a leading cause of state and regional insecurity, ECOWAS and SADC have the authority to use force against a member state to stop a humanitarian emergency in their respective member states. In a progressive development of international law, the AU formally ratified the right to intervene in the internal affairs of a member state to protect civilians from grave human rights violations such as war crimes, genocide, and crimes against humanity. This is a “milestone” for this regional body, which had traditionally eschewed the notion of intervention.⁵⁴ The World Summit has strengthened R2P’s position by first, revealing the extent of the consensus on intervention, and second, embedding it in a soft-law document in the form of a UN General Assembly Declaration, which was then reaffirmed by the Security Council in its Resolution 1596 (2006).

⁴⁹ Banda, *supra* note 35, at 21.

⁵⁰ University of California on R2P, *supra* note 48, at 7-8.

⁵¹ *Id.*, at 47.

⁵² Edward C. Luck, Policy Analysis Brief, *The United Nations and the Responsibility to Protect* 5 (Stanley Foundation, August 2008).

⁵³ Victoria K. Holt & Moira K. Shanahan, *African Capacity-Building for Peace Operations—UN Collaboration with the African Union and ECOWAS*, STIMSON OCCASIONAL PAPERS AND REPORTS 8 (Stimson Center, 2005).

⁵⁴ Banda, *supra* note 35, at 11.

The conclusion that emerges from this analysis is that the AU right of intervention is an *a priori* invitation to enforce *erga omnes* obligations in the form of *jus cogens* crimes that are subject to universal jurisdiction. As such, Article 4(h) provides the most fertile terrain to date to promote the normative commitment of R2P to enforce *erga omnes* obligations, particularly to stop war crimes, genocide, and crimes against humanity. One point that seems clear is that, henceforth, any claim to “humanitarian intervention” may glow with the light set by the AU. Yet, the right to intervene in Article 4(h) gives the AU a strong legal basis, thereby removing the need to justify intervention on moral and ethical grounds.

It can be inferred that AU member states understood themselves to be granting a vast range of discretion to the AU to intervene where a member state is unable or unwilling to undertake its R2P. For AU states, intervention to prevent or halt mass atrocity crimes is not only a right but also a responsibility. This is the direct result of the incorporation of Article 4(h) of the AU Act as well as the endorsement of the notion of R2P in the World Summit Outcome Document. Still, enforcement action by the AU without Security Council authorization faces the barrier of Article 53 of the UN Charter that proscribes such action. This is the issue now that needs to be addressed.

III. ART. 4(H) + R2P—ENFORCEMENT OF *OBLIGATIO ERGA OMNES* BY CONSENT TO PREVENT MASS ATROCITY CRIMES

Article 4(h) constitutes a treaty basis for humanitarian intervention among AU member states. All 53 members of the AU have signed and, therefore, consented to the adoption of the AU Act that embodies the right of the AU to intervene in a member state under prescribed circumstances. The provision of the right to intervene under Article 4(h) of the AU Act was adopted within a legitimate and legal process by the AU member states; as such it is valid and *fait accompli* for AU member states. Flowing from the principle in the *Nationality Decrees* case, acceptance by a state of a treaty obligations relating to any subject has the effect of removing that subject from the purely domestic domain.⁵⁵ According to Wippman:

The issue comes to the head if the target state refuses consent at the moment of intervention. Ordinarily, states cannot unilaterally renounce agreements absent a provision in the agreement or special circumstances. But military interventions agreements differ from others; they go to the heart of the values associated with state sovereignty and implicate larger concerns about international order. Accordingly, such agreements are vulnerable to challenges that they violate *jus cogens* norms governing the use of force, as well as Article 103

⁵⁵ See generally Advisory Opinion concerning the *Tunis and Morocco Nationality Decrees*, 7 February 1923, PCIJ, Series B, No. 4 [hereinafter *Nationality Decrees* Advisory Opinion]; see also David Wippman, *Treaty Based Intervention: Who Can Say No?* 62(2) U. CHI. L. REV. 607 (1995).

of the UN Charter, which provides that obligations under the Charter prevail over any inconsistent treaty obligations.⁵⁶

Nonetheless, military intervention pursuant to treaty may be lawful in particular circumstances.⁵⁷ Article 20 of the Articles on State Responsibility provides that valid consent by a state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of the consent. But then, Article 26 of the Articles on State Responsibility does not give room to wrongfulness of an act that is not in conformity with a *jus cogens* norm. For instance, if two states enter into a treaty sanctioning the use of force by one of them against the other, in that case “use of force” becomes a misnomer and the treaty is not contrary to Article 2(4) of the Charter. This may be the case with Article 4(h) of the Act as a result of states consenting to adoption of the Act.

Yet, lack of consent is a condition for use of force in the first place and hence for wrongfulness.⁵⁸ But a consensual use of force cannot be viewed as a coercive use of force, which Article 2(4) of the UN Charter must be understood to prohibit. The reason being that Article 2(4) of the UN Charter does not take away the sovereign right of states to permit other states to use force on their territory. Thus, consensual intervention can preclude the operation of Article 26 of the Articles on State Responsibility.⁵⁹ This argument derives from the amorphous content of the prohibition of the use of force itself. Although Article 2(4) of the Charter contains peremptory obligations, not every obligation under Article 2(4) is peremptory under general international law. Abass explains his position thus:

[C]onsent lies at the very heart foundation of international law and as such, care must be taken when precluding its operation in respect of certain international obligations. Whereas such obligations as torture, slavery, and genocide cannot generally be precluded by consent [...] the prohibition of the use of force does not invariably fall into this category. A consensual intervention to commit aggression cannot be regarded as excused under Article 26 of the [Articles on State Responsibility]. However, the same cannot be said of consent given by States or other international organizations to help them defeat, for instance, insurrections by soldiers attempting to forcibly overthrow democratic governments on their territory. Such a use of force must be seen as an incident of State sovereignty such that it cannot be regarded as

⁵⁶ Wippman, *id.*, at 607.

⁵⁷ *Id.*, at 607.

⁵⁸ Cf. Ole Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 *NORDIC J. INT'L L* 523, 535 (2002).

⁵⁹ Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 *INT'L & COMP. L. Q.* 211, 224 (2004); see also Wippman, *supra* note 55, at 622.

having been surrendered under any provision of the Charter or general international law.⁶⁰

The point is that consent by one state to intervention by another suspends the normal operations of the legal rules that would otherwise govern their relationship.⁶¹ Going by this reasoning, considering that it is now unambiguously accepted that the international community has a collective responsibility to protect populations from mass atrocity crimes in the form of genocide, war crimes, and crimes against humanity, the AU right of intervention can be said to codify an emerging general principle of law. Part of the explanation is that the right of intervention under the AU Act is premised on mass atrocity crimes whose obligations are indisputably *erga omnes* and whose normative status is, no doubt, *jus cogens*. The question then arises as to what happens when there is a clash of *jus cogens*—a conflict of peremptory norms.

This begs the question as to whether this potential clash means that it is permissible to disregard the prohibitions in Article 2(4) and the requirement of authorization in Article 53 of the Charter. It is conceivable to argue that it does not, because the Charter, it would seem, does not permit and does not absolutely prohibit humanitarian intervention.⁶² The Charter simply requires that intervention be authorized by the Security Council. Such a requirement is likely to provide an incentive for the peaceful resolution of human rights problems, to minimize uses of force, and to ensure that such resolutions were the result of “collective and ideally consultative and impartial, decision making by the Council.”⁶³ Simply speaking, high protection standards apply as a consequence of the prohibition of the use of force in international law to avoid arbitrary recourse to force and enhance peaceful settlement of international disputes. By consenting to Article 4(h) of the AU Act, AU states have transferred a certain part of their sovereignty to the AU. While the prohibition of the use of force has the status of *jus cogens* and thus cannot be contracted out by states, it is reasonable to argue that AU states waived their right to be free from intervention by the AU.

In the face of mass atrocity crimes, where *erga omnes* human rights obligations are at risk, AU states empowered a multilateral organ, the AU, to intervene internally, which does not affect the rights of non-AU states. Article 4(h) can be interpreted as a general *a priori* invitation in the form of a statutory intervention to prevent or halt mass atrocity crimes.⁶⁴ Article 20 of the Articles on State Responsibility espouses that valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limit of that consent. Insofar as a consensual use of force is not procured by fraud, coercion, or error and to the extent that it is within the ambit of grave circumstances outlined in Article 4(h), the AU right of intervention may attenuate or

⁶⁰ Abass, *id.*, at 225.

⁶¹ International Law Commission, *Eighth Report on State Responsibility by Ago*, 2(1) Y.B. INT'L L. COMM'N. 31 (1979), UN. Doc. A/CN.4/318 & Add. 1-4 (1979).

⁶² Leopard, *supra* note 13, at 359-360.

⁶³ *Ibid.*

⁶⁴ Kunschak, *supra* note 4, at 207.

preclude state responsibility in terms of Article 20 of the Articles on State Responsibility.⁶⁵

The inexorable conclusion is that AU states agreed in advance that the AU is entitled to help them, should a situation of genocide, war crimes, or crimes against humanity arise. This implies a shift from sovereignty as a right to sovereignty as a responsibility. It follows that a government that seriously violates its duties towards its citizens loses its representative function and may not object to such intervention. The rationale is that it is not the abusing governments that are protected, but rather the citizens.

IV. 'SOVEREIGNTY AS A RESPONSIBILITY'—WHY THE AU RIGHT TO INTERVENE MAY GAIN WEIGHT IN INTERNATIONAL LAW

The thinking of “sovereignty as a responsibility” is evident in a number of seminal international reports, statements, and declarations and in state practice. The Vienna Declaration and Programme of Action is lucid that human rights are a concern of the international community and the *Barcelona Traction* case propounded the *jus cogens* nature of some human rights obligations, which are also notably covered in Article 4(h) of the AU Act.⁶⁶ The capstone of the notion of “sovereignty as a responsibility” is the institutionalization of the right of intervention in Article 4(h) of the AU Act and the normative commitment of R2P by the World Summit in 2005.

In the World Summit Outcome of the 60th Session of the General Assembly, UN member states, for the first time clearly and unambiguously, endorsed and accepted their collective responsibility to protect populations from genocide, war crimes, “ethnic cleansing,” and crimes against humanity where the government locally is perpetrating these abuses itself or is unable or unwilling to stop them. The World Summit Outcome, which is a reflection of the international community, espouses that this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. Member states agreed to take timely and decisive collective action through the Security Council when peaceful means prove inadequate and national authorities are manifestly failing to protect their own populations.⁶⁷ Today, sovereignty should be understood as an instrumental value because it derives from a state’s responsibility to protect the welfare of its citizens. When a state fails in this duty it loses its sovereign rights.⁶⁸

Evidently, this is a general acceptance of the notion of R2P that is also reflected in Article 4(h) of the AU Act. The concept of R2P buttresses the supposition that the right of intervention under the AU Act is multi-layered, and that evidently the first-tier involving the right to intervene in the face of mass

⁶⁵ See also Abass, *supra* note 59, at 212.

⁶⁶ *The Barcelona Traction, Light and Power Co. (Second Phase) (Belgium v. Spain)*, ICJ REPORTS (1970).

⁶⁷ See generally United Nations, 2005 World Summit Outcome, 60th sess., UN Doc. A/60/L.1/2005, 15 September 2005 [hereinafter “The World Summit Outcome Document”], ¶¶138, 139; *cf.* Former Secretary-General Kofi Annan, Address to the 2005 World Summit, New York, 14 September 2005.

⁶⁸ See, e.g., Fernando R. Tesón, *The liberal case for humanitarian intervention*, in Holzgrefe & Keohane (eds.), *supra* note 18, at 92; Bellamy & Williams, *supra* note 11, at 148.

atrocities is getting general acceptance. This conclusion is given legal leverage because the enforcement of individual criminal responsibility has become *erga omnes* in nature and Article 4(h) embraces, and is intended to prevent, mass atrocities, namely, war crimes, genocide, and crimes against humanity.⁶⁹ Not least, Article 4(h) of the AU Act coupled with the General Assembly endorsement of the notion of the R2P is bound to provide new fuel for the development of the right of humanitarian intervention to halt mass atrocities in international law.⁷⁰ This convergence could form an evolving customary right of humanitarian intervention depending on states' future willingness to act forcibly to prevent large-scale atrocities. Common usage would then overcome or modify the UN Charter. To this end, the AU's claim to a right of intervention would add to such usage.⁷¹ Below is a synopsis of some of the reasons why the AU right of intervention is bound to be widely accepted in international law.

4.1. The International Community's Acceptance of the 'Responsibility to Protect'

Since 1991 the view of the UN has been that "the defense of the oppressed in the name of morality should prevail over frontiers and legal documents" and that each government is "open to scrutiny" by the UN and "internationally accountable" for its efforts to uphold the Charter's human rights provisions.⁷² In 1993 the Vienna Declaration and Programme of Action declared that the promotion of human rights was a universal responsibility to be shared by the world community. Then the question was that if humanitarian intervention was an unacceptable assault on sovereignty, how could the international community respond to gross and systematic human rights violations?⁷³ The turning point of the debate when the principle of non-intervention yields to the international responsibility to protect was the 2000 ICISS Report, *The Responsibility to Protect*, which did not claim a right for states to intervene but rather a "responsibility to protect" if a population is suffering serious harm and the state concerned is unable or unwilling to halt or avert the suffering.⁷⁴

The UN Millennium Declaration tangentially reflected this position, stating that "in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level," and incorporated a commit-

⁶⁹ See Antonio Cassese, *International Criminal Law*, in Evans, *supra* note 25, at 720.

⁷⁰ Cf. Simons, *supra* note 28, at 13.

⁷¹ Cf. Kunschak, *supra* note 4, at 204.

⁷² Quoted in D. Geldenhuys, *Brothers as Keepers: Africa's New Sovereignty Regime*, in 2(28) STRATEGIC REVIEW FOR SOUTHERN AFRICA 5 (2006).

⁷³ Cf. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 14-25 June 1993, A/CONF.157/23, 12 July 1993; see also Annan, *supra* note 27.

⁷⁴ See generally International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre, Ottawa, 2001) [hereinafter the "ICISS Report"].

ment to respect for internationally recognized human rights.⁷⁵ Despite misgivings by some states in practice,⁷⁶ human security as justification for military intervention under certain circumstances has gained widespread acceptance. With the same velocity as the ICISS Report, the landmark 2004 report entitled “A More Secure World: Our Shared Responsibility,” the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change endorsed “the emerging norm that there is an international responsibility to protect [civilians] in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.” The report revealed sustained political interest in the idea that sovereignty “carries with it the obligations of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.”⁷⁷ The High-Level Panel Report confirmed the developing consensus that this norm was “exercisable by the Security Council.”⁷⁸

Owing to the oft inability and unwillingness to discharge these dual obligations, the High-Level Panel report posited that the principles of collective security mean that some portion of those responsibilities should be taken up by the international community to help build the necessary capacity or supply the necessary protection.⁷⁹ This endorsement was relayed by Annan through his call for collective security in his 2005 report to the UN General Assembly, *In Larger Freedom*.⁸⁰ The Secretary-General’s report paved the way for the 2005 World Summit, where the principle of R2P gained international legitimacy when the heads of state and government adopted the normative commitment of R2P at the UN General Assembly level.⁸¹ This extrapolates that it is now generally accepted that a state forfeits its right not to be invaded when it cannot or will not stop massive violations of its citizens’ basic human rights.

Since its conception in the ICISS Report, the concept of R2P has gone through tremendous transformation in the High-Level Panel Report, then in *In the Larger Freedom*, and in the World Summit Outcome Document, where it was subsequently adopted and reduced to two paragraphs. Still, two important issues are conspicuously missing: first, no guidelines are set out to govern the potential use of force in situations that meet the stated thresholds; and second, that there is no mention of what should be done if one of the perma-

⁷⁵ Annan, *supra* note 27, ¶¶2, 25.

⁷⁶ For more views see Taylor B. Seybolt, HUMANITARIAN MILITARY INTERVENTION—THE CONDITIONS FOR SUCCESS AND FAILURE 2 (Oxford University Press, 2007); see also Roberts, *supra* note 14, at 3-51.

⁷⁷ Cf. ICISS Report, *supra* note 74; see also United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges and Change [hereinafter the High Level Panel Report], UN Doc. A/59/565, 2 December 2004, and A/59/565/Corr., 6 December 2004.

⁷⁸ The High Level Panel Report, *id.*, ¶203.

⁷⁹ *Id.*, at 22.

⁸⁰ United Nations, *In Larger Freedom: Towards Development Security and Human Rights for All*, Report of the Secretary-General [hereinafter “*In Larger Freedom*”], UN Doc. A/59/2005, 21 March 2005; see also Ekiyor, *supra* note 46, at 1.

⁸¹ See The World Summit Outcome, *supra* note 67.

ment members vetoes Security Council authorization.⁸² While the adoption of R2P in the World Summit Outcome is a revolution in consciousness in international affairs marking a departure in relationship between sovereignty and human rights, the World Summit watered down the concept of R2P to such an extent that it would not, in practice, afford protection to threatened populations and might even limit the Security Council's ability to respond decisively to anthropogenic catastrophes.⁸³

The concept of R2P as endorsed by the General Assembly in the 2005 World Summit Outcome Document is cast in the following three core pillars: first, an affirmation of the primary and continuing obligation of individual states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as incitement thereof; second, a commitment by the international community to assist states in meeting these obligations; and third, acceptance by UN member states of their responsibility to respond in a timely and decisive manner through the UN Security Council if national authorities are manifestly failing to protect their populations from these mass atrocity crimes.⁸⁴ In other words, the threefold narrative of R2P may be understood as a restatement of positive binding obligation of states to protect their citizens from mass atrocity crimes, the collective responsibility of the international community to prevent mass atrocity crimes, and the duty for collective enforcement action to stop mass atrocity crimes. According to commentators:

Depending on one's point of view, R2P could be called a "concept," a "principle," an "evolving trend," a "strong political commitment," an "emerging norm," or an "obligation with legal significance." Fundamentally, the provisions in these paragraphs are based on, and reconfirm, preexisting international norms. Therefore, their legal value is less important than the fact that the paragraphs signal a deeper *political commitment* on the part of all member states.⁸⁵

Nonetheless, in terms of legal value, the World Summit Outcome Document is arguably the most authoritative of the previous reports propounding the notion of R2P insofar as it can contribute to consolidation of state practice or

⁸² Don Hubert, *The Responsibility to Protect: Preventing and Halting Crimes Against Humanity*, Paper presented at Crimes Against Humanity, Harvard Kennedy School, 4-6 December 2008 (copy on file with the author), at 6.

⁸³ For a detailed analysis see Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20(2) ETHICS & INT'L AFFAIRS 143, 144-145 (2006).

⁸⁴ Centre for Conflict Resolution, *Preventing Genocide and the Responsibility to Protect: Challenges for the UN, Africa, and the International Community*, Policy Advisory Group Seminar Report, 13-15 December 2007, Stellenbosch, South Africa [hereinafter "CCR on Genocide and R2P"]; see also, *Actualizing the Responsibility to Protect*, 43rd Conference on the United Nations of the Next Decade, Stanley Foundation (2008), at 1, available at: <http://www.stanleyfoundation.org/publications/report/UNND808.pdf>.

⁸⁵ *Id.*, at 2 (emphasis in the original).

formation of the *opinion juris communis*.⁸⁶ Such acceptance by the General Assembly constitutes evidence of the opinion of governments in the widest forum for expression of opinion on sovereign responsibility to protect populations at risk of mass atrocity crimes. However, it is true to say that consensus endorsement at the World Summit does not signify universal acceptance.⁸⁷ It is also conceivable to argue that as a General Assembly resolution, the Outcome Document is only aspirational and is not intended to propound legal norms in the form of creating binding duties.

Nevertheless, looking at the formulation of the notion, the World Summit Outcome Document provides basis for the progressive development of the notion of “sovereignty as a responsibility” and the concomitant international “responsibility to protect” populations from mass atrocities. It is thus possible to argue that a General Assembly resolution of this caliber is, at most, evidence of an emerging customary law of international intervention to stop mass atrocities. Given that the resolution was adopted by acclamation, or rather unanimately, it may show the presence of a generally accepted custom, and, therefore, be binding on all states. Edward Luck, the Special Advisor on the Responsibility to Protect, lends support to this view, noting that the notion of R2P is widely regarded as a quantum shift in the protection of fundamental human rights, given that:

[R2P] gained political force as the product of the largest gathering of heads of state and government in history. The seriousness of the commitment, it was widely believed, was reinforced both by the high level and by the near-universal scope of those undertaking it, including a number of countries that had not been states parties to the relevant human rights, humanitarian, and refugee conventions.⁸⁸

Further support of the foregoing argument is rendered from pundits who have predicted that:

[T]here are encouraging indications that the political calculus in [R2P] and potential [R2P] situations is changing. The political costs of casting a veto in the UN Security Council in cases of emerging genocide or mass atrocities are now greatly increased, and the international community generally appears much less likely to “look the other way” in such

⁸⁶ According to the Institute of International Law, principles and rules proclaimed in law-developing resolutions “may influence state practice or initiate a new practice that constitutes an ingredient of the new customary law,” or “contribute to the consolidation of state practice, or to the formation of *opinio juris communis*.” Institut de droit international, Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective, Res. II, conclusion 22 (Cairo Conference, 1987), available at http://www.idi-iil.org/idiE/resolutionsE/1987_caire_o2EN.pdf; see also Stahn, *supra* note 32, at 101-102.

⁸⁷ Hubert, *supra* note 82, at 6.

⁸⁸ Luck, *supra* note 52, at 3.

situations than it was even a decade ago. However, ensuring an effective response in these situations is another matter.⁸⁹

Although ensuring an effective response to mass atrocity crimes remains a challenge for the international community, all UN member states joined in the adoption of the World Summit Outcome, explicitly accepting its R2P and pledging to act in accordance with it. As it turned out, in April 2006 the UN Security Council adopted an important thematic resolution, Resolution 1674 (2006) on the Protection of Civilians in Armed Conflict, which contains a clear reaffirmation of the World Summit Outcome conclusions germane to R2P. Later in August 2006 the Security Council passed Resolution 1706 (2006) that authorizes the deployment of 22,500 UN troops and police officers of the UN-AU Hybrid Mission in Darfur (UNAMID), explicitly reaffirming the provisions of paragraphs 138 and 139 regarding R2P contained in the World Summit Outcome Document. In addition to condemning violations of human rights and international humanitarian law, the resolution also states that “ending impunity is essential” to address abuses against civilians during armed conflict and prevent such abuses in the future. Resolution 1706 also made explicit reference to UNAMID’s authorization for the use of force to protect civilians. The foregoing resolutions contain the first official Security Council references to R2P.⁹⁰

It is on this basis that the AU right to intervene may be seen to have codified the emerging norm of R2P. The development of a regional peace and security mechanism in Africa and its incorporation of a regional “right to intervene” in cases where R2P’s just cause thresholds are satisfied certainly implies support for the ICISS concept.⁹¹ One state’s responsibility to protect is another’s intervention into the affairs of sovereign states.⁹² As good as R2P sounds, however, the challenges shared in implementing the AU’s brand of collective security and R2P are clearly visible, as the AU and the international community have been unable to fully enforce the R2P doctrine in the ongoing crisis in Sudan’s Darfur region.⁹³ As a corollary, the formulation of the notion of R2P and the consequent adoption by the General Assembly is advancement in the clarification of international legal perspectives, on modalities, and on the options for military intervention for protecting human rights. To this end, the AU right of intervention adds weight to the emerging norm of intervention in the face of grave human rights violations.

⁸⁹ CCR on Genocide and R2P, *supra* note 84, at 23.

⁹⁰ See also Leopard, *supra* note 13, at 100; Rosalyn Higgins, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 22-28 (Clarendon Press, 1994).

⁹¹ Bellamy, *supra* note 83, at 161-162; see also Greg Puley, *The Responsibility to Protect: East, West, and Southern African Perspectives on Preventing and Responding to Humanitarian Crises*, Ploughshares Working Paper 05-5 (2005), at 4.

⁹² See Ekiyor, *supra* note 40, at 2.

⁹³ *Id.*, at 3.

4.2. The Room for the Collective Use of Force to Prevent Serious Human Rights Violations as an Additional Exception to the Prohibition of Use of Force Regime under the UN Charter

Notwithstanding the prohibition of the use of force in international law, it is possible to argue that the UN Charter seems to leave scope for “humanitarian intervention” with regards to the protection of fundamental rights, which is proclaimed to be a central purpose of the UN. The anchor of this argument in provisions of the Charter is the second recital of the preamble of the Charter as well as articles 1(2), 1(3), and 55, which commit the UN to promote universal respect for, and observance of, human rights and fundamental freedoms, and 56, which pledges all members “to take joint and separate action” toward this end. These human rights provisions in the Charter raise the question not addressed by the Charter as to what should be done if the most fundamental human rights and humanitarian norms are flagrantly flouted within a state. This suggests that the rights and responsibilities conceptions of sovereignty are not dichotomous, but rather mark out a continuum along which there are gradations and conditionalities. It is conceivable to contend that these provisions of the Charter ought to have an effect on how to interpret the proscription of the use in Article 2(4) “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁹⁴

In addition to gross violations of human rights, the Charter does not seem to also contain a complete prohibition on the use of force in view of room for rescue of nationals, stopping mass atrocity crimes, and self-determination. These can be seen as precedents in strengthening customary international law. More so, the UN Charter, while strongly affirming the sovereign rights of states, also provides normative legitimacy and legal basis for the competing conception of “sovereignty as responsibility.” The room for enforcement action to prevent mass atrocity crimes is fortified by the fact that Chapter VII of the Charter is much less restrictive than its precursor regime under the 1919 Covenant of the League of Nations.⁹⁵ Under Article 39 of the Charter, the Security Council can take action where there is a “threat to the peace, breach of the peace, or act of aggression,” which may, as practice has shown, coincide with human rights crises. Thus, articles 41 and 42 leave the Council with a wide discretion as to the enforcement action it can take.⁹⁶ It is thus conceivable that in 1945, the drafters of the Charter saw the fulfillment of human rights as a means to secure international peace and security.⁹⁷

Historically, the principle of non-intervention that is implied in the concept of sovereignty was conditioned on states adhering to specific standards of behavior.⁹⁸ But the liberal practice under articles 55 and 56 of the Charter has

⁹⁴ Cf. Roberts, *supra* note 14, at 8.

⁹⁵ See, e.g., Arts. 10-13, 15 and 16 of the Covenant of the League of Nations, available from the Avalon Project at Yale Law School, at <http://www.yale.edu/lawweb/avalon/leagcov.htm>.

⁹⁶ Roberts, *supra* note 14, at 8.

⁹⁷ Sigrun I. Skogly, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 12 (Intersentia, 2006).

⁹⁸ See Francis Deng *et al.*, SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (Brookings Institution, 1996); see also Bruce W. Jentleson, *Coercive*

changed the concept of domestic jurisdiction. The extent to which an errant state can now rely on some form of interpretation of Article 2(7) is now in doubt.⁹⁹ Likewise, the recognition of obligations *erga omnes* and the evolution of *jus cogens* principles in the field of human rights are also evidence of the increased influence that international human rights law now commands in the international regime.¹⁰⁰ Actually, the UN Charter “was issued in the name of ‘the peoples,’ not the governments of the [UN] ... The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty responsibility not just power.”¹⁰¹ This point is supported by the fact that no state has openly defended human rights violations. It is the choice of means to effectively deal with such human rights violations that is controversial.¹⁰²

4.3. The Inconsistency of the UN Security Council to Discharge its Responsibility

While the Security Council is “the sole source of legitimacy on the use of force,” the Council failed to unite around the aim of confronting mass atrocity crimes of the scale of Kosovo, hence betraying the very ideals that inspired the founding of the UN.¹⁰³ This statement exposes the strength and the weakness of answering “the UN and only the UN” to the question of who can intervene.¹⁰⁴ The powers conferred by Chapter VII of the Charter well illustrate the initial conception of the Council as a body not to be occupied with ongoing monitoring or criticism of states but rather to respond to emergency situations threatening international peace and security. It cannot be surprising that an organ as politically constituted as the Council and empowered to use force has not acted consistently in deciding whether and how to react to gross human rights crises in a timely manner to forestall or arrest the commission of atrocities.¹⁰⁵ Humanitarian motives for intervention are, in the light of the Security Council’s recent practice, a real possibility, but only if the Council has expressly authorized such an intervention. Although the legality of the AU intervention without the Security Council authorization may be questioned, the Security Council’s selectivity in the approach and reluctance to act blur the

Prevention—Normative, Political, and Policy Dilemmas, 35 PEACEWORKS 6 (United States Institute of Peace, 2000).

⁹⁹ See Ian Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 558, 574 (Clarendon Press, 1963).

¹⁰⁰ See also Skogly, *supra* note 97, at 204.

¹⁰¹ Annan, *supra* note 27, at 2.

¹⁰² See Olof Beckman, *ARMED INTERVENTION: PURSUING LEGITIMACY AND THE PRAGMATIC USE OF LEGAL ARGUMENT* 294 (Lund University, 2005).

¹⁰³ United Nations Press Release, *Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in Next Century*, SG/SM/6997, 18 May 1999.

¹⁰⁴ See Jentleson, *supra* note 98.

¹⁰⁵ See Arts. 39-42 of the UN Charter. In cases of intervention authorised by the Security Council, such as Haiti and the Gulf War, concrete interests of particular States in, for example, arresting refugee flows or protecting oil supplies, were undoubtedly among the motivations for action; see Henry J. Steiner, *International Protection of Human Rights*, in Evans (ed.), *supra* note 25, at 757, 763-764.

Council's authority. The inaction in Rwanda and the reluctance in Bosnia and Herzegovina are juxtaposed as telling examples.¹⁰⁶

In the *Certain Expenses* case, the ICJ held that although the Council had primary responsibility for the maintenance of international peace and security, this was primary and not exclusive: it was open to the General Assembly to recommend peacekeeping, but not to decide on enforcement action, which was the exclusive province of the Security Council.¹⁰⁷ The logic is simple: state systems offer the first line of defense of human rights of citizens, and if they cannot provide that defense, the international system will. It follows from this reasoning that AU enforcement measures may also be justified on the ground that mass atrocity crimes in Article 4(h) of the Act exhibit a transnational dimension, in that the acts are not confined to the territory of one state but spill over and jeopardize the security of other states in a significant fashion. Hence, "all the Security Council's Members must accept the responsibility that comes with their privilege." The Council is not a stage for acting out national interest but the "management committee of our fledgling global security system." As such, "humanity would look elsewhere for peace and justice if the UN failed to rise to the task when action was needed."¹⁰⁸ This helps explain why the AU incorporated the right to intervene in a member state in the event of mass atrocity crimes, to compensate for the ineffectiveness of the Security Council.

4.4. The AU Right of Intervention is a Pro-Sovereignty Doctrine

In view of the past mass atrocities on the African continent, intervention becomes a necessity and not an academic issue. In Africa, intervention seems to be needed in as many cases where a weak state is unable to protect its citizens as when a repressive state is unwilling to do so or itself the cause of abuse. Hence, as a corollary of right of intervention, state sovereignty has important consequences for the protection of human rights in Africa. State capacity and authority are essential conditions for the protection and advancement of human rights. The AU right of intervention may be held as an expression of the development towards diminishment of the sovereignty of states, given that the sovereignty of the target state is affected by the intervention. The essence of intervention is to compel the target state to revert to a commonly accepted practice regarding the treatment of its citizens. Put differently, the right of intervention has the effect of reinforcing the sovereignty of states in providing assurance of the international community's acknowledgment of the right to determine internal matters—as long as the right is executed within the spirit of the UN Charter in general, and the AU Act in particular. Therefore, like R2P, the AU right of intervention is a pro-sovereignty doctrine insofar as it recognizes that strong and accountable states are best able to protect their citizens. Thus:

¹⁰⁶ For more details see Jentleson, *supra* note 98.

¹⁰⁷ *Certain Expenses of the United Nations*, Advisory Opinion, ICJ REPORTS 151 (1962).

¹⁰⁸ In a speech to the General Assembly, "Toward Democratic World Federation," on 20 September 1999.

[T]he R2P focus is squarely on the safety and well-being of vulnerable people, rather than on the strategic and parochial interests of the external states or the domestic government. As with the broader notion of human security, the ultimate focus is on the safety and well-being of the people themselves.¹⁰⁹

Understandably, the fledgling human rights protection in Africa needs a robust and borderless enforcement. In signing the AU Act, AU states accepted the duties and responsibilities concomitant with the right of intervention. There is no transfer or dilution of sovereignty but a paradigm shift from sovereignty as control to sovereignty as a responsibility in both internal functions and external duties. By ratifying the AU Peace and Security Council (PSC) Protocol, AU states agree that they shall comply with the recommendation of the PSC, including intervention pursuant to Article 4(h) of the AU Act. The AU Act is an important text that envisages the relations among states having different political, economic, and social systems on the basis of coexistence among their various ideologies. Since African states not only voiced no objection to its adoption, but also took an active part in bringing it about, it testifies to the acceptance by AU states to cooperate in the exercise of the AU's right of intervention. Considering that sovereignty has often been used to protect leaders at the expense of citizens, the intention now expressed in the Act is a significant stride towards the protection of the citizens.¹¹⁰

From an international law perspective, in terms of "particular international law" as opposed to "general international law," the AU Act provides a source of obligation (not a rule of general application) on member states in relation to the right of intervention under Article 4(h). In parenthesis, this shift should also be appreciated in the light of the African states' concern that the "invalid" territorial boundaries were "imposed" and drawn "arbitrarily" during the partition of Africa and the need for African states to render existing boundaries superfluous and obsolete. Thus, AU states have voiced a common concern to intervene in a member state insofar as it is unable or unwilling to save the lives of its citizens.¹¹¹ "Africans know that if [they] have to wait for the UN, people will die."¹¹² Ironically, states, which had formerly posed the

¹⁰⁹ *Actualizing the Responsibility to Protect*, 43rd Conference on the United Nations of the Next Decade (Stanley Foundation, 2008), at 15, available at <http://www.stanleyfoundation.org/publications/report/UNND808.pdf>.

¹¹⁰ See also ICISS Report, *supra* note 74, at 13-14.

¹¹¹ This position reflects the interests and aspirations of African peoples and constitutes for each member state a present and future responsibility, heightened by experience of the past. This view is evident in the *travaux préparatoires* of the AU Act as well as statements of the plenipotentiaries of the AU. Cf. Kwame Nkrumah, *United We Stand*, 1.2 PROCEEDINGS OF THE SUMMIT CONFERENCE OF INDEPENDENT AFRICAN STATES 7, (Addis Ababa, Summit CIAS/GEN/INF/36, May 1963); cf. Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 852 INT'L REV. RED CROSS, 807, 814-820 (2003).

¹¹² Kristiana Powell, *The African Union's Emerging Peace and Security Regime—Opportunities and Challenges for Delivering the Responsibility to Protect*, 119 ISS MONOGRAPH SERIES 24, 49-54 (May 2005) (quoting a senior official in an interview at the AU Commission at AU headquarters, Addis Ababa, Ethiopia, March 2005); see also Jakkie

strongest opposition to humanitarian intervention, are now its most progressive proponents. The logic is easy to determine—Africa has paid a high price for mass atrocities on the continent; hence it makes sense for Africans to play a leading role in intervening to stop the atrocities. AU states are blameless on this score because they have been goaded by past experience of atrocities due to armed conflagrations on the continent. This is a departure from Africa being seen as a recipient of, rather than a contributor to, the development of international law. As an actor on the international scene, the important role of the AU in advancing international human rights law should not be forgotten.¹¹³ By codifying the right to intervene under Article 4(h) of the Act, the AU, apparently, blows a clarion call to save succeeding generations in the spirit of the drafters of the UN Charter.

Since AU states, which are also UN members governed by the Charter, have negotiated and acceded to the AU Act, one can assume that they have generally accepted the emerging twin norms of “sovereignty as a responsibility” and are duly bound by the subsequent Security Council Resolution 1674 (2006), which embodies the notion of R2P. States would not intentionally subscribe to contradictory imperatives. Norms would otherwise lose their ability to govern behavior. In any event, the right to intervene is a pro-sovereignty provision insofar as it recognizes that strong and accountable states are best able to protect their citizens. A normative shift has occurred where AU states felt it necessary to embrace the norms of external intervention for the purpose of solving domestic crises that culminate into mass atrocities.¹¹⁴

For this reason, *a fortiori*, Article 103 of the Charter—which deals with juridical supremacy of the Charter in cases of conflicting obligations—would not come into play. The reasoning being that this consent also precludes wrongfulness on the part of intervening states to the extent that the intervention is to end a breach of a peremptory norm in international law.¹¹⁵ By incorporating the right of intervention in Article 4(h), AU states are ready and willing to surrender some of their autonomy by pooling state sovereignty into a supranational institution in which individual states cannot take decisions independently in matters of common interest. This follows from the principle of *pacta sunt servanda* embodied in Article 26 of the VCLT.¹¹⁶ Although the use of force for the protection of human rights remains an open and moot point, the right of intervention under Article 4(h) of the AU Act gives prominence to

Cilliers, *Regional African Peacekeeping Capacity—Mythical Construct or Essential Tool?* in FROM PEACEKEEPING TO COMPLEX EMERGENCIES—PEACE SUPPORT MISSIONS IN AFRICA 149 (South African Institute for International Affairs and ISS, 1999).

¹¹³ Cf. Arthur P. Muntharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT’L L. J. 1706 (1995); see also Tiyanjana Maluwa, *International Law Making in the Organisation of African Unity: An Overview*, 12(2) AFR. J. INT’L & COMP. L. 201 (2000).

¹¹⁴ See Jentleson, *supra* note 82, at 22.

¹¹⁵ See Art. 41 of the Articles on State Responsibility; but see Art. 26 of the Articles on State Responsibility; see *Report of the Law Commission*, 53rd sess., UN Doc. A/56/10.

¹¹⁶ The Convention is not simply declaratory of general international law, but particular Articles also reflect the existing rules or practice; see Ian Brownlie, *BASIC DOCUMENTS IN INTERNATIONAL LAW 270-297* (Oxford University Press, 1995).

the attitude of African states to the emergent twin notions of “sovereignty as a responsibility” and R2P. In fact, it may be regarded as a strong *opinion juris* on the emerging norms.

V. THE WAY FORWARD: PERSUASIVE PREVENTION— CONSTRUCTIVE ENGAGEMENT BACKED BY MULTILATERAL FORCE TO PREVENT MASS ATROCITY CRIMES

The debate on sovereignty and intervention is a manifestation that Article 2(4) of the Charter is not cast in absolute terms. This explains why the use of force and unilateral interventions is suggested to be tolerated and regulated, rather than prohibited.¹¹⁷ If Article 1(3) spells out that the “Purposes of the UN” are to include cooperation in solving international problems of, *inter alia*, humanitarian character and encouraging respect for human rights and for fundamental freedoms indiscriminately, what would be inconsistent with Article 2(4) of the Charter if the AU intervened in one of its member states which is unable or unwilling to protect its own citizens from mass atrocity crimes? Probably, Article 53(1) would come in that no enforcement action shall be taken under regional arrangements without authorization of the Security Council. Here, the crucial issue is to inform the Security Council, or, as practice has shown, in urgent cases to report to the Council after such an action. In the *Nicaragua* case, the ICJ held that the failure by the US to report its use of force to the Security Council was an indication that the US was not itself convinced that it was acting in self-defense. It should be noted that it has certainly become clear that even Chapter VII action is not limited to individual or collective self-defense.¹¹⁸

Put differently, the couching of the proscription of force under Article 2(4) and the non-intervention principle in 2(7) of the Charter seems to have left an opening for “humanitarian intervention” in light of the following interpretive argument: assuming that a given intervention is not against the personality of the state or its political, economic, or cultural elements, what if an intervention is merely intended to protect a population at risk?¹¹⁹ The foregoing arguments are buttressed by practice of the Security Council itself in that despite the UN Charter being clear on the requirement for prior Security Council approval, the Council has given its approval *post facto* by identifying certain crises as threats to the peace and to certain actions, such as Haiti and Iraqi no-fly zones, as humanitarian actions. Moreover, while NATO action in Kosovo was not legal under international law, other commentators argue that international law should not be the final arbiter of humanitarian actions.¹²⁰ As such, in examining the interplay of international law and humanitarian mili-

¹¹⁷ See editorial remarks by Michael W. Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642 (1984).

¹¹⁸ For instance, the Security Council has authorised action to secure the delivery of humanitarian aid as in Somalia and in Yugoslavia, to restore democracy as in Haiti, and to protect refugee camps in Rwanda. See Gray, *supra* note 25, at 609.

¹¹⁹ See also Roberts, *supra* note 14, at 10.

¹²⁰ *Whither Humanitarian Intervention?*, Report of the 3rd Pugwash Workshop on Intervention, Sovereignty and International Security, 4-6 May 2001, Castellón de la Plana, Spain, available at <http://www.pugwash.org/reports/rc/rc10.htm>.

tary intervention, there is room to argue that the demonstrated state practice and *opinio juris* may constitute evolving customary law legitimizing “humanitarian intervention.” The development of human rights and international humanitarian law in the post-1945 era has contributed to an emerging view that in collective enforcement action may be permissible to stop or prevent gross violations of human rights and humanitarian norms.¹²¹ However, the caveat is that although international human rights and humanitarian law treaties oblige state parties to prevent and punish mass atrocity crimes, they do not state that forcible military intervention is among the means of implementation.¹²²

Nonetheless, evidence abounds that prohibition of serious war crimes, genocide, and crimes against humanity stipulated in Article 4(h) are *erga omnes* obligations having the status of a peremptory norm.¹²³ The rationale is that if potential perpetrators of mass atrocity crimes calculate that there is a real prospect of prosecution anywhere on the African continent, they may be deterred from acting in the first place. Thus, it is possible to view Article 4(h) as establishing *erga omnes contractantes* to prevent or halt mass atrocity crimes in form of treaty-based obligations in whose performance all AU states have a legal interest. By consenting to Article 4(h) of the AU Act, AU states have agreed to set aside their national sovereignty to give way to AU enforcement measures in the face of war crimes, genocide, and crimes against humanity. This interpretation is given effect by the *erga omnes* obligations in Article 4(h) and the principle of universal jurisdiction for violations of such obligations, which makes no distinction whether the perpetrator is a foreigner or one’s own government.¹²⁴ In addition, Article 4(h) is supported by the normative commitment of R2P based on the international consensus that the state has the primary responsibility to protect its own citizens, but where the state nominally in charge is manifestly unable or unwilling to provide protection from mass atrocity crimes, the responsibility falls on other states to do so.

Although Article 23(2) of the AU Act gives a possibility of political and economic sanctions and denial of transport and communication for errant states, the use of force to curtail mass atrocity crimes cannot be ruled out. Actually, perpetrators of war crimes, genocide, and crimes against humanity cannot be stopped without the use of military force. However, as the AU Mission in Sudan showed, the AU does not have the capability and the capacity to conduct such effective military interventions. In addition, the legality of enforcement action without authorization of the UN Security Council is questionable. It is, therefore, easy to see that universal jurisdiction to protect human rights is the missing link in the implementation of the Article 4(h) of the AU Act and the notion of R2P. However, to ensure the observance of the law

¹²¹ See Helen Stacy, *Humanitarian Intervention and Relational Sovereignty*, 7(1) STANFORD J. INT’L RELATIONS 3 (2006).

¹²² See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 Jan. 1951.

¹²³ The mass atrocity crimes in Article 4(h) are, just like peremptory norms, based on prohibitive primary rules of international law. Accordingly, all the legal consequences applicable to an internationally wrongful act will also apply to international crimes. See André de Hoogh, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES—A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 69 (Kluwer Law International, 1996).

¹²⁴ Cf. Jentleson, *supra* note 98, at 20.

in prospect, rather than intervention and penalization of violations, is important in preventing violations. For this reason, what may work for the AU is the concept of “persuasive prevention,” i.e., the constructive engagement backed by credible multilateral force to prevent or halt mass atrocity crimes. Article 4(h) and R2P provides the normative framework for such a doctrine as the thrust of this concept is to provide guidance to ensure consistent compliance by states of their international obligations to prevent mass atrocity crimes and prosecute and punish perpetrators of such heinous crimes. The key is how to influence the calculus of potential perpetrators to ensure compliance with human rights obligations.

To effect “persuasive prevention,” as a minimum, the AU should consider the following:¹²⁵ first, the AU needs to adopt a broader term of mass atrocity crimes for purposes of intervention, while limiting the legal definition of the *jus cogens* crimes for purposes of prosecution. Considering that such crimes are invariably state crimes, the key for such an expanded scope is the culpability of the errant government for such heinous crimes. Secondly, the AU should establish mechanisms for early reaction such as a genocide alert institution as well as an institution to oversee the implementation of international humanitarian law and the protection of civilians on the continent. The rationale for establishing such institutions is that the conditions for intervention under Article 4(h) are mass atrocity crimes that can be detected timely by the proposed institutions. Most human rights violations today, particularly those in Article 4(h), are witnessed in the context of armed conflicts.

Thirdly, the AU should formulate a doctrine for the deployment of the ASF for timely and effective implementation of Article 4(h) of the AU Act. This should also provide for a cumulative checklist of caveats for the implementation of Article 4(h) if there is an impasse in the Security Council on the authorization of enforcement action. More significantly still, the ASF should have “capability to protect” civilians at risk of mass atrocities.¹²⁶ Fourthly, the AU should adopt a legally binding instrument for ensuring adherence to obligations to end impunity.¹²⁷ This legal instrument should institutionalize and advance the universal but scattered obligations for the prevention of, and accountability for, mass atrocity crimes and enforcement of reparations. This instrument should also provide for the “obligation to cooperate” in the enforcement of *erga omnes* obligations outlined in Article 4(h). The idea behind “persuasive prevention” is to stigmatize the commission of such *jus cogens* crimes on the African continent and ostracize the perpetrators. All things said and done, “persuasive prevention” is an effort to save succeeding genera-

¹²⁵ For further reading on the concept, see Dan Kuwali, *Saving Succeeding Generations vis-à-vis the Responsibility to Protect—Aligning the AU Right of Intervention with the UN Charter*, Doctoral Thesis, Lund (forthcoming, 2009).

¹²⁶ See generally this point Puley, *supra* note 91, at 15.

¹²⁷ For detailed analysis, see Clint Hinote, *Campaigning to Protect: Using Military Force to Stop Genocide and Mass Atrocities*, paper presented at the Carr Center for Human Rights, Harvard University, 15 May 2008 (paper on file with author); see David C. Gompert, *For a Capability to Protect: Mass Killing, the African Union and NATO*, 48(1) SURVIVAL 8-17 (2006).

¹²⁷ See generally Diana Orentlicher, *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity*, E/CN.4/2004/88, 27 February 2004, at 18, ¶¶53-55.

tions—the primordial intention of the framers of the UN Charter. However, there are obvious limits to international criminal accountability as an instrument for dealing with mass atrocity crimes. As Justice Goldstone has astutely observed:

Crime and human rights violations emerge from causes deeply embedded in the structure of societies—poverty, deprivation, social injustice. When courts deal with massive human rights violations arising in connection with civil conflict, they are considering only the visible surface of underlying social problems. Criminal law, however effective, cannot replace the social policies needed to combat deprivation and social injustice. The recent attention to developing a functioning international criminal justice system has to be warmly welcomed, but it should be accompanied by efficient international policies and structures to deal with those root causes. In this area, much remains to be done.¹²⁸

One cannot agree more with this apt analysis. It is true that prosecution cannot be a panacea to the underlying causes of mass atrocity crimes, which involve complex issues such as ethnic conflicts, economic inequalities, and scramble for natural resources, among others. This is where the New Partnership for Africa's Development (NEPAD) comes in, given the growing understanding that justice, growth in welfare, and sustainable peace are deeply entwined goals.¹²⁹ Notably, while focusing on economic development, NEPAD also promotes “good governance” and human rights. NEPAD explicitly recognizes that: “Peace, security, democracy, good governance, human rights, and sound economic management are conditions for sustainable development.”¹³⁰ To this end, NEPAD proposes systems for monitoring adherence to the rule of law that can promote respect for human rights, in addition to serving as a check to prevent conditions in a given country from deteriorating to the point of insurgency or conflict.¹³¹

Considering that development, security, and human rights share a symbiotic relationship, encompassed in the concept of human security,¹³² the AU right to intervene under Article 4(h) should therefore not be equated with the use of military force. The focus should instead be on the entire spectrum of preventive strategies at the disposal of the AU and the international community in the face of mass atrocities. This signifies the utility of the concept of “persuasive prevention” that can be employed in the manifold human security

¹²⁸ Richard J. Goldstone, *Forward*, in Ramesh Thakur & Peter Malcontent (eds.), *FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES* xii, xv (United Nations University Press, 2004).

¹²⁹ Oliver Jütersonke, *Conference Report*, in Oliver Jütersonke & Keith Krause, *supra* note 37, at 7.

¹³⁰ The NEPAD strategic framework aims at developing an integrated socio-economic development framework for Africa. The 37th Summit of the OAU in July 2001 formally adopted the strategic framework document. For more details, see <http://www.nepad.org/2005/files/actionplans.php>.

¹³¹ *Ibid.*

¹³² Jütersonke, *supra* note 129, at 8.

policy areas of the AU in view of the interrelated challenges of security, development, and human rights, to prevent mass atrocity crimes. It can be argued that a genuine respect for human rights, the rule of law, and the value of a deterrent against mass atrocity crimes would effectively take root if AU states engage in “persuasive prevention” through early warning and corresponding early reaction to a range of human security challenges.