



Original Article

## Sovereignty and Humanitarian Intervention: A legal challenge of Art. 4(H) of the African Union Constitutive Act

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The emergence of the new norm of military intervention based on humanitarian grounds, also dubbed as 'Responsibility to Protect (R2P)', after the end of the Cold War, has been described as 'highly controversial' and that its application could connote humanitarianism or imperialism (Zimmermann, 2014). In that, its application would eclipse the principle of sovereignty, considered the very foundation of the international system. This article is an attempt to assess the legality of Art. 4(h) of the African Union Constitutive Act of 2002, particularly, its incompatibility with the principle of sovereignty. This legal challenge can only be understood by giving a brief sketch of both sovereignty and the legitimacy of the transnational norm of military intervention that has been institutionalized by the African Union Constitutive Act.

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## INTRODUCTION

The end of the Second World War in 1945 ushered in a new international structure that culminated in the establishment of the United Nations with the Charter as the framework for collective security

arrangement. Inherent in the Charter are specific provisions on sovereignty being the main safeguard for sovereign states on military interventions; a complete departure from the balance of power that existed in the nineteenth and

early twentieth centuries. The Charter, thus, established indefeasible rights of states from outside interference and also as the legal basis of non-interference which conforms to '*jus cogens*'; that is law binding to all states and no state can decide to opt out of it as it clearly prohibits the use of force against an independent state.

Thus, in as much as the Charter contains many general aspects of international importance, there are five basic provisions pertinent to sovereignty and non-intervention: Articles; 2(1), 2(4), 2(7), 39 and 51. The first established the principle of equality; that all members of the United Nations are horizontally equal. The second provision is that all member states respect or refrain from the use of force against the territorial integrity of member states or any other acts that shall be deemed inconsistent with the Charter. The third provision is that there is no provision that would allow the United Nations to authorize any forms of interference on matters that are within the domestic jurisdictions of member states unless on measures contained under Chapter VII. The fourth provision bestows upon the United Nations Security Council the responsibility of determining the existence of the threat to peace or any type of aggression, and measures taken will be in accordance with Articles 41 and 42 related to determining the restoration of international peace and security. The last article is basically an exception; that member states have a legitimate right of self-defence, individually or collectively, provided that such exercise of self-defence shall be reported to the Security Council for necessary measures deemed to be for the purpose of restoring or maintaining international peace and security.

With sovereignty, thus, well-enunciated and laid anchored as part of international law a number of international instruments on non-interference were also adopted by the United Nations General Assembly; UNGA Res. 290[V]; UNGA Res. 213[XX]; UNGA Res. 2625 (XXV); UNGA Res. 375(IV); UNGA Res. 42/22 and UNGA Res. 36/103. Moreover, non-interference is also embodied in all regional organizations' charters

such as; in the Helsinki Accords or Helsinki Declaration, signed in Helsinki, Finland in 1975 at the Conference on Security and Co-operation in Europe (CSCE). Also, in the OAU Charter of 1963; in the Pact of the Arab League of 1945; in the Charter of the Association of Southeast Asian Nations (ASEAN) of 2007 and the Organization of American States (OAS). All these instruments are indicative of the reformulation of non-intervention in line with Article 2(4) of the United Nations Charter. However, the breach of the principle of non-intervention could not be included as part of the International Law Commission's Final Draft Code of Offences of 1996; that is the principle '*nullum crimen sine lege*' could not be applicable and, hence, it was not part of the Rome Statute of the International Criminal Court (ICC) (Jamnejad and Wood, 2009). The significance of all these legal instruments was to have an institutionalized system that can safeguard the sanctity of sovereignty both at regional and international levels although there were military interventions during the Cold War period, which was characterized by rivalry between the United States and the then Soviet Union (now Russia). In fact, the Cold War period witnessed a number of military interventions, covertly based on national interests and at times allegedly on self-defense but rarely were they justified on humanitarian grounds as typified by; India-Eastern Pakistan (Bangladesh) (1971), Vietnam-Cambodia (1978-1979), Tanzania-Uganda (1978-1979) and United States-Nicaragua (1981-1986) (Tanca, 1993; Nyhamar, 2000; Brower et al., 2013).

However, with the advent of the twilight of the end of the Cold War, beginning in the late 1980s leading to the 1990s and even the first decade of the twenty-first century, international politics seemed to have tilted towards a 'unipolar system', whereby the competition between superpowers leaned towards the West. Hence, Francis Fukuyama, one of the leading liberals, expressed optimism this way: "As we reach the 1990s, the world as a whole has not revealed new evils, but has gotten *better* in certain distinct ways. Chief among the surprises that have occurred in the

recent past was the totally unexpected collapse of communism throughout much of the world in the late 1980s” (Fukuyama, 2006: 12). A similar sentiment was also echoed by Bellamy and Wheeler (2008), who viewed the events of the 1990s as a major shift towards intervention, based on humanitarian grounds. Humanitarian intervention or rather the new norm of military intervention, thus, became front of mind among scholars and policymakers. According to Holzgrefe (2003: 18), humanitarian intervention is “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied”. The author, in qualifying this definition, excludes two types of state behaviour; one is the non-forcible intervention and the second exception is that a state may apply forcible intervention as a way of protecting or rescuing its nationals abroad, perceived to be under threat within another state’s territory. Another view on the use of force is that it is neither through authorization from the United Nations Security Council nor consent from a state when it comes to protecting nationals abroad (Ramsbotham and Woodhouse, 1996).

Humanitarian intervention, however, as theoretically posited by scholars, became the main source of controversies and debates, particularly when applied in practice. Hence, among a number of military interventions that took place in the 1990s, the case of Kosovo can be cited as one that generated debates because of the lack of consensus within the international community. In his annual report (SG/SM7136-GA/9596), the late Kofi Annan emphasized the case of Kosovo that “While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community”. The Secretary-General characterized the dilemma as having two sides; the issue of legitimacy of recourse to military

intervention by a regional organization as was taken by NATO in Kosovo in 1999 and the concern over gross violations of human rights, coupled with the failure of the international community in halting such acts as was the case of the Rwanda genocide in 1994. The main message of the Secretary-General was an attempt to reorient the focus of intervention in order to safeguard two objectives: one was to make intervention as legitimate as possible, through recourse to the United Nations Security Council. The other objective was to hold the international community to be more accountable and to take the logic of intervention into account by setting an agenda so that a way forward was to be charted, particularly in reconciling sovereignty with human rights protection.

In fact, attempts in charting a way forward were to be derived from Francis Deng’s concept of ‘Responsibility to Protect (R2P)’, who argues that, “In attempting to balance between national sovereignty and the need for international action to provide protection and assistance to victims of internal conflicts, certain normative principles are becoming increasingly obvious” (Deng, 1995: 285). The main argument of Deng was to redefine sovereignty to be not only in terms of authority and control but should also extend to responsibility. Thus, in response to the Secretary-General’s report the UN General Assembly recommended in 2000 the establishment of the International Commission on Intervention and State Sovereignty (ICISS) which eventually published its report in 2001. The recommendations of the ICISS Reports were then included in the UN’s High Panel Draft Resolution and, thereafter, adopted at the fifty-ninth World Summit in 2005 (A/60/L.1) and became the World Summit Outcome Document (WSOD). Paragraph 138 of the recommendations identified four crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. Paragraph 139 stated that in the event a state fails to live up to its responsibility to protect citizens then the responsibility would shift to the international community.

However, shifting the responsibility to the international community as recommended in the report of ICISS, based on the tenet of the concept of ‘Responsibility to Protect (R2P)’, as appeared in paragraph 2.14 that sovereignty be responsibility than control, was received with scepticism and even objection. Thus, the Malaysian government, on behalf of the Non-Aligned Movement (NAM), argued that R2P should not be applied as it has no legal basis in international law (Bellamy and Wheeler, 2008). Again, as to whether the principle of R2P will strengthen or undermine the high standard accorded to international law, the President of the United Nations General Assembly in describing how power politics played out in the application of R2P said the following:

Given the extent to which some great powers have recently avoided the strictures of the Charter in resorting to the use of force, and have gone out of their way to denigrate international law as being an impediment to both national policy and justice, there is little reason to doubt that endorsement of R2P by the General Assembly will generate new “coalitions of the willing”, crusades such as the intervention in Iraq led by self-appointed saviours who arrogated to themselves the right to intervene with impunity in the name of overcoming nation-state impunity (UNGA 63<sup>rd</sup> Session, 2009).

Thus, according to this quotation, the adoption of R2P under the guise of collective security would lead to undesirable results as it would create new avenues for coalitions of the willing and, therefore, would be tantamount to real threats to the international system (Evans, 2009). Moreover, the main challenge to the new norm is its legality in international law. This was clearly clarified in the concept note of the 63<sup>rd</sup> Session of UNGA, 2009, that even as the principle of R2P appeared in a number of international documents- UN Security Council Resolution 1674, the Secretary-General’s Report on “Implementing the Responsibility to Protect”, the High-Level Panel’s “Report on Threats, Challenges” and the Outcome Document of the World Summit in 2005- but all squarely did not give rise of being part of

international law as per Article 38 of the Statute of the International Court of Justice (ICJ). It, therefore, meant that the norm of military intervention on humanitarian grounds or on the basis of R2P, is clearly incompatible with the principle of sovereignty.

## DISCUSSION

The doctrine of humanitarian intervention, thus, having not passed the test of being legal, as evidently stated above, can now be analyzed in the context of the African Union Constitutive Act. In fact, this section looks, first at the background of the rationale of the transformation from OAU to AU. The second part is a general discussion on the feasibility of operationalizing Art. 4(h) of the Act and to what extent is it compatible with the principle of sovereignty.

Post-colonial Africa under the Organization of African Unity was aptly characterized as having two problems. One of the problems was how to reconcile the principle of non-intervention with what was perceived by African leaders as legitimate disregard for this principle as a way of pursuing a total liberation of the whole continent. The second problem was the nature of the conflicts that plagued many African countries which could be attributed to how Africa was colonized by the European powers. Due to this inherent problem, the nature of conflicts that arose soon after independence were not easily resolved, particularly, conflicts of multifaceted nature of which ‘crises of governance’ were visible. These conflicts rendered the African state a ‘highly contested arena, and spawned an era of personalized rule’ (Gueli, 2004: 128). So, while the first problem presented itself as a quandary the second was essentially, about problems of state formation. It was on the basis of these realities that the first African political generation founded the Organization of African Unity (OAU) in 1963. According to Mathews (2018: 18), “The OAU was tasked mainly with leading the struggles for decolonization and end of apartheid in the rest of Africa, and facilitating the gradual unification of the continent”. Despite these two challenges, the OAU served the interests of its member states for

over four decades during the bipolar rivalry of the Cold War period.

But almost one decade after the end of the Cold War, the OAU transformed into the African Union in the South African City of Durban in 2002. One of the main reasons for the shift from the OAU to the AU was the realization that there were a number of constraints and even failures by the OAU to tackle some of the problems that had faced the continent at the time. The transformation from OAU to AU was meant to be, essentially, a corrective measure (Edo & Olanrewaju, 2012). It was about embarking on more cooperation and integration as such processes would benefit the continent in terms of growth and development. However, the *New African Magazine* (July 26, 2012), disparagingly described the process as, "... the name change from "OAU" to "AU" was the result of the African countries being seduced to imitate the European example without first enacting any of the organic arrangements that bind the members of the "European Union" together." But Bujra (2002), argued that the transformation was aspirational in nature and that although the AU lacked factors that could solidly bind the continent as it had been the case with the EU and ASEAN, it was more a reflection of shared identity and unification.

According to Williams (2007), the AU, as part of its security culture, institutionalized two transnational norms in the Constitutive Act: Article 4(h) and Article 4(p). Article 4(h) pertains to the responsibility to protect against genocide, war crimes, ethnic cleansing, and crimes against humanity, while Article 4(p) addresses the prevention and resolution of conflicts caused by unconstitutional changes of government. This article focuses specifically on the legality of Article 4(h) in relation to five key issues. These include the determination of grave circumstances, the level of independence of the AU in providing solutions to African problems, the applicability of Article 4(h) with regards to the "right authority" based on criteria from the theory of war, the coherence between Article 4(g) and Article 4(h) of the Constitutive Act, and the application of

Article 4(h) in accordance with the relevant provisions of the United Nations Charter.

As the Act expressly legitimizes intervention through the principle of non-indifference this principle serves as the greatest distinction between the AU and the OAU which was rooted in non-intervention. Although the intent of AU in passing this principle is clear, the Union faces challenges in determining the so-called 'grave circumstances' for invoking Art. 4(h) of the Constitutive Act. According to Art. 7(1), the Assembly of the Member States of the Union would make its decisions through consensus and that in the event of failing to reach consensus, they would opt for a two-thirds majority. Again, in the same article, procedural matters are considered as exceptions when a simple majority would apply. The main problem with this article is the process of the initiation in determining grave circumstances that would be identified in one of the members of the Union without any objection from what would be the target state. In other words, it would be difficult to define grave circumstances devoid of subjectivity. According to Kuwali (2009), such a process of defining grave circumstances "is highly subjective and the nature of the decision would inevitably be highly politicized." This equally applies to the decision of whether there has been real institutionalization of the norm that is acceptable by all members of the Union or not. According to Williams (2007), there is no doubt that the norm had been institutionalized. What is pending is that the norm has not been internalized by the African states. Further, some African states, together with the AU Commission are stumbling blocks to the operationalization of the principle since they are beginning to act as entrepreneurs in order to bridge the gap between those which had accepted the norm and those which remained suspicious. Indeed, such incongruence between applying the norm of the responsibility to protect and pursuing it as part of the AU's security culture was clearly indicative of a lack of consensus within the Union itself. Therefore, in affirming such incongruence, Williams (2007: 278), persuasively argued that "...despite the AU's institutionalization of the

responsibility-to-protect principle, this norm has not been internalized to the extent that the organization is willing to challenge the sovereignty of one of its more powerful members, even though that member has engaged in norm-violating behaviour.” This was in reference to the first decision taken by the AU Assembly meeting regarding the crisis in Darfur (Sudan) when the AU invoked the right of sovereignty of Sudan. So, implicit in the above quotation, is that lack of consensus in the internalization of the institutionalized norm would always present itself as an impediment to invoking Art. 4(h) of the Constitutive Act.

Besides the lack of consensus as a result of the lack of internalization of the norm within the Union, there were other factors that needed consideration. There are a number of factors that presented themselves as an impediment to the lack of consensus within the African Union when it comes to initiating and determining what situation would be described as of grave circumstances. Such factors can be collectively summarized as follows: that although the African Union has institutionalized the norm in Article 4(h) that would be invoked in response to grave circumstances yet it still suffers in taking collective decisions for various reasons; some of which emanate from external influence. The other thing is that the Union institutionalized the transnational norm without proper mechanisms put in place of how to fund its own decisions and that ironically, some African states are contributing to servicing foreign economies. In fact, the issue of the AU being independent in making its own decisions remains a real challenge, particularly when almost two-thirds of the AU’s annual budget comes from external sources and that the other one-third as contributions from Member states is not even guaranteed (Engel, 2023). Moreover, realignment within the Union and in whatever form it takes, coupled with the interests of the powerful states within the United Nations Security Council, all squarely make the task of the African Union to be in tall order, rendering the Union to be not independent in operationalizing its own decisions.

However, in as much as the African Union can be described as weak, ineffective and even not independent in dealing with its own problems the main pertinent challenge facing the Union was the adoption of the transnational norm-the responsibility to protect without internalizing it; meaning the issue of sovereignty continued to be a legal hurdle as exhibited in the cases of Darfur (Sudan) and Libya. This brings the issue of the right authority to the fore. So, in establishing the rationale for the legality of Article 4(h) of the African Union Constitutive Act, both the normative approach and the standing of R2P in international law must be analyzed in the context of right authority.

The just war tradition can be used to illustrate the incompatibility between the principle of sovereignty and norms of intervention. The just war tradition outlines six principles to be considered before resorting to force. These are; the right reason, right intention, proper authority and declaration, last resort, probability of success and proportionality. Right authority as one of the six pillars of Just War theory, is a framework for justifying recourse to war or military intervention. According to Coady (2002), right authority is a presumption that there is a sovereign power to authorize war. In regards to intervention, there must be a higher body at the regional or international level within which legitimate authority to authorize intervention resides and that actions by entities with lower powers under this body must be subjected to its authorization. It means, further, that such authority represents the existence of international law and any act by one state without being sanctioned by this central body would be illegal. Hence, such a depiction of centralized authority is exemplified by the United Nations. Coady (2002:26), moreover, argued that this international body though it might have some shortcomings but it is assumed to represent justice and impartiality; that is “The more an intervention is removed from the partial interests of particular states, especially powerful ones, the more likely it is to approximate justice, and the more likely it is to be perceived as legitimate by the parties in conflict and by the international community.”

However, such an ideal situation might not be the case in practice; that is, it may be difficult when it comes to implementation as some powerful states would act in defiance, coupled with the current structure of the UN Security Council where some powerful states have the veto powers, making the issue of justice to be in doubt (Ibid., 2002). But despite the fact that there are practical problems that could be an impediment to justice yet it is not possible to reconcile unilateral intervention with the legitimacy of the United Nations. Again, even as the possibility of what is called “Coalitions of the willing” as vested interests could amplify multilateral interventions “The need for UN authorization can do something to reduce this possibility. All interventions that bypass the United Nations at least need a very strong case to rebut the presumption that they are ethically dubious” (Ibid.: 26). That is, there must be strong evidence to refute what is considered as doubtful or uncertain.

Further, on the issue of whether the right authority, as a normative approach and also as part of international law, negates Article 4(h) of the AU Constitutive Act, two issues can be analyzed: The first is the recourse to customary international law. However, this might be controversial and according to Hernández (2019: 35), “Customary international law entails the recognition that the practices of States on the international plane can create legal rules.” That means for a custom to be recognized it must not be through the process of lawmaking but rather through practice and for it to acquire the status of international law there has to be tacit acceptance by states. But, for customary international law to be binding on all states is still the subject of an unending debate among international jurists (Ibid., 2019). That means even if the norm has been practised for a period of time and accepted as part of customary international law the issue of being binding on all states still remains unresolved. The second issue is the practicality of the Assembly of the Member States of the Union coming out unanimously or even though the two-thirds majority in invoking Article 4(h) remains unlikely or would mean division among member states.

But on the relevance of customary international law as an alternative in applying the norm of the responsibility to protect, Gunatilleke (2016), referred to the division among scholars. There are those who believe that R2P has already evolved and become part of customary international law whereas others contended that the norm has not become part of customary international law as an alternative to the authority of the United Nations Security Council. However, judging between the two camps, Gunatilleke (2000: 2), argued that “the claim that there is a growing customary international legal norm on humanitarian intervention appears, at best, to be strained” and that those with the view that R2P had not been part of customary international law seemed to approximate the position that was taken by member states as was outlined in the 2005 World Summit Document. It, therefore, meant that since customary international law has not been established as an alternative to the authority of the United Nations Security Council then this same authority negates the invocation of Article 4(h) of the Constitutive Act.

The other pertinent issue, considered as also worth analyzing, is the level of consistency between Article 4(g) read together with Article 3(b) and Article 4(h) of the Constitutive Act as retaining the former might have inherently contributed to making some members of the Union to remain suspicious in internalizing the norm of responsibility to protect and, hence, the implausibility of invoking Article 4(h). But as regards the inconsistency between Article 4(g) and Article 4(h), Puley (2005), maintained the view that they are complementary as the former is just a warning against unilateral action whereas the latter is about the action that should be based upon the consensus among Heads of State. However, according to Kindiki (2007: 11), there is evident contradiction between the two; in that Article 4(g) clearly stipulates the principle of non-intervention and that the AU will continue to observe the issue of ‘non-interference by any member state in the internal affairs of another’. Indeed, and on the basis of this contradiction, it can, therefore, be argued that having retained

Article 4(g) in the Constitutive Act could be the reason that has compounded the dilemma facing the African Union, similar to that faced its predecessor, the OAU as per Article III (2)(3) of the OAU Charter. Moreover, referring to this inconsistency between Article 4(g) and Article 4(h) and the failure of the AU to act in the cases of Sudan and Libya, Kabau (2012: 91), persuasively argued that “The contradictory provisions within the AU legal framework that affirms the principle of non-intervention and traditional concept of sovereignty may have provided the basis for the subsequent practice.” Indeed, the end result as witnessed during the Libyan crisis and the subsequent response by the African Union revealed a glaring contradiction between Article 4(h) as stipulated in the African Union’s framework and the issue of non-interference enshrined in Article 4(g). It, therefore, meant that the African Union still maintains the sanctity of the principle of sovereignty.

Again, with the incongruence between Article 4(h) with the norm of the responsibility to protect, the main issue that also remains begging is how consistent Article 4(h) is with the relevant provisions of the United Nations Charter. Going by the procedures, Article 53 of the United Nations Charter requires that any action taken by the regional body in enforcing its decision such as intervention as per Article 4(h) of the AU Constitutive Act must be authorized by the United Nations Security Council. Hence, according to Cha (2002:135), “It is widely recognized that the Security Council has primary subject matter jurisdiction on issues related to the maintenance of international peace and security, in accordance with the powers conferred on it under Article 24, while regional organizations exercise subsidiarity jurisdiction”. So, on the basis of this legal fact, the issue of the African situation being an exception may not arise since the framework applies equally to all regional organizations such as the Organization of American States (OAS), the then Organization of African Unity (OAU) and the League of Arab States (ibid., 135). This meant, further, that the AU in this case cannot be treated

differently even if it meant the AU is the only regional organization in the world that has adopted the norm of military intervention on humanitarian grounds.

As, on the issue of whether the authorization comes prior to or after intervention, Kuwali (2009), argued that, although there has been an established precedent of post facto authorization to sub-regional actions before this would not mean that Article 4(h) could be invoked without first being sanctioned by the United Nations Security Council. Moreover, Kindiki (2007:13), argued that the first issue to be raised is the legality of Article 4(h) as in the context of Article 2(4) of the UN Charter; in that because of such conflict between the two “... article 4(h) would be void for incompatibility with Article 2(4), which is regarded as **jus cogens**.” That is an international norm of international law that binds all states without exception. So, in this case, article 2(4) of the UN Charter overrides article 4(h) of the African Union Constitutive Act. Also, procedurally, as in the case of subsidiarity, the AU Constitutive Act seemed to have not considered that eventuality, in terms of supervision as per article 24 of the United Nations Charter, that the overall maintenance of international peace and security is bestowed upon the UN Security Council and that because of such supervisory mandate, ‘the AU would be bound by article 53 of the UN Charter’ (ibid., 2007).

However, other scholars such as Amvane (2015), raised another controversy related to the applicability of Article 53 in the event that there would be no unanimity among members of the Security Council when at the same time grave violations remained persistent in one of the African states. According to this author, the feasible choice would be for the African Union to invoke Article 4(h) of the Constitutive Act without prior authorization of the UN Security Council. But ironically, the author seemed also to have no faith in the African leaders in taking such a bold stance as cases such as Darfur, the Central African Republic, Libya, Burundi and Egypt typified, when the Union adopted ‘a policy of



prudence' rather than invoking article 4(h) without authorization from the UN Security Council as required by article 53. But, here, according to this reasoning, the author does not provide a clear way forward as to whether the adoption of a policy of prudence can be considered as a precedent that would be applicable to similar situations that may arise in the future.

### Conclusion

Thus, if the issue of invoking Article 4(h) is just a matter of prudence and not on the basis of its legality then there is strong reason to conclude that Article 4(h) is not consistent with the relevant provisions of the United Nations Charter and, hence, it is incompatible with the principle of sovereignty as per article 2(4) of the United Nations Charter. This conclusion goes in line with the argument posited by Cha (2002: 143), that "The powers of the Security Council under the UN Charter remain unencumbered and unimpaired by the imperatives of any regional organization or agency, and as such the carefully calibrated use of Article 53 in undertaking humanitarian intervention will ultimately rest with the decision-making process initiated at the Security Council". This means that the principle of sovereignty would always remain impermeable to any otherwise process and, therefore, Art. 4(h) of the African Union Constitutive Act does not withstand the test of being legal.

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