PERSUASIVE PREVENTION
Towards a Principle for Implementing Article 4(h) and R2P by the African Union

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GLOSSARY OF TERMS

**Actio popularis**
Public interest (legal) action

**Acquis**
Total body of law

**Ad hoc**
Concerned with a particular end or purpose

**A fortiori**
For a still stronger reason; all the more

**Animus**
Intention to commit a crime

**Arguendo**
For the sake of argument

**A priori**
Proceeding from a known or assumed cause to a necessarily related effect; deductive

**Aut dedere aut judicare**
The duty to extradite or to prosecute

**Erga omnes**
Obligations to the international community as a whole

**Delicta juris gentium**
Crimes against all nations

**Genocidaires**
Perpetrators of genocide

**Hostis humani generis**
Enemies of all people

**Jus cogens**
Peremptory norm of general international law

**In extremis**
In extreme cases

**Inter alia**
Among other things

**Erga omnes contractantes**
Treaty-based obligations in whose performance all contracting parties are said to have a legal interest

**Erga omnes partes**
(same as erga omnes contractantes)

**Opinio juris**
An opinion of law or necessity

**Pacta sunt servanda**
The duty to perform treaty obligations in good faith

**Per se**
By itself

**Stricto sensu**
Strict sense

**Travaux préparatoires**
Preparatory work of a treaty
FOREWORD

‘Persuasive Prevention’ presents a fresh perspective to the challenge of international humanitarian interventionism in Africa from an international law perspective. It provides a succinct analysis of the basis for an effective implementation of the Responsibility to Protect (R2P) drawing on the relevant Articles of the African Union (AU) Act. In this regard, it undertakes a comprehensive analysis of the principles, and prospects for an effective implementation of the right of intervention and R2P by the African Union. While noting the limitations of the AU as well as existing international legal regimes in this regard, the author explores the ‘missing’ link of a principle of ‘persuasive prevention’ – which posits a pro-active, rather than a reactive response by regional organizations and the international community to protect people from serious human rights violations before, during and after violent conflict.

Exploring the notion of people’s sovereignty, Dan Kuwali presents a compelling case for conflict prevention and persuasive prevention, which will deter would-be violators of the people’s rights, rather than seek to implement the difficult process of post-conflict transitional justice – with its attendant costs, compromises and contradictions. Focus is also directed at an analysis of R2P, and the international cooperation needed to make it work. This foregrounds the critical examination of the challenge faced by the AU in protecting people’s rights and effectively implementing the R2P. Of note is the observation that a lot depends on the capacity of the AU, and one of its organs – the African Standby Force (ASF) – to develop the capacity for deterrence and compellence.

This work provides an important discussion of the African Union's Peace and Security Architecture (APSA), within the context of the urgent need for legally binding instruments that can prevent acts of impunity and crimes against humanity on the continent, or enforce accountability and compliance with international human rights and humanitarian law. In this regard, it addresses both the relevance of international jurisprudence and effective regional institutions and processes to sustainable people-based peace, and the protection of human lives and dignity in Africa.

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ABSTRACT

While the legality of intervention without Security Council authorisation is still debatable in international law, over-reliance on military intervention increases the risk of too much focus on reactive rather than proactive strategies. If the thresholds for Article 4(h) intervention – like those of the responsibility to protect – are serious international crimes subject to universal jurisdiction, it follows that measures to ensure the observance of the law in prospect, rather than intervention and penalisation of violations in retrospect, are important in preventing violations. Therefore, in order to in a timely manner and effectively implement Article 4(h) and R2P, the missing link is borderless ‘persuasive prevention’ which aims at enforcing fundamental human rights obligations to prevent mass atrocity crimes stipulated in Article 4(h). To this end, as a minimum, the AU should discharge its responsibility to prevent human rights violations through the ‘force of law’. Where atrocities are likely to take place, the African Standby Force (ASF) should be deployed in a timely way, not to defeat a State, but to pursue perpetrators of mass atrocity crimes. To achieve this, the ASF should have the ‘capability to protect’ to ensure the ‘obligation to prosecute or extradite’. Although the AU has taken an interventionist stance, what is needed most is early action to prevent mass atrocity crimes. The AU may need to establish a body to monitor the implementation of obligations whose breach may lead to the heinous crimes in Article 4(h). In addition, the AU needs a legally binding instrument to ensure accountability and end impunity for crimes in Article 4(h). The idea is to influence the calculus of potential authors of atrocities and ensure compliance with human rights and humanitarian law obligations.
Article 4(h) of the AU Act gives Member States the prerogative to intervene in a Member State on prescribed grounds. The pertinent part of Article 4(h) provides for ‘the right of the [AU] to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.’ The thresholds for intervention pursuant to Article 4(h) of the AU Act are serious crimes under international law, therefore, accountability through universal jurisdiction to deter potential perpetrators is effective intervention. This is because evidence abounds that prohibition of war crimes, genocide and crimes against humanity stipulated in Article 4(h), are obligations of interest to the international community as a whole (erga omnes) having the status of peremptory norms (jus cogens).

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 enforcement by consent (establishing erga omnes contractantes) to prevent or halt mass atrocity crimes in the 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. In addition, Article 4(h) is supported by the political 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 against 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. This view is confirmed by the UN Secretary-General Ban Ki-moon who stated that “Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases.” However, as AMIS showed, the AU does not have the capability and the capacity to conduct such military interventions. In addition, the legality of enforcement ac-

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tion without authorisation of the UN Security Council is questionable. It is, therefore, easy to see that universal jurisdiction to prosecute perpetrators of mass atrocity crimes is the missing link in the implementation of Article 4(h) of the AU Act and the notion of R2P.

However, to ensure the observance of the law in prospect, rather than intervention and penalisation of violations, is important in preventing violations. For this reason, this study advances a concept of ‘persuasive prevention’, i.e., the constructive engagement backed by credible multilateral force to prevent or halt mass atrocity crimes. The thrust of this concept is to provide guidance to ensure consistent compliance by States with 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 and IHL obligations. The notion or mechanism of ‘persuasive prevention’ may be seen from the following graduations: the force of law (preventive intervention through the use of legal measures); the responsibility to prevent (timely enforcement action); the capability to protect (persuasion backed by force); and the obligation to cooperate (taking R2P seriously). The concept of persuasive prevention derives from the following findings in this study:

The starting point is that a focus on the military option not only risks neglecting other more sustainable non-military responses. The confrontational approach also makes such other responses more difficult to implement as they often depend on cooperation with the government of the state concerned. Like the notion of R2P, the thresholds of the AU right of intervention are mass atrocity crimes; thereby the exercise of universal jurisdiction can also be considered a form of intervention under Article 4(h). In order to progress from rhetoric to reality, the AU faces the challenges of political will and the resource gap. This discussion, therefore, addresses this conceptual and operational gap by employing the concept of ‘persuasive prevention’ to explore the extent to which the ASF may be deployed pursuant to Article 4(h) of the AU Act to stop mass atrocities, by helping to define the range of legal options available to policy-makers. The point is to use military means not to defeat a State but to pursue perpetrators of mass atrocity crimes through the ‘force of law’, ‘responsibility to prevent’, ‘capability to protect’ and the ‘obligation to cooperate’ and the ‘duty to prosecute or extradite.’ The key lever here is how to influence the calculus of potential perpetrators to ensure compliance with human rights and humanitarian law obligations through compellence, deterrence and, if need be, inducement.

The premise is that measures to ensure the observance of the law in prospect, rather than intervention and penalisation of violations, are important in preventing mass atrocity crimes. The hypothesis is that if the thresholds for intervention are jus cogens crimes, then borderless ‘persuasive prevention’ to secure the effective application of the law is far more beneficial than the punishment of perpetrators after atrocities and unnecessary human suffering and atrocities have been inflicted upon the civilian population. The key question is how to use military force to stop mass atrocities. Thus, the aim of this analysis is to introduce the concept of ‘persuasive prevention’ for military interventions pursuant to Article 4(h) as well as R2P, and to outline its application to doctrinal development within the framework of the AU. It does so by: 1) reframing the discourse from use of force to protect human rights, to the deployment of military force to stop mass atrocity crimes in Article 4(h) of the AU Act; and 2) discussing how to translate the normative
commitment in Article 4(h) and R2P into a concrete and legal course of action to prevent mass atrocity crimes by the ASF. A methodology of ‘persuasive prevention’ will fill an important legal policy void in the implementation of Article 4(h) to prevent mass atrocities, and is especially relevant given the current military challenges in the Darfur crisis as well as the institutional and financial incapacity of the AU. This study provides a fresh perspective to the implementation of treaty-based intervention to prevent mass atrocity crimes in accordance with international law.
Part 1: From ‘Humanitarian Intervention’ to Statutory Intervention

The ‘right’ in Article 4(h) implies a legal title by definition, incompatible with the traditional notion of sovereignty whereas ‘intervention’ entails coercive measures including economic and criminal sanctions, non-offensive as well as offensive military action. Article 4(h) of the AU Act predates the concept of the ‘Responsibility to Protect’ (‘R2P’), which was endorsed by the 2005 World Summit in the UN General Assembly. The World Summit Outcome Document affirmed that every sovereign government has a responsibility to protect its citizens and those within its jurisdiction from genocide, war crimes, ‘ethnic cleansing’ and crimes against humanity. The enunciation of the notion of R2P was not intended to detract in any way from the much broader range of obligations existing under international humanitarian law (IHL), international human rights law, refugee law and international criminal law. The decisive endorsement by the UN General Assembly came at the World Summit itself, where 154 Heads of State and Government embraced the notion of R2P. The UN General Assembly, as the world’s most representative forum, is typically seen as the organization’s norm-setting body. Article 4(h) intervention is rooted in the same school of thought as R2P, which is based on the concept of sovereignty as responsibility.

Article 4(h) has the same thresholds for intervention as R2P, although it does not use the innocuous term ‘ethnic cleansing’. These thresholds are not only serious international crimes subject to universal jurisdiction but are also crimes that invariably involve a government’s action against its own citizens. The notable differences between the formulation of R2P and Article 4(h) are that: (a) the implementation of R2P is ‘through the Security Council’ whereas the AU Act is silent on the authorisation of the Security Council; (b) R2P can be triggered when the target state is ‘manifestly unable or unwilling’ to protect its citizens, whereas the AU can intervene with or without the consent of the target Member State; (c) while R2P is a political commitment, Article 4(h) is a legal obligation. Although ‘mass atrocity crimes’ is not a term of art, for purposes of convenience, the study shall adopt the generic term ‘mass atrocity crimes’ to refer to the thresholds for intervention under Article 4(h) as well as R2P, namely, war crimes, genocide and crimes against humanity.

The broader term of ‘mass atrocity crimes’ is used for purposes of intervention, while limiting the legal definitions of the crimes for purposes of prosecution. The reasoning being that thresholds for Article 4(h) intervention are high, elusive to prove leaving much room for political discretion. Further, there is an overlap among these thresholds. The downside of a generic term is that it adds a new meaning to the thresholds which the signatory States did not intend and may also open too wide a door for intervention. However, Article 4(h) and R2P do not entail military intervention. If based on the extent of crimes actually committed or the numbers of casualties, these thresholds fail to consider...
that Article 4(h) and R2P have a preventive function. It is not necessary to prove beyond doubt that such crimes have been committed before action is taken. Article 4(h) and R2P have drawn a line between competing norms of state sovereignty and the collective obligation to protect fundamental human rights.

According to Kindiki, the couching of intervention by the AU as a ‘right’ is shaky since it could be viewed as giving the AU discretion to decide whether or not to intervene. He argues that the provision should have required the AU to intervene as a matter of ‘duty’ since “the sense of obligation to intervene is more likely to move the AU into action.” Although this is legally sound, Baimu and Sturman contend that it is doubtful whether African States pay attention to such details as to whether they have a right or a duty to act in a certain way. “[W]hat matters is whether States have the political will to undertake what they committed themselves to do.” However, in legal terms, a ‘duty to act’ or responsibility to protect makes a stronger case than a mere ‘right to act’. Williams argues, and convincingly so, that Article 4(h) represents a “permissive norm: that is, it stipulates what action can legitimately be taken in certain circumstances but does not oblige the AU to act in response to those circumstances.” Where forcible intervention by a regional organisation or sub-regional organisation is based not explicitly on Article 53 of the UN Charter, but on a specific statute such as the AU Act, then such intervention amounts to treaty-based intervention at the regional or sub-regional level. Humanitarian intervention undertaken by a state or states acting without the authority of the UN Security Council or regional organization shall, for convenience albeit misleading, be referred to as ‘unilateral humanitarian intervention’ or better still ‘unauthorised intervention’. The term enforcement action without authorisation will also be used interchangeably with unilateral or unauthorised humanitarian intervention. Article 4(h) gives the AU a strong legal basis for intervention in the face of mass atrocity crimes. This is statutory intervention, which removes the need to justify intervention on moral and ethical grounds, i.e., the end of ‘humanitarian’ intervention. The AU Act is the trailblazer amongst international treaties to explicitly provide for the right of intervention.

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3. Ibid.
4. Kindiki, supra note 10; Gill, supra note 10, p. 10.
Part 2: Balancing Act:
Reconciling Enforcement Action and the Prevention of Mass Atrocity Crimes

2.1. Rethinking Intervention: Military Force to Pursue Perpetrators of Mass Atrocity Crimes

The notion of R2P, advances a narrative that military intervention to protect endangered human lives should and will occur only as a last resort, after the failure of other measures to achieve satisfactory results. Inevitably, it will be part of a broader political strategy directed towards persuading the targeted State to cooperate with international efforts. One element in some arguments for the use of military force to pursue perpetrators of mass atrocity crimes is that in the long run the measured threat or use of force may be preferable to economic sanctions. This is because the latter tends to adversely affect the lives and well-being of the civilian population, while governing culprits remain unscathed.1 Questions, then, arise as to whether human rights can be defended through force or whether use or threat of use of force can be justified to prevent or halt mass atrocity crimes. The problem of international intervention is that it requires striking the right balance between state sovereignty and R2P. The current challenge posed by the Darfur crisis further places emphasis on the need to develop ways to respond effectively to prevent mass atrocity crimes. The issue then becomes: when is force necessary to protect fundamental human rights? Or to reframe the debate, when is collective use of force necessary to prevent mass atrocity crimes?

It is usually assumed that the mere presence of foreign military forces, or their initial action in stopping ongoing atrocities, will create the conditions for lasting improvement. However, the circumstances within a target society that give rise to humanitarian intervention are deeply ingrained, and are not fundamentally changed by a temporary injection of foreign military forces.2 Nonetheless, military intervention can save lives and create space in which peace can be built. For example, following the 1999 NATO action in Kosovo, many States argued that the use of force was necessary to induce Yugoslavia to accept a peace plan to restore security for ethnic Albanians.3 In 1998, Annan affirmed that “if diplomacy is to succeed, it must be backed by force and fairness.” In this sense, in 1999, he reiterated that “there are times when the use of force may be legitimate in the pursuit of peace.”4 In the 2000 Millennium Report, he declared that “[a]rmed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.”5 In his speech to the UN Human Rights Commission on the anniversary of the genocide in Rwanda, the then Secretary-General Annan, commented on the Darfur crisis and said that “[w]hatever term it uses to describe the situation, the international community cannot stand idle[…] The international community must be prepared to take swift and appropriate action. By “action” in such situations I mean a continuum of steps, which

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may include military action.” Assuming Annan is right on such use of military might, then it follows that there is need to explore how multilateral military force can be employed for the protection of fundamental human rights to prevent mass atrocity crimes.

Clearly, the Kellog-Briand Pact and the UN Charter outlawed recourse to use of force as a means of settling disputes in international relations. Additionally, in the Nicaragua case, the ICJ held that the use of force could not be an appropriate method to ensure the protection of human rights and that where human rights are protected by international conventions, the form of respect for, and protection of, human rights is provided for in relevant human rights conventions. Intervention is wrongful when it uses methods of coercion in regard to such choices that must remain free ones involving a political, economic, social and cultural system and the formulation of foreign policy. The UN Charter as a comprehensive framework agreement addressed questions of enforcement only in a rudimentary way. The relevant provisions largely deal with institutional enforcement. Most confer upon Charter organs the power to address specific situations and to make non-binding recommendations.

Although the UN Charter contains fundamental ‘Purposes of the UN’ for the maintenance of international peace and security, with corresponding mechanisms for the protection and enforcement of international peace and security in Article 2(4) and Chapter VII, there are no equivalent provisions or mechanisms in the Charter for the protection of human rights. By comparison, Article 53 of the UN Charter is also not clear on enforcement rights of regional organisations such as the AU if the Security Council is unable or unwilling to act. Article 51 of the UN Charter, which affirms the inherent right of self-defence against armed attacks and implicitly recognises a right to take non-forcible measures, is the only provision indirectly bearing on decentralized responses by States. In contrast, Chapter VII of the Charter regulates the circumstances under which the Security Council can take coercive enforcement action against Member States in the event of “any threat to peace, breach of peace or act of aggression.”

There is no question that the Security Council can take Chapter VII enforcement action in situations that involve gross breaches of fundamental human rights obligations. It is one thing for the Security Council to determine the existence of a situation listed in Article 39 of the UN Charter; it is quite another thing to agree what, if any, forcible action to deal with the situation is to be taken by whom and at which point in time. The lacuna in the enforcement of fundamental rules has arguably been filled by States taking collective countermeasures, and by regional organisations under the authorisation of the UN Security Council, when it is able

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2. The 1928 Kellogg-Briand Pact supra note 40; see also UN Charter, Art. 2(4).
4. Cf. Art. 36 of the UN Charter (recognising the Security Council has a right to recommend measures aimed at the pacific settlement of disputes) Arts. 10–14 and 62 UN Charter (recognising the competence of the General Assembly and the UN Economic and Social Council (ECOSOC) to pass non-binding resolutions).
6. See the UN Charter, Art. 39.
to act, through ‘peacekeeping’ or ‘peace enforcement’ under Chapters VI and VII of the UN Charter, respectively. As for direct recourse, the UN Economic and Social Council (ECOSOC) subsidiary organs have established different procedures for addressing human rights complaints by individuals or other non-state actors. In particular, under ECOSOC Resolutions 1235(1967) and 1503(1970), the Human Rights Council, and its subsidiary organs can investigate and examine situations revealing a ‘consistent pattern of gross and reliably attested violations of human rights’ and can set up country-specific working groups.1

Following the ruling of the ICJ in the Nicaragua case, it has been asserted that multilateral treaties in the field of human rights provide their own machinery for monitoring, supervision, and implementation. For that reason, countermeasures, in reaction to breaches of obligation under such treaties, could not be resorted to.2 In the Nicaragua case the ICJ held that although the US, which would have had to rely on means of ensuring respect not provided for in the applicable conventions, “might form its own appraisal of the situation” in Nicaragua, “the use of force could not be an appropriate method to monitor or ensure such respect.”3 However, it is important to note that the ICJ’s observation that the US could itself form its own appraisal of the human rights situation in Nicaragua was indispensable.4 That is so because the ICJ was precluded from interpreting or applying multilateral treaties by reason of the US reservation to the jurisdiction of the ICJ. Therefore, any evaluation of the question whether the US could take countermeasures against Nicaragua had to be based on customary international law.

The ‘self-contained’ regime5 of human rights treaties in the ICJ dictum above also raises problems if one considers, for example, Article VIII of the Genocide Convention which stipulates that the States parties may call upon the competent organs of the UN to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide. This provision seems to indicate that competent organs do not act on their own accord under the Genocide Convention. For any action appropriate for the prevention or suppression of acts of genocide must be taken on the basis of the Charter, not on the basis of the Genocide Convention.6 Similarly, common Article 1 of the four Geneva Conventions of 1949 may also be seen to point in the same direction that “the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.” This view is strengthened by Article 89 of the 1977 Additional Protocol which provides that “[i]n situations of serious violations of the Conventions or this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the [UN] and in conformity with the [UN Charter].” This could be taken as implying an obligation to take enforcement action in cooperation with the UN against an errant state. Yet, military enforcement measures taken by the UN Security Council itself, as envisaged in Article 43 of the Charter, still remain a dead letter.

It is obvious that the effective functioning of the human rights treaties procedures is

3. Ibid., para. 268.
4. Ibid., para. 267.
fully dependent on the good faith of the State parties. Where a state is violating human rights of its citizens on a widespread scale, it is unlikely that the victims, will attempt, or will have the opportunity to attempt, to have recourse to the legal remedies, if any, that are available to them. It is hardly imaginable that an amicable solution to the matter on the basis of respect for human rights will, or indeed can, be arrived at in a situation where a State party is wilfully engaging in premeditated breaches of human rights obligations.1

In the context of mass atrocity crimes it is not to be expected that an author State will be deterred by mere verbal rhetoric from continuing to commit the crime. Even a display of military power might not suffice to put an end to the crimes under Article 4(h). The end result will most likely be that armed force will be necessary if the commission of the crimes is to be stopped. Although the author State may, naturally, be tempted to resist at all costs. This suggests that armed force may be used against a State committing an international crime. On this score, de Hoogh counsels that “resort to countermeasures in response to the commission of an international crime would, a fortiori, be fully justified under the human rights instruments as well as customary international law.”2 Hence, resort to countermeasures may be possible and appropriate means to ensure respect for human rights. The motivation for this view is that such respect might not be forthcoming on the basis of representations alone such that demands for reparation regarding breaches of human rights obligations may be enforced by way of countermeasures.3

2.2. Legality of Use of Force to Prevent Mass Atrocity Crimes

While the UN Charter proscribes the threat to use force, this does not necessarily mean that any display of military force will constitute a prohibited threat in Article 2(4) sense. Preparation for self-defence, for instance, seems to be lawful.4 The holding in the Corfu Channel case as well as that in the Nicaragua case indicates that it is not just any display of force that amounts to a breach of the prohibition under Article 2(4). Looking at the Corfu Channel case, the issue concerned the UK sending ships to action stations through the Corfu Channel, an international strait, in order to affirm its rights of innocent passage. Such action was considered not to amount to violation of Albanian sovereignty.5 In the Nicaragua case, which involved military assistance to rebels, the ICJ was not convinced, considering the circumstances that military manoeuvres held by the US near the borders of Nicaragua constituted a prohibited threat of force.6

A number of commentators have argued that moderate military force, by contrast, can in principle be aimed at the perpetrators of mass atrocity crimes without also punishing the victims.7 Arguendo, the logical argument born from the reasoning of the ICJ in the Nicaragua and Corfu Channel cases is that intervention to stop or prevent mass atrocity crimes is not within the ambit of prohibited intervention under the UN Charter. This

4. Ibid., p. 287.
view is supported by Brownlie who argued that the use of force which is not accompanied by intent to violate territorial integrity or political independence is not contrary to the prohibition in Article 2(4) of the Charter. It is, therefore, fair to suggest that multi-lateral use of force to prevent mass atrocity crimes constituting *erga omnes* obligations is not contrary to the spirit of the prohibition in Article 2(4) of the UN Charter.

Taking a positive side of the 1999 NATO intervention in Kosovo, it would be difficult to challenge that the use of force could not be an appropriate method to ensure respect for human rights obligations in the face of mass atrocities by a government against its own citizens. Indeed, should armed force be resorted to, and operations carried out in compliance with rules of IHL, as NATO attempted to do in Kosovo, it could constitute the most effective means to bring about an end to mass atrocity crimes. This is why de Hoogh is of the view that in the *Nicaragua* case, the ICJ may have made the foregoing statement in the light of the peculiar facts of the case; that the humanitarian objective of protection of human rights could not be considered compatible with “the mining of ports, the destruction of oil installations, or with the training, arming and equipping of the *contras*."

According to the reasoning of the ICJ in the *Nicaragua* case, States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack’. Since it is not possible for States collectively to lawfully use force in reaction to acts not constituting an armed attack, the AU’s right to intervene without the authorisation of the UN Security Council may be viewed as invalid. A persuasive argument can be made, however, that the peremptory norm in Article 2(4) of the UN Charter, does not simply prohibit the use of force, but the use of force against the territorial integrity or political independence of a State. It is, therefore, conceivable to maintain that the prohibition of force provision leaves open the possibility that there might be uses of force that do not impair the other State’s ‘territorial integrity’ or ‘political independence’ and are not consistent with the purposes of the UN and therefore, permissible. If this is the case, it may be correct to contend that the lawful uses of force in the UN Charter are, actually, enforcement measures, whose object and purpose is the protection of the territorial integrity and political independence of States. In fact, the thresholds for intervention pursuant to Article 4(h) of the AU Act as well as R2P are serious international crimes, which are subject to universal jurisdiction. As such, the ASF may use of force under Article 4(h) to pursue perpetrators of war crimes, genocide and crimes against humanity.

In the same vein, the *Legality of Use of Force (Yugoslavia v. Belgium)*, the agent for Belgium argued that the armed intervention was in fact compatible with Article 2(4) of the UN Charter proscribing the use of force in international relations. Belgium claimed that NATO’s actions were not directed against the ‘territorial integrity or political independence’ of Yugoslavia but in support of Security Council resolutions that explicitly affirmed the sovereignty and territorial integrity of Yugoslavia. Hence NATO did not

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2. *Nicaragua case*, supra note 24, paras. 134–135; see also de Hoogh, supra note 2, p. 323.
4. See de Hoogh, supra note 2, p. 175.
employ force “in [a] manner inconsistent with the Purposes of the [UN]” as Article 2(4) proscribes.¹ According to Caplan, however, “this restrictive interpretation of Article 2(4) is not supported by the travaux préparatoires of the drafting of the Charter; nor does it reflect the views of the vast majority of legal scholars on the subject.”² It is clear that the Charter prohibits any unilateral use of force and the travaux préparatoires leave no doubt that the terms ‘territorial integrity’ and ‘political independence’ were included not to qualify an absolute prohibition of the use of force but rather to emphasise the protection of smaller States.³ In this connection, Simma informs – and Sunga echoes – that the purpose of inserting the phrase ‘or in any other manner inconsistent with’ in Article 2(4) was not to open the door to implicit exceptions from the rule but to make the prohibition watertight.⁴

Nevertheless, the textual exegesis of the phrase ‘against the territorial integrity or political independence’ in Article 2(4), seems to suggest that only force against the territorial integrity or political independence of a State is prohibited.⁵ That is not to imply that force which is not against the territorial integrity or political independence of States would be permissible, but rather, it entails that any such use of force is not covered by this specific part of the prohibition of Article 2(4) of the Charter, and that consequently, it would not, on that account, entail a breach of obligations under the provision.⁶ This argument gains support from the Friendly Relations Declaration – that is deemed as authoritative interpretation of the provision – which proclaimed that: “[e]very State has the duty to refrain from the threats or use of force to violate the existing international boundaries of another State.”⁷ The prohibition to use force against the ‘political independence’ of a State is linked to the prohibition of intervention in international law. In the Nicaragua case, the ICJ stated that:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulations of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the direct form of support for subversive or terrorist armed activities within another State.⁸

⁵. See de Hoogh, supra note 2, pp. 288–289.
⁶. *Ibid*.
It is thus conceivable to suggest that the qualifier ‘political’ in the sense of independence of a State, against which States may not use force, relates to the freedom to order one’s internal affairs such as the political, economic, social, and cultural system and external affairs, including the formulations of foreign policy.\textsuperscript{1} Once certain choices, such as respect for human rights, can no longer be in the exclusive domain of a state owing to international obligations, the subject-matter on which that choice turns is said to be out of the realm of domestic jurisdiction, thereby meaning a “restriction has been placed on the independence of a State.”\textsuperscript{2} In this sense, it is difficult to argue that the human rights provisions of the UN Charter, coupled with a panoply of human rights treaties that have been adopted since 1945 can be ignored in favour of sacrosanct principles of state sovereignty and non-use of force. In addition, the use of armed force will not necessarily in every case be directed against the political independence of a State. Force used to pressure a State into compliance with its international obligations will, therefore, not of necessity constitute a breach of obligations under Article 2(4) of the Charter. However, this is not to say that the use of force in pursuit of another State’s compliance with its obligations becomes lawful \textit{per se}. It remains to be considered to what extent uses of armed force are illegal due to inconsistency with the Purposes of the UN.\textsuperscript{3}

Both Article 4(h) and the notion of R2P have defined the international debate about international action to halt mass atrocity crimes and refined the steps necessary to put those principles into practice. It is clear that Article 4(h) which constitutes consensual intervention by way of community enforcement of the law generally exists only by means of centralizing the enforcement function in community organs.\textsuperscript{4} By adopting the AU Act, there is reason to argue that Article 4(h) can be interpreted as an \textit{a priori} invitation by AU States for the AU to intervene to prevent or stop mass atrocity crimes in the form of war crimes, genocide and crimes against humanity.\textsuperscript{5} The object of the AU using force against an author state of serious international crimes will thus be, in the first instance, to effect the cessation of the conduct constituting the crime. Given that promotion of human rights is one of the purposes of the UN under Article 1(3) of the Charter, intervention aimed solely at putting an end to human rights violations within a State, rather than acquiring its territory or impinging on its political independence, falls outside the proscription of use of force under the UN Charter. This view is support by commentators who have noted that:

If, as a last resort, coercive economic, diplomatic, or military measures are ultimately required to protect people, they do not take place in a vacuum, but rather are natural extensions of the ongoing, long-term task of prevention and protection. Thus, R2P envisages a much longer process and larger toolkit than traditional humanitarian interventions. Also, the 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.\textsuperscript{6}

\begin{footnotes}
\item[1] See de Hoogh, \textit{supra} note 2, p. 290.
\item[4] \textit{ibid.}, p. 92.
\end{footnotes}
The AU’s statutory right to intervene does not impair a State’s juridical statehood or legal independence in terms of Article 2(7) of the Charter, but curtails their autonomy in domestic affairs. However, if UN authority were not required for such enforcement action then this would be an alteration to the present restrictions on the use of force and a major dilution of the authority of the UN Security Council. On balance, in view of the codifications of enforcement by consent by the AU, it would seem logical to regard the AU, being a multilateral regional organisation, as a legitimate alternative to UN authorisation when the Security Council is deadlocked.

Few would doubt that the international crimes under Article 4(h) are jus cogens norms based on prohibitive primary rules of international law. As such, all the legal consequences applicable to an internationally wrongful act will equally apply to international crimes. Applying the maxim aut dedere aut judicare, it is possible to argue that the arrest, prosecution or extradition, conviction and punishment of perpetrators of mass atrocity crimes under Article 4(h) may be demanded and imposed on a State that has committed an international crime. This argument is supported by the concept of obligations erga omnes, or obligations towards the international community, which conveys the idea that all States have a legal interest regarding breaches of such obligations.

Thus, any State is authorised to proceed with the prosecution, conviction and punishment of individuals engaging in, inter alia, war crimes, genocide and crimes against humanity as contained in Article 4(h) of the AU Act subject to jurisdiction. The argument for intervention through individual criminal liability under Article 4(h) is even buttressed by the fact that the populations may not be held collectively accountable for the crime of the State or its agents. From an international criminal law perspective since Nuremberg, only persons who are individually responsible for a criminal act are accountable. It follows that the AU may not, due to an international crime committed, take it on itself to commit another crime towards the populations of an author Member State. Nor could the nationals of a State be deprived of their human rights, and they could not be discriminated against on the basis of their State’s crime. It is important to stress that specific mechanisms of supervision and control, as well as complaint procedures available to States and individuals, take precedence over any attempts at enforcing human rights obligations on the inter-state level.

2.3. ‘Crossing the Rubicon’ – Extraterritorial Enforcement of Obligations Erga Omnes

In the Barcelona Traction (obiter) dictum, the ICJ propounded that obligations erga om-
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...nse are the ‘concern of all States’ and ‘owed towards the international community as a whole’, such that all States have a legal interest in their protection, and they enjoy ‘corresponding rights of protection’. The ICJ, did not, however, spell out the ways and means by which States could respond to violations of obligations erga omnes. Nor did the ICJ elaborate in any detail on how the new obligations should be identified. Nonetheless, obligations erga omnes are most intimately connected to the realm of secondary rules of international law, in that ‘all States can be held to have a legal interest’. This is “the consequence of the characterization of an obligation as erga omnes only if and when such an obligation is breached.” Thus, being erga omnes is a consequence, not the cause, of a right’s fundamental character. The criteria to establish whether an obligation possesses erga omnes does not lie with the human rights character of the obligation, but with the fact that it is established under rules accepted and recognized by the international community of States as a whole as peremptory norm. The expression erga omnes has a wider meaning and goes well beyond issues of law enforcement.

Customary obligations erga omnes almost inevitably have a conventional counterpart. Nearly all treaties regulating matters that are protected by obligations erga omnes contain at least some provisions on enforcement. The multiplication of substantive legal rules is thus paralleled by a proliferation of enforcement mechanisms. It is also safe to say that various treaties not only cover the same area of law, but impose upon States obligations that are either identical in scope or further-reaching than respective customary obligations erga omnes. Given the number, and wide acceptance of such treaties, it is highly likely that a State violating an obligation erga omnes will at the same time be in breach of one, or more, treaty obligations. However it should be noted that:

> It would be simply wrong to conclude that any breach of an obligation deriving from peremptory norm of international law is an international crime and that only the breach of an obligation having this origin can constitute such a crime. It can be accepted that obligations whose breach is a crime will ‘normally’ be those deriving from rules of jus cogens, though this conclusion cannot be absolute. But above all, although it may be true that failure to fulfil an obligation established by a rule of jus cogens will often constitute an international obligation, admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime.

Bassiouni submits that international crimes that rise to the level of jus cogens constitute obligation erga omnes that are indelible. Bassiouni argues that the legal basis for arguing that serious international crimes such as those in Article 4(h) have reached the status of jus cogens consists of: the international pronouncements, or what may be termed as

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2. *Ibid.,* para. 34.
3. De Hoogh, supra note 2, p. 53 fn, 234.
5. Tams, supra note 30, pp. 97–98
international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; the language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law; the large number of States which have ratified treaties related to these crimes; and the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.\(^1\)

Going by Bassiouni, the serious international crimes such as those in Article 4(h) are *jus cogens* crimes. As such, just like peremptory norms, they are based on prohibitive primary rules of international law. Accordingly, all the legal consequences applicable to an internationally wrongful act will apply also to international crimes.\(^2\) A breach of *erga omnes* obligations would trigger state responsibility. However, the principle of state responsibility has rarely been applied in the sphere of human rights. Part of the explanation is the confusion between that principle and the principle of jurisdiction.\(^3\) As President Higgins explains, “the law of jurisdiction is about entitlements to act, the law of state responsibility is about obligations incurred when a state does [a wrongful] act.”\(^4\) In principle, all other States are to be considered as an ‘injured State’ in the case of an international crime. Although the question arises as to whether all other States, individually, are entitled to respond to an international crime in the same manner as if their individual rights were infringed by the commission of the crime.\(^5\) The answer to that question depends to a large degree upon the progressive institutionalisation, as well as the establishment of collective procedures.\(^6\) States will be entitled to invoke some of the legal consequences normally at the disposal of an injured state in exercise of the “entitlement to require the author state to stop the breach.”\(^7\)

Jurisdiction can be viewed as “the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially.”\(^8\) International law limits the ability of a state to apply its statutes extraterritorially. Legally speaking, a State may not extend its power beyond the limits of national jurisdiction without authoritative legal bases. Thus, international legal principles maintain that domestic jurisdiction rests on reconciling a state’s interest in a particular offence with other States’ interests in that offence. This implies that a State may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. A State has jurisdiction based on five principles, namely territoriality principle, which applies when an offence occurs within the territory of the prosecuting state; nationality principle, which admits jurisdiction when the offender is a national or resident of the prosecuting state; the protective principle, which permits jurisdiction where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state; the passive personality principle, which recognizes jurisdiction

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1. Ibid., p. 70.
6. Ibid.
7. Ibid., p. 65.
where the victim is a national of the prosecuting state; and the universality principle, for *delicta juris gentium* whose perpetrators are *hostis humani generis* (enemies of all people) and allows that jurisdiction may be based solely on securing custody of the perpetrator. The jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce. For this reason, extraterritorial jurisdiction involves a two-step process: firstly, it must be determined whether a domestic law exists that covers the offensive acts; secondly, it must be ascertained whether a sovereign State may, under international law, prescribe such conduct extraterritorially.

*Delicta juris gentium* stem from the fundamental fact that responsible government control is wanting in the areas where they occur. Often these crimes are perpetrated in areas beyond the actual sovereign control of any authoritative government or in situations that provide impunity. As a consequence, there is a growing recognition that universal jurisdiction exists such that all states have a right to prosecute or even entertain civil suits against perpetrators of *jus cogens* crimes. International codification and consensus since the Second World War have confirmed war crimes as international criminal acts, thus permitting States to define and punish those extraterritorial crimes wherever, and by whomever, they are committed – a case of ‘crossing the Rubicon’. There are several international conventions that clearly provide for a duty to prosecute the humanitarian or human rights crimes enumerated in Article 4(h) of the AU Act, including in particular, the grave breaches provisions of the 1949 Geneva Conventions, the Genocide Convention and the Torture Convention.

Although there is no specific treaty requiring prosecution of crimes against humanity, under traditional notions of customary law, perpetrators of crimes against humanity are deemed to be *hostis humani generis*, and any State, including their own, can prosecute and punish them through its domestic courts. In the absence of a treaty containing the *aut dedere aut judicare* principle, the notion of universal jurisdiction is generally thought to be permissive, not mandatory. Customary international law as well as the *jus cogens* norms not only establishes permissive jurisdiction over perpetrators of crimes against humanity, but also requires the prosecution of perpetrators. Like the Geneva Conventions by virtue of

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the nearly universal ratification, the ICJ determined that the substantive provisions of the Genocide Conventions constitute international customary law binding on all States.¹

The same is true with torture as enunciated by the Committee against Torture that “[e]ven before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture.”² The Genocide Convention “does not derogate from that obligation. Parties to the anti-genocide instrument have merely obligated themselves to prosecute offences specifically committed within their territory.”³

But then, just as States cannot expect their domestic courts to enforce criminal law on their own without the enforcement powers of the police, equally, the international community must recognize that it cannot just create the ICC without providing it with assistance and police powers to enforce its orders and decisions. This problem has been most clearly manifested in the international community’s reluctance to assist in the apprehension of those indicted by the ICC in Northern Uganda and Darfur.⁴

However, it is widely accepted that obligations *erga omnes* would be obligations towards all the parties of a multilateral treaty, towards all the States bound by a regional or universal rule of customary international law or towards the international community. In this sense, all other States would be affected in that their objective interests result only from the recognized importance of a particular prohibition, not from the fact that a violation of the prohibition necessarily amounts to a breach of an obligation towards all States.⁵ The notion of *erga omnes partes* or *erga omnes contractantes* is sometimes used to describe treaty-based obligations in whose performance all contracting parties are said to have a legal interest.⁶ Some commentators have also argued that obligations *erga omnes partes* are notably said to arise under human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Banjul Charter or the International Covenant on Civil and Political Rights (ICCPR),⁷ as well as the 1949 Geneva Convention and the 1977 Additional Protocols, or IHL in its entirety, among other multilateral treaties.⁸

According to de Hoogh, “[r]ather than purely concerned with questions of standing and law enforcement, the term ‘erga omnes’ has become a legal *vademecum* prescribed to produce a wide array of legal effects.”⁹ States can respond to breaches of *erga omnes* by instituting ICJ proceedings and, if the breach is of a serious character, by resorting to countermeasures. The *erga omnes* enforcement rights are triggered by breaches of customary international law. However enforcement of obligations *erga omnes* can also be affected by treaties. This could notably be the case if treaties protect the same interests as the *erga

¹. *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15*, p. 23 (holding that the Convention’s principles are binding on States, “even without any conventional obligation”).
⁵. De Hoogh, *supra* note 2, p. 54.
⁷. *Ibid*, p. 120 fn. 25.
omnes concept but confer upon States rights of protection that are substantially different from those deriving from the erga omnes concept. Where this is so, the State responsible for the wrongful conduct apparently incurs responsibility for the treaty breach and the breach of customary international law. State parties to the treaty in question may thus hold two sets of enforcement rights. As members of the international community, they have enforcement rights based on the erga omnes concept; as treaty parties, they have enforcement rights based on the treaty.1

To go to the heart of the matter, a recurrent feature of peremptory norms is that they are referred to as being intended for the protection of the fundamental interests, community interests, common interests, general interests of the international community, overriding vital interests and values of the international community of States.2 Obligations owed by a State to the international community as a whole are the concern of all States. All States have a legal interest in their protection, and these are therefore obligations erga omnes. Delicta juris gentium (crimes against all nations) such as those in Article 4(h) affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity.3 The logic of extraterritorial enforcement of delicta juris gentium is that these crimes are often committed in locations where they cannot be prevented or punished easily. This suggests the necessity of extending universal jurisdiction, not only to ensure prosecution for these heinous acts, but also to serve as viable means for deterring similar crimes in the future. For Joyner:

The perpetration of these offences amounts to the rejection of civilized society. They offend the law of civilized states and have therefore been declared crimes against universal law. Not only do such acts of savage inhumanity imperil the peace and security of the state in which they were committed, they also threaten the peace and security of other states in the world community as a whole. Such odious and dangerous offences must be regarded as crimes of international concern.4

Universal jurisdiction assigns a State the authority to prosecute a criminal under its own law, rather than that of the State where the crime was committed. This principle is grounded in the assumption that the prosecuting State is acting on behalf of all States. In the case of crimes under Article 4(h), therefore, unless the perpetrator or the victims are citizens or residents of the State wanting to prosecute, any assertion of authority to prosecute an alleged offender must be based on the principle of universal jurisdiction.5 Thus, there is a strong legal basis for using universal jurisdiction as a means of intervention for prosecuting perpetrators of jus cogens crimes encapsulated in Article 4(h) of the AU Act, who remain free and at large. The pragmatic rationale for universal jurisdiction is justified where the perpetrators of the crimes would otherwise go unpunished. In the Canadian case of R. v. Finta, for instance, Judge La Forest held that the extraterritorial prosecution of war crimes and crimes against humanity was of ‘practical necessity’ because the central concern is state-sponsored or sanctioned

1. Ibid., pp. 252–253.
2. De Hoogh, supra note 2, pp. 45 fn. 198 and 199.
5. Ibid., p. 163.
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persecution and, in such cases, the state is unlikely to prosecute and the perpetrators are often dispersed or exiled.¹

The jurisdictional duty to prosecute perpetrators of serious international crimes correlates to the idea that those crimes, as stipulated in Article 4(h), offend all States. The ILC Articles on State Responsibility manifest that violations of erga omnes and jus cogens norms affect all States, whether perpetrated by the governments of States or individuals. This situation invites support for a kind of actio popularis, which would enable any government to vindicate rights common to all. Going by this reasoning therefore, the erga omnes and jus cogens doctrines can be used to buttress the right of universal jurisdiction by all States to prosecute perpetrators of mass atrocity crimes articulated in Article 4(h) of the AU Act.² If this is the case, then the international legal norms of erga omnes and jus cogens lend support to the claim that universal jurisdiction can play a role in obtaining jurisdiction over perpetrators of mass atrocity crimes in Article 4(h) of the AU Act. It is thus reasonable to say that there clearly exists universal jurisdiction over the mass atrocity crimes in Article 4(h) of the AU Act.³

2.4. Towards Deterrence to Close the Gap between Accountability and Impunity

There can be no doubt that almost all the international crimes under Article 4(h) are characterized by the fact that they can only be committed with willful intent or premeditation. Any State committing genocide or engaging in war crimes and crimes against humanity displays its animus (intention to commit a crime) to do what it is doing. If it had had no such animus, one would expect it to act to suppress the conduct of its organs. In fact, none of the crimes in Article 4(h) can be committed without the active cooperation of highly placed State organs, such as top government officials and police and military officers high up in the ranks.⁴ The specific treaties in this context make reference to elements of intent. For example, Article II of the Genocide Convention stipulates that “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.” Further, the existence of a ‘wide spread’ and ‘systematic’ practice for crimes against humanity would suffice to establish the willful intent or premeditation on the part of the author state. The same can be said for ‘willful killing’, for example, in terms of war crimes.⁵

Mass atrocity crimes occur where perpetrators can commit such atrocities with impunity, such as in weak states where the judiciary is dysfunctional and there is no law enforcement, often because of chaotic conditions or irresponsible leadership during times of armed conflict. In this scenario, perpetrators commit their egregious crimes then flee, leaving few, if any, witnesses. The enforcement of human rights and IHL in such a situation is difficult, if not completely lacking. The perpetrators calculate that they will commit the crimes with impunity. According to Joyner such crimes “flourish in direct propor-

5. The Geneva Conventions I, II, III, IV, Arts. 50, 51, 130 and 147, respectively; ibid., p. 61.
tion to the dearth of political order and the deficiency of law enforcement. Persons can often perpetrate these crimes because the conditions in which they operate afford them impunity from the forces of law and order."

It may thus be suggested that deterrence is the key when it comes to conflict prevention. Prosecutions have long been believed to have the potential to prevent future atrocities. The argument is that if leaders genuinely believe that they are likely to be prosecuted if they commit atrocities, then this will usually provide a strong incentive against such conduct. It is for this reason the framers of the Rome Statute of the International Criminal Court (ICC) set out in its preamble their determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” The benefit of deterrence accrues overwhelmingly to the international community as, to the extent it works, it prevents future atrocities around the world. This view is confirmed by the UN Secretary-General Ban Ki-moon, who has noted that by seeking to end impunity, the ICC and ad hoc tribunals have been an essential mechanism for reinforcing efforts at dissuasion and deterrence.

On the one hand, it is necessary to understand that the interests and motivations of parties to a conflict are different, and this may impact on how effective deterrence may be. For instance, a credible threat of prosecution may be less effective against rebels, at least until the late stages of their rebellion by which time it is too late for them to ameliorate their conduct to escape prosecution. Most rebels embarking on their challenge to the reigning government may not be too concerned about potential future prosecution for the atrocities they commit since their immediate concern is survival and success. On the other hand, when it comes to the calculations of government officials, prosecution is a threat to something as they already have power and thus may have greater deterrent impact. If a credible threat of prosecution for potential perpetrators exists in the minds of a regime’s leadership, then those leaders have something tangible to lose and arguably will weigh that risk when deciding on how to respond to a challenge to their authority. If leaders knew that their policy options would automatically lead to investigation and prosecution, they might choose to respond differently to a challenge. The fact that this might exercise influence on leaders’ calculi is evident in Libya’s Muammar Gaddafi’s reaction to the handover of Charles Taylor to the Special Court for Sierra Leone (SCSL) when he said that “[i]t sets a serious precedent. This means that every head of state could meet a similar fate.” The point is that deterrence will be effective only if the threat of prosecution is sufficiently immediate and credible.

Similarly, in recent times the Lord’s Resistance Army (LRA) has been pushed towards accountability on multiple fronts by multiple actors. It seems that the ICC’s arrest warrants played a direct role in spurring the current peace initiative in Northern Uganda. The issuing of warrants helped alter the LRA’s calculations and created an incentive for the indicted commanders to negotiate. The ICC’s intervention also complicated Khara-

1. Joyner, supra note 162, p. 162.
2. SG Report on R2P, supra note 4, p. 11.
4. Quoted in ibid., p. 12.
5. Grono, ibid., 12.
toum’s continued support of the LRA, helping suffocate the LRA’s supply lines and uproot their secure safe havens. The ICC’s case focused international attention on the long overlooked crisis in Northern Uganda and added renewed pressure on efforts to end the conflict. The ICC’s threats to hold the LRA leadership criminally liable for its atrocities in Northern Uganda has embedded accountability and victims’ interests in the structure and vocabulary of the peace process. The parties to the talks have accepted, in principle, that at least some form of robust accountability is inevitable.\(^1\)

The point is that if heinous crimes in Article 4(h) of the AU Act go unpunished, this might lead to the creation of a cycle of violence, as either some victims, finding themselves in a position of power, might decide to take the law into their own hands, or some perpetrators, knowing that they will not be punished, might feel free to commit more crimes.\(^2\) It seems correct to contend that the prosecution, conviction and punishment of perpetrators of mass atrocity crimes constitute an imperative as a kind of measure against repetition. In the words of de Hoogh, “[f]or what is to prevent the responsible officials or organs of the State from repeating their acts if they are not subjected to individual scrutinisation for their role during the commission of the crime?”\(^3\) It is therefore, safe to say that the ICC and universal jurisdiction have the potential to give deterrence a credibility and validity it has not had before. It is for this reason that the AU needs to link the intervention under Article 4(h) to the regime to fight impunity in terms of Article 4(o) of the AU Act. A key component of R2P is the responsibility to prevent mass atrocity crimes from eventuating. It follows, therefore, that institutionalising deterrence pursuant to Article 4(h) is perhaps one of the most effective ways to give meaning to the right to intervene which is rooted in the same school of thought as R2P.

2.5. Preventive Deployment: The Need for Deterrence, Compellence (and Inducement)

While non-violent humanitarian intervention is the ideal modality, it is reasonable to recognise that it cannot be an absolute panacea to some tragedies such as genocide, war crimes and crimes against humanity. Peacekeeping is sometimes valuable and essential but it is ineffectual in certain circumstances whereas peace enforcement is inappropriate and too ‘bloody minded’.\(^4\) This suggests the need to explore ‘coercive prevention’ and other early conflict intervention strategies. The foregoing reasoning led to the development of a ‘third option’ in the form of ‘coercive inducement’ – a willingness to employ military force to achieve the desired implementation of a norm or mandate. ‘Coercive inducement’ aims to persuade rather than to seize or bludgeon, and it must form part of a concerted campaign involving a variety of means – politico-diplomatic, economic, hortatory, as well as military – to influence behaviour.\(^5\)

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1. Ibid., p. 4.
3. De Hoogh, supra note 2, p. 165.
5. Initially coined by Kofi Annan in 1996, today, ‘coercive inducement’ is discussed as a normative approach to international conflict presented as a ‘middle ground’ theory which straddles the continuum between a Chapter VI (peacekeeping) mandate and a Chapter VII (peace enforcement) mandate – focused on getting one’s way through the employment of military forces as opposed to using force per se.
A variant, ‘coercive diplomacy’ (carrot-and-stick) involves the use of threats and or limited force in order to convince an actor to stop or undo actions already undertaken. The use or threats of limited force may be, but need not, be accompanied by offers of inducements in order to enhance the adversary’s incentive to comply with the coercer’s demand. The use or threats of limited force may be, but need not, be accompanied by offers of inducements in order to enhance the adversary’s incentive to comply with the coercer’s demand. Compellence is broader than coercive diplomacy, which is only reactive, whereas compellence involves threats at initiating adversary action. It is also the reactive nature that distinguishes coercive diplomacy from its ‘sister’ strategy of deterrence, which involves the use of threats to influence adversaries not to undertake undesired actions in the first place. These two themes are vital in coercive diplomacy, especially with regard to coercion used to prevent a situation from happening or getting worse, versus coercion used to reverse an existing situation.

Deterrence is different, and generally easier, than compellence in that deterrence “involves setting the stage — by announcement, by rigging the trip-wire, by incurring the obligation — and waiting.” The overt act is up to the opponent. Compellence, in contrast, usually involves initiating an action (or an irrevocable commitment to action) that can cease, or become harmless, only if the opponent responds. Both deterrence and compellence have three requirements: first, the party making the threat must have the capability to carry out the threat; second, the threat must be credible in the context of the situation; and third, the threat must be clearly communicated to those who must either act or forego action, including both the action required as well as the consequences for non-compliance. All three requirements are necessary when attempting to use force to coerce potential perpetrators of atrocities.

In the same vein, Jentleson has explored ‘coercive prevention’ and particularly the threat or use of military force as frequently necessary parts of overall preventive strategies. This is a different approach from ‘coercive (or preventive) diplomacy’ that makes its non-coercive nature a defining parameter and the use of coercion as a last resort. In this case, while coercion rarely is sufficient for prevention, it often is necessary. The common ground in all these preventive strategies is that both require that ‘coercive threats’ made must be consistent and forceful in order to be credible. Further, both theories emphasize the need for a deployment’s quick implementation, a mandate authorizing force if necessary, a unified command, and effective coordination between the different political and diplomatic actors. However, significantly, ‘coercive prevention’ entails that “force rarely if ever should be a first resort, but at times needs to be more of an early resort.”

5. Ibid.
7. Serveau, supra note 126, p. 1; Daniel et al., supra note 213.
9. Ibid., pp. 33–34; see Daniel et al., supra note 122, pp. 168–188; for a detailed comparison on the ‘coercive prevention’ and ‘conducive diplomacy’, Serveau, supra note 126, p. 4 et seq.
emphasis in all these strategies is the necessity for credible and persuasive threats. There is an emphasis on the need for communication to function alongside any threat or use of force, and the importance of clarity and consistency in objectives and demands.1

According to Jentleson “it is the costs of waiting, more than the costs of acting early, that are so high; and the available options narrow over time. It is conflict prevention – not inaction – that is the more realistic strategy.”2 In making the case for coercion as part of conflict prevention, Jentleson dwells on ‘coercive prevention’s’ broad strategic logic in two respects. First, is that most of these conflicts are fundamentally internal in their dynamics, between and among ethnic and other groups within what is or recently was constituted as a State. Such conflicts are inherently more difficult to settle through negotiations than are conflicts between States.3 Secondly, most contemporary conflicts are “the result of deliberate and conscious choices made by leaders and groups to pursue their interests through war and other violent means.” 4 These conflicts are historically shaped but not historically determined, their dominant dynamic not historical inevitability but rather the consequences of calculations by parties to the conflict of the purposes served by political violence.5 It is in seeking to influence this calculus that ‘coercive prevention’ has its potential viability. Jentleson argues:

These are brutal leaders, but they are not mad men. They make calculations and as such have to be seen as rational in the instrumental sense of the term. They follow the same basic calculus […] that ‘the benefits sought by a group and the price it is willing to pay depend ultimately on the perceived interests of the ruling elite and coalitions in a society […] The key questions thus become how to influence the nature of the goals sought by such leaders […] and how to influence the choice of strategies for achieving them.5

In this vein, non-coercive strategies face problems both with lowering the expected accomplishment of the goals and with raising the anticipated costs. Coercive strategies are required considering that instruments of diplomacy are only conducive for realizing cooperation, and are fragile to resolve conflicts unless they are accompanied by “deeper changes in what the actors want and how they conceive of their interests.” Jentleson presents three operational strategies for coercive prevention namely, ‘coercive threats’ intended for deterrence, compellence, and reassurance; ‘preventive peacekeeping deployments’, as exemplified by the 1993 UN Preventive Deployment Force (UNPREDEP) pursuant to Security Council Resolution 795(1992); and ‘uses of force’, delineating a conception of ‘fair-but-firm’ strategies and adding early resort to “the usual terms of debate between first resort and last resort.”6 To be sure, preventive show of force implies:

5. Ibid., pp. 9–10.
6. Ibid.
8. Ibid., pp. 31–35.
The deployment of military forces to deter violence at the interface or zone of potential conflict where tension is rising among parties [...] The objective is to demonstrate commitment to a peaceful resolution while underlining willingness to use a ready and capable military force if necessary. Should deterrence fail, the preventive deployment force must be robust enough to defend itself while a decision is made either to withdraw or reinforce.¹

This explains the importance of coercive strategies in conflict prevention. However, the usual caveat applies that different situations have to be assessed differently according to whether preventive military action or the threat thereof is likely to have positive deterrent or reassurance effects or whether it will exacerbate the conflict.² Where prevention failed as in Rwanda, for example, the key reason was the inadequacy of coercive measures. Put simply, where prevention has succeeded forceful measures were a key part of the success, and that when prevention failed a key reason was the lack or inadequacy of coercive measures.³ The ambivalence to use decisive force in Darfur and the resultant mutation of the AU Mission in Sudan (AMIS) and seemingly the UN-AU Hybrid Mission in Darfur (UN-AMID) epitomizes the exact opposite of this theory. It is clear that most of the interventions authorized by the UN Security Council in the 1990s have been more reactive than preventive. Rwanda remains a telling example where the subsequent deployment sought to mitigate the genocide that already had taken place rather than proactively seeking to prevent mass atrocities. The crucial issue in considering why more was not done earlier in cases such as Kosovo and Timor-Lester (formerly ‘East Timor’) is the legitimisation of action not just to punish an aggressor or return refugees, but to prevent the aggression from occurring, to protect populations at risk from becoming refugees or casualties.⁴

The foregoing theories relate to conflict prevention, but then, the thresholds for intervention under the AU right of intervention, just like R2P, are jus cogens crimes subject to universal jurisdiction. It can be deduced, therefore, that to secure compliance with human rights and IHL obligations by potential perpetrators is more worthwhile than reactive intervention after the fact. It is against this background that there is need to explore means of enforcement of obligations erga omnes in the implementation of Article 4(h) of the AU Act as well as the notion of R2P. In this way, the use of military force would not target the territorial integrity of a State nor its political independence, but rather be used to pursue perpetrators of mass atrocity crimes in terms of Article 4(h). The guiding question is how to influence the calculus of perpetrators to ensure compliance with human rights and IHL obligations in order to prevent such atrocities.

2. Jentleson, supra note 3, p. 16.
4. Ibid., p. 31.
Part 3: ‘Persuasive Prevention’ – A Graduated Enforcement Action of Article 4(h)

Taking the above theories of conflict prevention as a broad framework, this discussion seeks to pursue – admittedly in a preliminary and perhaps limited fashion – what may be called ‘persuasive prevention’, a methodology premised on preventive measures involving graduated enforcement of legal obligations to prevent mass atrocity crimes. For purposes of doctrine, ‘persuasive prevention’ can be viewed as the constructive engagement backed by credible multilateral force to prevent or halt mass atrocity crimes. The thrust of this concept of ‘persuasive prevention’ is to provide guidance to ensure consistent compliance by States with their international obligations to prevent mass atrocity crimes, and to prosecute and punish perpetrators of such heinous crimes. In simple terms, ‘persuasive prevention’ is intended to involve compellence and deterrence to enforce erga omnes human rights obligations in order to prevent jus cogens crimes. The persuasion may, but need not, be accompanied by inducements particularly assurances to enhance the target’s compliance with the demand. While coercive inducement and coercive prevention are largely reactive and tailor-made for conflict prevention, ‘persuasive prevention’ is confined to proactive prevention of jus cogens crimes, particularly war crimes, genocide and crimes against humanity in Article 4(h). As such, the essence of ‘persuasive prevention’ is to secure the full implementation and enforcement of international human rights and humanitarian law treaties in a measured way. Thus ‘persuasive prevention’ entails engaging States to succeed in prevention of potential mass atrocity crimes by influencing the calculus of governments to comply with their obligations. In reference to the Darfur crisis, for example, the need for ‘persuasive prevention’ can be noted when Evans states that:

The inability here to use coercive military measures does not mean that this is a case of ‘R2P failure’: it just means that the international responsibility to protect the people of Darfur against the incapacity or ill-will of the Sudan government has to take other forms, including the application of sustained diplomatic, economic and legal pressure to change the cost-benefit balance of the regime’s calculation.¹

Given the assent to the right to intervene in Article 4(h) of the AU Act and the evolution of the concept of ‘sovereignty as a responsibility’ coupled with the concomitant advent of R2P, there is a normative basis for ‘persuasive prevention’ under the AU Act. In addition, with the developments in IHL and international criminal law towards individual criminal responsibility, the focus is not only on States but also on individual perpetrators as well as non-state actors. Thus, far from being utopian, the normative foundations for ‘persuasive prevention’ are already an integral part of the existing acquis of international human rights and humanitarian law as well as international criminal law. What is necessary is to rediscover or uncover these obligations and apply them in good faith and in a clear and consistent manner. The fundamental principles that come to mind are the duty of ant dedere aut judicare, the principle of pacta sunt servanda, the erga omnes nature of essential human rights and their concomitant jus cogens status, the principle of universal jurisdiction, the cosmopolitan commitment of R2P and, importantly, the duality of responsibility – state responsibility and individual responsibility for heinous crimes contained in Article 4(h).

This line of thought is not only consistent with the jurisprudence of the 1948 *Nuremberg Judgment*, but also the contemporary reasoning of the ICJ as evidenced in the 2007 didactic decision in *Bosnia v. Serbia* case. In the latter case where the Applicant State requested compensation for the damage and loss incurred as a result of international responsibility for violations of the Genocide Convention, the ICJ stated that:

> [I]nternational law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility [...] the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature [...] these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals.\(^1\)

In the above case, the ICJ also had occasion to say that those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I of the Genocide Convention.\(^2\) This fortifies the need to enhance the means for securing compliance with international human rights and humanitarian obligations. Greenwood has noted, however, that “there can be no denying that the enforcement machinery of international law in general is comparatively weak and that it lacks most of the features found in national law. There is no police force and no network of courts with compulsory jurisdiction.”\(^3\)

In the *Bosnia v. Serbia* case, the ICJ alluded to a mundane problem in enforcement of the law when it said that “genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach.”\(^4\) This is exactly the situation in Darfur now where the ICC has indicted Ahmad Harun, former State Minister of the Interior during the height of the Darfur conflict (2003–2004), and, at the time of writing, the Minister of State for Humanitarian Affairs, and militia commander Ali Muhammad Ali Abd-al-Rahman (Ali Kushayb) but the Government of Sudan (GoS) has refused to hand them over to the ICC.

The AU PSC released several communiqués asking the GoS to disarm the Janjaweed militia said to be responsible for the majority of the killings and rapes in the Darfur region of the country. The GoS defiantly ignored these communiqués and the atrocities have continued. On 4 March 2009, the ICC issued a warrant for the arrest of Omar Has-

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2. See *Bosnia and Herzegovina v. Serbia and Montenegro case*, ibid., para. 159.


4. *Bosnia and Herzegovina v. Serbia and Montenegro case*, supra note 146, para. 82.
san Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity. This is the first warrant of arrest ever issued by the ICC for a sitting Head of State. The Darfur situation exposes the two key questions which the methodology of ‘persuasive prevention’ intends to answer – how States can be brought to comply with international obligations to prevent mass atrocity crimes and how to deter potential perpetrators of mass atrocity crimes. It has been rightly noted that by stressing the international community’s collective responsibilities at different phases of conflict, R2P actually lowers the threshold for ‘paying attention’ to emerging crises. Hence the focus of this theory is primarily to influence the calculus of human rights violators to refrain from perpetrating abuses through the use of established norms in international law.

While the question of strategy is beyond the present discussion, the exploration here focuses on how the ASF can assist to ensure compliance with legal obligations in the absence of the envisaged UN standing force in Chapter VII of the Charter. The reason is simple, genocidaires, war criminals and perpetrators of crimes against humanity can hardly be stopped or prevented by peacekeepers. While emphasizing the need for ‘large scale’ loss of life in order to justify military intervention, R2P as conceived by the ICISS, indicates that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing. Without this possibility of anticipatory action, the international community would be placed in an untenable position of being required to wait until genocide begins, before taking action to stop it. The problem, again, is how to determine when the level of abuse is so serious that it warrants intervention, considering the fact that claims of abuse have been exaggerated in the past in order to justify interventions. This illustrates the importance of articulation and implementation of the ‘legitimacy test’ in the form of a checklist of caveats to provide a transparent road-map for such intervention by the ASF.

It should be remembered that the Security Council attempted to deal with the abhorrent practices of mass murder, torture, and rape that characterized the conflict in Bosnia primarily through judicial means rather than through the use of military instruments. The Council established the ICTY, under Chapter VII, to try individuals accused of violations of international law. The unpredictable NATO aerial bombardment was unsuccessful, to an extent, in deterring the Bosnian Serbs from overrunning the safe areas of Srebrenica and Zepa in 1995 and committing mass killings of ‘Muslim civilians’. To reconcile the two approaches, a better approach was that the Security Council was legally entitled to adopt, and could have adopted, much stronger military measures by the UN Protection Force (UNPROFOR) to stop the practice of ‘ethnic cleansing’ while pursuing the perpetrators. While the Multinational Implementation Force (IFOR) and Stabilization Force (SFOR)

3. Ibid.
were duly mandated to apprehend persons indicted by the ICTY, participating States were reluctant out of concern for a negative impact on continued peaceful implementation of the Dayton Peace Accord. Yet, those States were obligated to execute the arrests pursuant to Articles 2(5) and 25 of the UN Charter and relevant treaty obligations.

Since the AU’s right to intervene is intended to end mass atrocities, then in order not to contravene Articles 2(4) and 2(7) of the Charter, the Article 4(h) intervention should not target the ‘territorial integrity’ nor ‘political independence’ of the target State. It should also not be coercion against a ‘political, economic, social and cultural system and the formulation of foreign policy of a State’. Rather, intervention should be intended to prevent humanitarian catastrophe by deterring potential perpetrators of the international crimes spelt out in Article 4(h) of the Act. This may, however, involve an intervention striking against the political system that abuses human rights of its citizen. According to Murphy, this is suitable and, from a humanitarian point of view, necessary and proportionate. In principle, it is not the political system that is stricken but the individual perpetrators who commit mass atrocity crimes and, as a consequence, do not earn sovereignty.

As Boutros-Ghali rightly said:

[I]t is the State that should be the best guarantor of human rights […] when States prove unworthy of this task, when they violate the fundamental principles laid down in the [UN Charter], and when – far from being protectors of individuals – they become tormentors […] In these circumstances, the international community must take over from the States that fail to fulfil their obligations.

This argument finds expression in the Nuremberg Judgment, as well as the Bosnia and Herzegovina v. Serbia and Montenegro case, that crimes in international law are committed by individuals and not abstract entities such as States and only by punishing those individuals can international law be upheld. This argument is also consistent with the decision in the Nicaragua case where the ICJ held that the use of force could not be an appropriate method to ensure respect for human rights and that arrangements for the protection of human rights are provided for in the relevant human rights instruments. It is trite law that war crimes, genocide and crimes against humanity are serious crimes under international law whose obligations are _erga omnes_. Universal jurisdiction allows any State to prosecute perpetrators of such serious crimes in international law. It is also true that the duty of _aut dedere aut judicare_ on the part of States for _jus cogens_ crimes is a customary principle of law.

It follows, therefore, that intervention through prosecution of perpetrators is a viable option open for the AU. Former UN Secretary-General Hammarskjöld had a point:  

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1. Murphy, supra note 16, pp. 314–323.
“peacekeeping is not a job for soldiers, but only soldiers can do it.” In the absence of a UN standby force and a police force for the ICC, therefore, the question should not be whether or not military intervention is appropriate, but rather when and how should military force be used to prevent mass atrocity crimes. By the same token, therefore, the aim for the deployment of the ASF should not be to use armed force against a State as such, but rather to defeat perpetrators of atrocities and save victims of atrocities as well as create space in which peace can be built. The idea is not to use front-line weapons, but to employ their organizational competence and operational skills, to advance security and peace while protecting human rights. In his views on intervention to protect civilians in Darfur, Kindiki almost articulates the essence of ‘persuasive prevention’ when he says that:

Forcible military measures help bring violence under control and curtail bloodshed. However, military measures are not effective in dealing with the underlying issues that triggered the violence. It follows, therefore, that the most optimal route to take for durable peace in Darfur is one that combines forcible humanitarian intervention but with the possibility of seizing any possibility to conduct diplomacy. In this connection, the best response by both the UN and the AU with regard to the situation in Darfur falls between diplomacy and forcible humanitarian intervention, where immediate, proactive military action is accompanied by conflict resolution.

Here, what is needed is constructive engagement backed by credible threats to use force for deterrence or compellence. Article 4(h) of the Act represents a tremendous paradigm shift in military intervention for humanitarian ends. Although Africa has had a significant number of interventions since 1961, too few lessons have been learnt in terms of how to intervene effectively. It is also evident that the AU needs substantial financial and logistical support to intervene in the conflicts on the continent. This entails that very specific rules, training and equipment are required for the ASF to be in keeping with their new roles as ‘guardian soldiers’. A number of legal scholars agree on using force or its threat to achieve a range of human rights-related objectives such as: first, ensuring the safe delivery of humanitarian supplies; second, deterring armed attacks on civilians or actually defending civilians against armed attacks; third, apprehending persons suspected of having violated international humanitarian or criminal law; fourth, putting pressure on recalcitrant parties to continue negotiation or giving oppressive governments an incentive to cease human rights violations; and fifth, restoring or establishing democracy. In essence, the concept of ‘persuasive prevention’ can better be elaborated in the following graduations in a form of a ‘response ladder’.

3.1. The Force of Law: Preventive Intervention through the Use of Legal Measures
The first step towards implementation of Article 4(h) and R2P by the AU is that AU Member States should ratify the relevant international instruments on human rights, in-
ternational humanitarian law and refugee law, as well as the Rome Statute of the ICC. The effect of Article 4(h) and R2P is that AU States have embraced the emergent normative interpretation of sovereignty as embodying responsibilities as well as rights. The principle is that a government is responsible for protecting the rights of individuals but if a government is unable or unwilling to provide protection, then other governments, intergovernmental bodies and the international community can persuade the recalcitrant government to fulfil its responsibility. In short, the right to intervene in a State comes from the State’s failure to meet its responsibilities as a sovereign member of the international system. Actions can be benign, such as building the capacity of the judicial system, they can be persuasive such as diplomatic pressure; they can be coercive, such as imposing economic sanctions and criminal prosecutions, and they can be hostile, such as military intervention.

Here, Evans offers useful insights that:

R2P is about taking effective preventive action, and at the earliest possible stage. It implies encouragement and support being given to those states struggling with situations that have not yet deteriorated to the point where genocide or other atrocity crimes are a reality, but where it is foreseeable that if effective preventive action is not taken, with or without outside support, they could so deteriorate. It recognizes the need to bring to bear every appropriate preventive response: be it political, diplomatic, legal, economic, or in the security sector, but failing short of coercive action[…] The responsibility to take preventive action is very much that of the sovereign state itself, quite apart from that of the international community. And when it comes to the international community, a very big part of its preventive response should be to help countries to help themselves.

From an international law point of view, the good faith clause in Article 2(2) of the UN Charter was intended to blunt the principle of sovereignty, which undermined the foundations on which the existence of the community arrangements was based. No State can, therefore, invoke its sovereignty in order to evade its international obligations as determined by the duty of good faith and in accordance with the Charter. Likewise, by adopting the AU Act with its right to intervene, AU Member States have agreed that if they cannot protect and prevent mass atrocity crimes against their citizens then the AU will and that state sovereignty will no longer shield perpetrators of such atrocities. Thus, leaders must reflect, through their actions and treatment of one another, the values that lie at the core of good governance, respect for the rule of law, democracy and the protection of human rights – the factors that are crucial to prevent mass atrocity crimes. Hence practitioners have suggested the need to establish criteria for making a peer review of a country. These criteria could encompass situations when a State has ratified few or none of the main human rights treaties (review may only take place in respect of non-ratified treaties); when a State has seriously fallen behind in the submission of reports; and when

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1. SG Report on R2P, supra note 17, p. 11.
3. Evans (2008a), supra note 145, pp. 283–298, p. 290 (emphasis in the original omitted)
urgent cases of ongoing or imminent grave violations arise with prevention in mind.\textsuperscript{1} Secretary-General Ki-moon has stated that:

[Mass atrocity crimes] are, more often than not, the result of a deliberate and calculated political choice, and of the decisions and actions of political leaders who are all too ready to take advantage of existing social divisions and institutional failures. Events on the scale of the Holocaust, Cambodia in the 1970s and Rwanda in 1994 require planning, propaganda and the mobilization of substantial human and material resources. They are neither inevitable nor unavoidable. They require permissive conditions, both domestically and internationally.\textsuperscript{2}

Thus, where a government is abusing its citizens triggering the mechanism under Article 4(h), as a rule of thumb, the AU should not stay silent about mass atrocity crimes but cooperate with States and the international community to ensure that appropriate political, economic and — where necessary — military measures are taken to prevent and repress any such violation. Reflecting on human security and the protection of human rights in Africa, Cilliers and Sturman have suggested that an effective and inexpensive mode of intervention for the AU is peer pressure and compliance with the values and standards of the AU Act.\textsuperscript{3} This view is validated by the warning of the then Special Adviser on the Prevention of Genocide, Juan Méndez, to the authorities in Côte d’Ivoire in November 2004 that they could be held criminally responsible for the consequences of xenophobic hate speeches that led to mass violence. This warning brought the malicious incitement to a halt.\textsuperscript{4} The same was the case when the former Secretary-General Kofi Annan, who was mediating the post-election dispute in early 2008, cautioned Kenyan authorities that those engaged in acts of violence could not be allowed to act with impunity.\textsuperscript{5}

Firstly, as way forward, then, African leaders should listen to their citizenry and sanction and speak out against their peers whenever and wherever they trample on the rights of the people. The State-to-State complaints mechanism in the Banjul Charter has not, in principle, been invoked by States to compel scrutiny of another State’s human rights record.\textsuperscript{6} Speaking out about atrocities is the only way to help prevent them. “The media creates pressure on public opinion. Without this pressure, there is no pressure on politicians, who are sensitive only to pressure from people within their own countries.” It is, therefore, legally sound to state that this conception of peer pressure is consonant with the primary function of international criminal law which is deterrence and ultimately prevention. In other words, peer pressure is an easily acceptable notion that conjures up the

6. It was, however, once initiated by the DRC against Burundi, Uganda and Rwanda in a case that appeared to be motivated by political considerations instead of human rights protection.
concept of state sovereignty with the right to intervene to prevent mass atrocity crimes. Thus, peer pressure is a vital mechanism for entrenching good governance, and a commitment to democracy and democratic processes and, importantly, respect for human rights to prevent mass atrocity crimes. In this sense, peer pressure can be a component of ‘persuasive prevention’, the advantage being that ‘persuasive prevention’, unlike peer pressure, is anchored in legal obligations.

In a general sense, the basis for such action is the *erga omnes* nature of the obligations embodied in Article 4(h) as well as the specific treaties protecting those rights under attack. Diplomatic activities should extend to preventive and repressive means to ensure compliance with human rights and humanitarian norms by recalcitrant governments and redress for victims. Further, the AU may also need to ensure that errant governments responsible for serious violations of human rights constituting mass atrocity crimes in Article 4(h) make reparation for the suffering caused. The goal of reparation, *stricto sensu*, is to undo what has been done.¹ Non-material measures including recognition of facts and responsibilities are not less important in this respect than restitution or compensation. Importantly, the AU should support competent prosecutors and courts to enforce individual criminal responsibility for mass atrocity crimes embodied in Article 4(h) and to take effective measures aimed at preventing such crimes. Accountability for international crimes should be the rule and not the exception because impunity opens doors for further, and even worse, violations.²

Secondly, the corollary to the AU right to intervene is the duty that the AU should, as necessary and appropriate, help Member States build capacity to protect their populations from war crimes, genocide and crimes against humanity.³ Recently, several legal as well as penal institutions have been established in Africa such as *ad hoc* criminal tribunals and UN Commissions of Inquiry. While these institutional mechanisms can play a central role in safeguarding civilians from mass atrocity crimes, there are various ways in which they might be strengthened to do so. The *ad hoc* penal institutions as well as the ICC in holding rights-abusing government officials and rebel leaders to account would concentrate the minds of potential perpetrators of mass atrocity crimes on the risks they run of international retribution thereby changing the calculus of these groups. Having complimentary jurisdiction, the ICC may also serve as a catalyst and stimulus for trials before national courts. The threat and imposition of international legal sanctions could play a vital role in protecting civilians from large-scale violence and curb abuses.

In terms of ‘persuasive prevention’, what is needed is credible international resolve to ensure that perpetrators of *jus cogens* crimes under Article 4(h) are arrested, prosecuted and punished. By way of inducement, the AU, as well as the ICC, should give assurances of a fair trial. On this point, for instance, the Government of Sudan (GoS) needs to be informed that the individuals are only suspects and not convicts. It is thus incumbent upon the AU to decisively and credibly act in terms of Article 4(h). In so doing, the AU would use enforcement measures in Article 4(h) to induce compliance with orders and requests

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of the ICC for the arrest and surrender of the accused persons. The importance of applying international law treaties as tools for action cannot be overemphasized. However, such instruments are only useful if States both ratify and implement relevant legislation. It is in this dimension that the AU’s PSC can put pressure on States to not only ratify but also implement the texts of various international instruments, particularly in the field of human rights and IHL. This may oblige governments to better live up to the responsibilities that sovereignty entails, in order to prevent mass atrocity crimes.

For example, Bhoke has noted that the indictment of Taylor by the SCSL greatly weakened his dictatorial grip over his people and his consequent arrest in 2006 was a crucial factor in bringing peace to Liberia. Further, the effect of ‘persuasive prevention’ can easily be discerned from the assertion of the Chief Prosecutor of the ICC, Moreno-Ocampo, that “[a]fter the arrest warrants were issued, the [GoS] signed an agreement to arrest the [LRA] leaders. That was important because that is what forced the [LRA] to move from Sudan to Congo and they practically stopped committing crimes in northern Uganda and South Sudan.” Already, the indictment of the leadership of Uganda’s rebel group, the LRA and subsequent loss of its sanctuary in Southern Sudan has left the LRA with no option but to negotiate with the Ugandan government. Moreno-Ocampo informs that the arrest warrants against Ahmad Harun and Ali Kushayb have helped speed up peace negotiations and the reduction of violence in Darfur. This claim is substantiated by threats about President Al-Bashir's indictment in that:

>D>espite their public defiance and claims that they are not worried by the charges that they emphatically deny, the Sudanese authorities have engaged in relentless diplomatic manoeuvres to have the charges against President Al-Bashir dropped. These manoeuvres led the Arab League and the [AU] – Sudan being a member of both – to condemn the move of the ICC and/or to request the [UN] to intervene with a view to at least suspending the proceedings of the [ICC], on the basis that its ‘wrong timing’ might not serve the interest of peace and that without peace, it might not serve the interests of victims or of justice either.

Although there can only be anecdotal evidence as to whether the threat of arrest warrants has deterred commission of crimes prevention of mass atrocity crimes through deterrence is what ‘persuasive prevention’ is all about. Nevertheless, there is reason to argue that international criminal accountability is an effective instrument for deterrence to prevent mass atrocity crimes. For example, the indictment of Al-Bashir, a sitting President, serves “to demonstrate how the ICC has the potential to reach beyond state authority and to hold individuals to account in ways that might substantially recast polit-

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2. Secretary General’s address to the 59th session of the UN General Assembly, 21 September 2004.
5. Ibid. As a territorial state, Sudan has a legal obligation to arrest and surrender to the ICC.
6. Souaré, supra note 120, p. 2.
7. Ibid.
While the likely ramifications of the indictment on the peace process in Darfur are not certain, it is certain that the indictment has the potential to “alter the balance of political forces around this conflict.”

Thirdly, while the aim of human rights protection mechanisms is to prevent human rights violations, enforcement of reporting obligations is another effective preventive measure available for the AU. Yet, a track record of most States reveals a sad picture that many States do not submit reports as required by human rights treaties. It is on this basis that the enforcement of obligations to report individual events as well as establishing patterns of conduct may contribute to the prevention of mass atrocity crimes in Article 4(h). Given the limited resources and the complexity of proving cases of mass atrocity crimes, prosecution would, unfortunately, only apply to a select few individuals who are alleged to bear particular responsibility for the most serious crimes, especially those crimes enumerated under Article 4(h) of the AU Act.

Importantly, Article 47 of the Banjul Charter provides that if a State Party has good reasons to believe that another State Party has violated the provisions of the Banjul Charter, it may draw the attention of the State to this in writing with a copy to the Chairman of the AU and the African Commission. In addition, Article 49 provides that if a State Party considers that another State Party has violated the provisions of the Banjul Charter, it may refer the matter directly to the African Commission. Considering that the protection of human rights is no longer a domestic issue, the foregoing provisions are powerful engines for prevention of mass atrocity crimes by AU Member States.

Even the African Commission itself has powers to refer to the AU Assembly cases which ‘reveal the existence of a series of serious or massive violations of human and peoples’ rights’ in terms of Article 58 of the Banjul Charter. In addition, the AU should encourage AU States in the practice of facilitating the ‘1235 Procedure’ for the Human Rights Council ‘to examine information relevant to gross violations of human rights and fundamental freedoms and make thorough study of situations which reveal a consistent pattern of human rights violations’. In addition, the AU should urge States to be responsive to the ‘1503 Procedure’, especially where communications reveal ‘a consistent pattern of gross human rights violations’.

The point being made here is that given that intervention is reactive, focus should be on proactive strategies such as using the force of law to enforce human rights obligations. The human rights monitoring role prescribed for the Banjul Charter is not intended to be exercised only in situations of human rights violations but as a routine. AU Member States may need to establish a mechanism to coordinate investigation and information.

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2. Ibid.
sharing between and among actors responsible for human rights protection in Africa and the international community. The ‘Kampala Document’ demands promoting vigorous observance by AU States of international obligation through monitoring.\(^1\) In this spirit, the mandate of the African Commission may need to be expanded and elaborated so that it can undertake an annual assessment of the human rights record of each African country and publish its findings.

While having a close cooperation with the PSC in terms of Article 19 of the PSC Protocol, the African Commission is mandated, under Article 58 of the Banjul Charter, to draw the attention of the Assembly of Heads of State to serious violations of the Banjul Charter. Given this central role, the African Commission should spearhead coordination and enhance interaction of these organs with the African Court of Justice and Human Rights in order to strengthen the protection of human rights and prevention of mass atrocity crimes enumerated in Article 4(h) of the AU Act.\(^2\) Considering that action on any question of law may be brought before the African Court on the basis of any relevant instrument in terms of Article 28 of the ACtJHR Statute, the Court may be useful in determining the often politico-legal penumbra issue of whether or not genocide has been committed in a given situation.

Further, any AU organ or recognised organisation can request an Advisory Opinion from the Court on any legal matter relating to the Banjul Charter or any other relevant human rights instruments in terms of Article 53(1) of the ACtJHR Statute. This provides wide latitude to engage the African Court to deal with cases of war crimes, crimes against humanity, genocide and gross violations of human rights to change behaviour of repressive States and individual perpetrators.\(^3\) To this end the African Court can also provide legal clarity for instance on the dilemma of trade-off between peace and justice in post-conflict settings and the often one-sided victor’s justice for war crimes. This explains the importance of encouraging AU States to sign the additional declaration in terms of Article 8 of the ‘Single Protocol’ as read with Article 30(f) of the Statute of the African Court of Justice and Human Rights (ACtJHR Statute) accepting the competence of the African Court to hear cases from NGOs and individuals to broaden the horizon of those who can bring cases before the Court.

As the Banjul Charter does not permit any State derogations from human rights treaty obligations, whether during civil wars or other anthropogenic emergencies, a failure to fulfil the rights enumerated in the Banjul Charter may attract legal consequences for a State, whether through the individual-State human rights complaint mechanisms authorized by Articles 56 to 58 of the Banjul Charter, or through the State-to-State complaints mechanisms under Articles 47 through 53 of the same. Unlike other regional human rights systems, in the African system, citizens as well as non-citizens, groups of individuals or NGOs could all initiate cases against the government alleging violations of


\(^3\) Cf. de Hoogh, _supra_ note 2, p. 404.
the Banjul Charter. Nonetheless, these procedures seem to be reactive and the question, therefore, remains whether enforcement of reporting obligations and monitoring would be an effective means of preventing gross violations of human rights. However, there is safe ground to argue that Article 30(f) of the ACtJHR Statute may be used to bring a case before the African Court thereby stimulating the prevention and prosecution of mass atrocity crimes enumerated in Article 4(h) of the AU Act.

Experience has shown that crimes enumerated in Article 4(h) are committed under the hand of the State or those who wield state-like power. This begs the difficult question of who will try the perpetrators of war crimes, genocide or crimes against humanity. It is conceivable that the African Court may be one of the possible fora for bringing such cases. Although the African Court cannot actually prosecute perpetrators of mass atrocity crimes, its involvement in cases relating to them can serve far-reaching goals. Given the inter-State complaint procedure and the limited NGO access to the African Court, its judgment can put pressure on governments to comply with extraterritorial obligations such as the aut dedere aut judicare and to cooperate with efforts to bring perpetrators to justice. This is what is lacking to bring those individuals that have been indicted in Darfur to the ICC.

For example, if a State had custody of an ‘indictee’ and refused requests for extradition to a competent national or international tribunal, a case might be brought to induce that State to extradite the indictee. By the same token, if a State refuses to investigate abuses or grants amnesty to perpetrators in violation of its international law obligations to prosecute them, a suit might be brought against that State to restrain it from doing so. Thus, from the perspective of Article 4(h), the African Court has a potential to be the single most powerful engine for the enforcement of the human rights commitments by AU Member States and the prevention of the mass atrocity crimes in Article 4(h). Given that the ‘Single Protocol’ allows African governments and Inter Governmental Organisations as well as the African Commission, to bring cases before the African Court, these institutions should closely coordinate in pursuing delinquent States beyond borders and bring them to justice through the Court.

On the international level, the Human Rights Council established by the 2005 World Summit Declaration, represents another venue to embed R2P and the AU’s right to intervene. The Human Rights Council can play an important role in the early-warning phase of protection by, inter alia, alerting the international community to emerging patterns of abuse and by calling on, and assisting, the state in question to exercise its primary responsibility for the safety of its citizens. This entails that the Human Rights Council needs to be far more proactive, objective, and apolitical in its work than its predecessor have been; it will also need to issue country specific resolutions when warranted by the facts on the ground. An impartial determination by the Human Rights Council would help depoliti-

cise human rights and thus facilitate the Security Council’s conflict prevention efforts.¹

In order to use the force of law, AU Member States “must get past the stigma of “naming” those countries that may be in a potential downward slide to mass violence.”² The preventive role of international human rights and humanitarian law in preventing mass atrocities is a more cost effective strategy than responding to them after the fact. As such, AU Member States should ratify the Genocide Convention, the Geneva Convention, and its Additional Protocols as well as institutionalise universal jurisdiction in their legal systems. Thus, AU Member States should introduce the provisions of these instruments into domestic law by criminalising the incitement and perpetration of genocide, war crimes, and crimes against humanity.³ Needless to say that the right to intervene in Article 4(h) per se offers the prospect of functioning as a deterrent for the worst cases of human rights violations.

Indeed, the framers of the AU Act recognised that Article 4(h) can lawfully override entrenched norms regarding domestic jurisdiction. In this sense, the AU can intervene in situations involving mass atrocity crimes based on evolving conceptions of domestic jurisdiction.⁴ However, still to be answered is when can the AU intervene considering that the threshold for intervention, namely, war crimes, genocide and crimes against humanity are still the subject of international debate. Almost all AU Member States are party to the 1949 Geneva Conventions and the 1977 Additional Protocols, yet the vast majority of victims of war are in Africa.⁵ At least 25 AU Member States are parties to the Genocide Convention with Rwanda being a State Party since 1975 whereas Sudan acceded without reservation in 2005.⁶ Yet, Rwanda has been a textbook example of genocide – ‘the crime of crimes’ – and the occurrence of genocide in Darfur is still a subject of hot debate. Well over half the AU membership has ratified the ICC Statute and how can one explain why the first four situations before the ICC are from AU Member States?⁷ In their case, ‘persuasive prevention’ can fill the void to influence compliance with obligations to prevent mass atrocity crimes.

3.2. The Responsibility to Prevent: Timely Enforcement Action

The UN Secretary General Ban Ki-moon has aptly advised that in a rapidly unfolding emergency situation, decision makers must remain focused on saving lives through “timely and decisive” action “not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results.”⁸ More often than not, intervention is too little too late. Darfur is a direct consequence of the Security Council’s failure to take more timely action to protect populations at risk of mass atrocity

². The Stanley Foundation R2P, supra note 62, p. 3.
³. Ibid., p. 28.
⁴. Lepard, supra note 17, p. 173.
⁵. Morocco is not a Member of the AU. Somalia has ratified the 1949 Geneva Conventions but is not a State Party to both 1977 Additional Protocols. The République Arabe Sahraoue Démocratique (Western Sahara) still an unrecognised State in UN terms – in effect being under Morocco – is unable to sign or accede to treaties.
⁶. For further details visit: <www2.ohchr.org/english/bodies/ratification/1.htm> (24 December 2007).
⁷. As of 18 July 2008, there are 30 AU Member States that have ratified the ICC Statute, available at: <www.iccnow.org/documents/RatificationsbyUNGroup_18_July_08.pdf> (5 November 2008).
crimes.1 The problem is that if they intervene at all, States are typically slow to intervene due to their distance from the situation, lack of awareness, reluctance to commit troops in the face of uncertainty, and international norms calling for the use of force only as a last resort.2 When States do intervene, their approach tends to be gradual, as more potent measures are only adopted after it becomes apparent that lesser measures are not working. This asymmetry, characterized by a tendency to hurry on the part of the perpetrators combined with reluctance to escalate on the part of the interveners, works against those who want to stop mass atrocity crimes.3 However, one of the beacons of the doctrine of R2P is the responsibility to prevent.4 Early intervention before the situation becomes ‘grave’ in the sense of Article 4(h) is probably the most effective course for preventing or halting atrocities, but it requires awareness.5 Even Evans supports this view thus:

Hitler’s Germany, Rwanda, and the former Yugoslavia had all for years been characterized by growing repression, abuse of human rights, and especially, hate speech directed at often vulnerable groups blamed for a country’s troubles. But the signs were not heeded by those in a position to make a difference, and the necessary action was not taken in time. Experience has constantly taught us that effective prevention is far less costly in blood and treasure than cure – than reacting only after many lives have been lost, a lust for revenge aroused, and reconciliation made that much harder.6

Considering the lessons learnt from the 1994 genocide in Rwanda, where the Special Rapporteur of the UN High Commissioner for Human Rights presented the international community with a serious warning about the political development in Rwanda as early as 1993, it is especially true that early warning can be a meaningful innovation when the AU reacts to early warnings in a timely and adequate manner. The point is that corresponding early response should be considered as soon as the commission of the mass atrocity crimes in Article 4(h) of the AU Act becomes perceptible. For example, as Annan put it:

The mediation process in Kenya and the political settlement that was reached was perhaps the first effective application of the doctrine of R2P. The international community moved early, reacted quickly, did not use force but used all economic, political and diplomatic pressure to get an agreement.7

The point is that better awareness should lead to better decisions on the course of the action to take. This option may also be advantageous in that, as some forms of surveillance are quite overt, it can serve to deter without a specific threat. “Leaders may act very dif-

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1. Global Centre for the Responsibility to Protect, Presentation to the Arria Formula Meeting (presented by Nicola Reindorp), 1 December 2008, p. 4.
2. Hinote, supra note 124, p. 29.
3. Ibid., p. 29.
5. Hinote, supra note 124, p. 4.
ferently when they know they are under observation.”

Although the AU has established an early warning system, there is no effective corresponding early reaction machinery. “If early warning alarm bells do not generate an early response they might as well not be rung at all.” The guiding question is how the AU can create an effective regime for the prevention and punishment of mass atrocity crimes enumerated in Article 4(h) of the AU Act.

Firstly, according to Article 2 of the PSC Protocol, the PSC is meant to be “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.” The mandate accorded to the PSC, includes, *inter alia:* the anticipation and prevention of disputes, conflicts, and policies that may lead to war crimes, genocide or crimes against humanity; recommendation to the AU Assembly regarding intervention in the case of ‘grave circumstances’; and support and facilitation of humanitarian action. The ASF concept calls for the ability to intervene within 14 days from the provision of a mandate by the Peace and Security Council (PSC) in the case of genocide for urgent assistance to a peacekeeping force, and as an early intervention presence in the case of imminent conflict. The 2003 policy framework of the ASF dictates that in an emergency situation, the AU should undertake preliminary preventive action while preparing on more comprehensive action that may include UN involvement. The emphasis here is on speed of action and deployment. It is for this reason that the AU Commission recommended that an operational African peace and security architecture will need to develop effective early response systems and effective support for mediation efforts such as preventive deployment. While Article 12 of the PSC Protocol provides for a Continental Early Warning System (CEWS) in order to facilitate the anticipation and prevention of conflicts in Africa, the UN Charter also provides for a legal and political foundation for the building of stronger early warning capabilities.

Secondly, Article 34 of the UN Charter mandates the UN Security Council to investigate any situation which might lead to international friction or give rise to a dispute. AU Member States may invoke Article 34 of the UN Charter to ensure that the Security Council institutes investigations into a simmering situation at a very early stage. The six case studies in which genocide, war crimes, or crimes against humanity occurred or were prevented from occurring over the past 3 decades in Cambodia, Rwanda, Bosnia, Burundi, the DRC, and Sudan’s Darfur region, highlight concerns regarding effective and timely international responses to mass atrocity crimes. Actually, the willingness to prevent, react or rebuild has been marked by overt selectivity, driven mostly by self-interest.

To avoid such problems in future, on their part, AU Member States may invoke Article 34 of the UN Charter to bring a simmering conflict to the attention of the Security Council. In so doing the burden will shift onto the Security Council to act in a timely manner and effectively. As a matter of fact:

[R2P] situations do not typically emerge without warning. There are a number of factors that tend to contribute to an “enabling environment”, including the sealing off of a country; a “crisis of identity” within societies; the presence of competing elites or political groups (particularly those with an exclusionary ideology); and a history of discrimination, violence and/or impunity. The role played by neighbouring and other interested states as well as by non-state actors should therefore be taken into account, as should the presence of internally displaced persons.¹

Thus, what is needed most is early action to prevent mass atrocity crimes from occurring.² For example, to prevent genocide, Stanton informs on the significance of understanding its metamorphosis in order to determine effective preventive measures and appropriate referral organ. According to Stanton, genocide develops in eight stages that are ‘predictable but not inexorable’.³ For example, considering Articles I and V of the Genocide Convention, all signatories to the Genocide Convention are required to prevent and punish acts of genocide both in peace and wartime although some barriers make this enforcement difficult. Particularly, Article VIII of the Genocide Convention provides that any Contracting Party may call upon the competent organs of the UN to take such action under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide or of the other acts enumerated in Article III of the Convention. Tragically, no State has ever used the ready and steady Article VIII powers to invoke the attention of the UN. Article XI of the Genocide Convention enables a signatory State to take a case to the ICJ relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a State for Genocide or for any other acts enumerated in Article III.

In the same vein, the US Task Force on the UN has suggested that, the US for example, should adopt a four-stage approach to deal with genocidal regimes: firstly, the government implicated in genocide, mass killing or massive violations of human rights should be warned that it has a responsibility to protect; secondly, if it fails to act, the government should have its financial assets frozen and ‘targeted sanctions’ should be imposed on specific individuals; thirdly, if these measures fail, the Security Council should consider military intervention. The Task Force maintains where the Security Council is derelict or untimely in its response, States – individually or collectively – would retain the ability to act; fourthly, individuals guilty of mass murder should be identified and held accountable.⁴

The point is that early engagement is essential for prevention of a simmering con-

Conflict deteriorating into mass violence. If the AU became engaged early, it could gauge more easily whether mass atrocities were occurring, or whether they could occur in the future, which strategies of engagement were working, and how the international community should proceed.¹ Timely enforcement action “should occur before the positions of local actors harden and before they go into denial over the threat of mass atrocities.”² The experience in Eastern DRC and Darfur shows that the international community should become engaged in volatile situations before governments lose their control of proxy militias which cause mass violence when they are no longer responsive to state actors.

In a general sense, the responsibility to react under the R2P calls for collective reaction to situations of compelling need for human protection. The doctrine emphasizes that this action can only be taken after all preventive measures fail. These include political, social and judicial measures and where all of these fail, military action. Scholars agree that while there is evidence that non-violent measures, if applied effectively, can help to safeguard civilians from large-scale violence and abuse, there are, however, other circumstances where these measures are likely to be insufficient and where military force will be required to provide greater civilian security.³ The question is: if prevention is the single most important dimension of R2P, is it not contradictory to require ‘large-scale loss of life’ before saving lives?⁴ Holl argues – and Jentleson agrees – that “preserving force as a last resort implies a lock step sequencing of the means to achieve foreign policy objectives that is unduly inflexible and relegated the use of force to in extremis efforts to salvage a faltering foreign policy.”⁵ The point is that force rarely if ever should be a first resort, but at times it needs to be more of an early resort.⁶ Timely enforcement action is particularly pertinent in cases of looming mass atrocity crimes, calling for immediate attention and possibly coercive action under Chapter VII of the UN Charter.⁷ Given the extreme nature of war crimes, genocide and crimes against humanity, the option to wait and see may not be a sustainable option when Article 4(h) dictates a contingent responsibility to intervene.

As usual, the template here is the UNPREDEP, which consisted of three phases of operation. The first was the traditional work of peacekeeping missions: troops and military observers stationed along Macedonia’s borders to assist the country’s security forces in deterring attacks. The second phase involved a broader political mandate and ‘good offices’, including the negotiation and mediation services of diplomats to maintain peaceful relations and a contingent of UN civilian police to prevent human rights violations against Macedonia’s minority groups. The third, which was a highly innovative component to the peacekeeping mission, encompassed the ‘human dimension’ intended

¹. The Stanley Foundation on R2P, supra note 62, p. 36.
². Ibid.
⁶. Jentleson, supra note 3, pp. 33–34; Mepham & Ramsbotham, supra note 200, p. 44.
⁷. See Bosnia v. Serbia case, supra note 51, para. 145.
to reinvigorate and reorient Macedonia’s nascent civil society institutions and touched on practically every social institution and government service.\(^1\)

The response by UNPREDEP in the crisis in Macedonia demonstrates that under Article 4(h) as well as within the framework of R2P, the prevention of mass atrocity crimes requires the rapid and close coordination between international and regional bodies to halt violence, facilitate peace talks, and provide ongoing security and support to enable implementation of the peace plan.\(^2\) Even in Burundi, to prevent genocide and respond to escalating conflict, immediate regional economic sanctions and an international development aid embargo were employed; peace talks brokered by regional leaders and supported by Western governments were instituted; and regional and UN peacekeeping forces eventually were invited to provide security to enable implementation of the peace plan.\(^3\)

Thus, the ASF may employ the threat or use of force to apprehend individuals suspected of committing such crimes enumerated in Article 4(h) if, first, the threat or use of force involved in apprehending the suspects is unlikely to cause direct harm to civilians; and second, the degree of force threatened or employed is the least necessary to attain the objective of apprehension, thereby complying with the ethical and legal principles of necessity. Where these conditions are not or cannot be satisfied, the ASF should not abandon attempts to apprehend the suspects, but rather wait for more propitious circumstances.\(^4\) Guidance from the *Legality of Use of Force* case is that the use of force raises very serious issues of international law such that States must act in conformity with their obligations under the UN Charter and other rules of international law, including IHL.\(^5\)

It should be noted that impartiality is attributed as a key cause for the ‘ethnic cleansing’ in Bosnia. The recognition by the EU, the US and the UN Security Council of the right to self-determination was identified as a catalyst to the ‘ethnic cleansing’ in the war in Bosnia in 1992 to 1995. In addition, there was an overall failure to provide solutions that were acceptable to all, especially the ethnic minorities created by the dissolution of the former Yugoslavia, based on serious international negotiations to establish new international borders. For these reasons, wherever the ASF employs force, there is need for ‘impartiality’ that can be achieved by what Jentleson calls a ‘fair-but-firm strategy’.\(^6\) Impartiality requires focusing on the behaviour of the involved parties – employing force because of what is being done, not because of who is doing it.\(^7\) The parties to the conflict must know that cooperation has its benefits and that those benefits will be fully equitable; the parties also must know that non-cooperation has its consequences and that the international parties are prepared to enforce those consequences differentially as warranted by who does and does not do what. In this regard, fairness and firmness go hand-in-hand symmetrically.\(^8\)

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\(^2\) Ibid., p. 88.


\(^8\) Ibid.
Importantly, intervening forces, as the Security Council put it, “where appropriate and within their mandates”, should have a “credible deterrent capacity.”\(^1\) Lessons drawn from the UN’s experience indicate that international military intervention in support of humane values should be timely and robust or shunned altogether.\(^2\) Be that as it may, it is clear that military intervention is the most contentious and costly dimension of both the right to intervene under Article 4(h) and the R2P agenda. Therefore, it is a reasonable assumption that investing in longer-term structural prevention and development or in mediation, diplomacy, negotiations, sanctions or legal instruments could have a greater overall impact in preventing mass atrocities in Africa and elsewhere.\(^3\) Better still, ‘persuasive prevention’ will entail that the ASF should provide a credible deterrent to potential perpetrators of mass atrocities.

The AU (and so the ASF) should therefore be ‘more active’ and ‘more capable’ in ‘persuasive prevention’. This informs the need to change the basic mindset from a culture of reaction to a culture of prevention.\(^4\) It is for this reason that the AU needs to invest in early-warning systems, preventive deployment missions and other forms of institution building in volatile states and conflict zones.\(^5\) The foregoing analysis may help explain why the contemporary US strategic vision now calls for an increase in the global ‘conflict intervention’ capacity. In line with the theory of ‘persuasive prevention’, the US Strategy informs that where “perpetrators of mass killing defy all attempts at peaceful intervention, armed intervention may be required.”\(^6\) Having early-warning data and ongoing situation updates would spare the AU “the polemic over whether a state is willing or able to enact protective measures.”\(^7\) According to Banda, “it is sufficient that the facts on the ground demonstrate otherwise.”\(^8\) A timely decision by the AU would, in turn, enable the ASF to protect civilians with an appropriate mandate and adequate resources.

The key point is that military intervention should never be the first option but, given the speed with which civilians are killed when targeted by armies and militia, it should not be delayed for long. In a given scenario, the AU may need to adopt urgent, interim measures to protect the populations at risk of mass atrocity crimes under Article 4(h) of the AU Act. Such measures could be aimed at securing immediate access to victims or preventing the continuation of war crimes, genocide or crimes against humanity. Based on the emerging trend of ‘hybridisation’ of peacekeeping,\(^9\) the ASF should be relieved by the UN or the international community as soon as a secure and stable environment has been created. In this context, the PSC should make every effort to secure authorisation of the UN Security Council for any enforcement action. While prohibition of enforcement action without UN

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4. ICISS Report, supra note 153, p. 27.
8. Ibid.
9. For example, as part of its exit strategy, the AU Mission in Burundi (AMIB) AMIB transformed into a UN mission while the AU Mission in Sudan (AMIS II and I) has been recapped as UN-AU Hybrid Mission in Darfur (UNAMID).
Security Council authorisation would not conform to the present state of international law, it is submitted that the AU’s right to intervene under Article 4(h) is a codification of enforcement by consent prevailing in sub-regional organizations in Africa. This progressive development of the law in this respect provides for enforcement action by consent of AU States, in recognition of contemporary practices, to ensure effective suppression of conduct constituting jus cogens crimes. To make a quantum leap from rhetoric to reality, the AU may need a doctrine outlining the foregoing guidelines for the timely and effective implementation of Article 4(h) to prevent mass atrocity crimes on the continent.

3.3. The Capability to Protect: Persuasion Backed by Force

One of the most powerful lessons of Rwanda’s genocide in 1994 was the need to respond robustly to a State that was a perpetrator of mass atrocity crimes against its populations. When atrocities occur, foreign governments can try to stop the violations with diplomatic persuasion, but that approach is rarely effective. Thus, when the AU wants to stop mass killing and is unable to do so by diplomatic or other coercive means, the AU will have no other option but to use force. The use of force involves interplay between strategies of ‘offence’ and ‘compellence’, where the intervener prepares for, and uses force against the perpetrators in the hope that the perpetrators will capitulate, but with the will to press forward to military victory. While deterrent threats tend to be somewhat general and open-ended, threats to compel will need to be very specific and have an associated deadline, for tomorrow never comes. Therefore, Banda is right when she argues that each time that a UN Security Council deadline for compliance passes unobserved – and goes unpunished – it weakens the credibility and the authority of the UN and the international protection regime as a whole. The cost to the perpetrators – literally the pain they must suffer – must rise to unacceptable levels for compellence to work.

As indicated earlier, history has revealed that cases of atrocities are closely associated with infamous leaders. Although the hatred that they leveraged would have existed in their absence, it is plausible that the mass atrocities would not have occurred without their leadership. Therefore, attacking the leadership, may deny the perpetrators the primary catalyst they need to unify their efforts. According to Seybolt, the purpose of intervention to defeat the perpetrators of violence is to change the political order of the target country. In this version, change can take the form of driving the power holders from power, forcing them permanently to cede control over a piece of territory or forcing them to accept a power-sharing arrangement with the group they are oppressing. The humanitarian effect of a new political order is to stop the widespread killing that justified the intervention. Admittedly, intervention of this type, while it may help to protect basic human rights, seems to be political, not humanitarian. Offensive military action focused
on the perpetrators of mass atrocity crimes is political, difficult and dangerous. Defeating a perpetrator favours violence over peace in the short term.

While there is an overall increase in the protection of human rights, it should be noted that none of the instruments for the protection of human rights contemplates the use of force for their enforcement.1 With reference to the European Court of Human Rights (ECHR), for example, Neuhold argues that even this most remarkable human rights regime has to rely on the readiness of the parties to comply with judgments of the European Court.2 Although sanctions for the refusal to do so are available within the framework of the Council of Europe, “they are hardly sufficient to really force a contracting state by a ruling of the European Court of Human Rights, which it decides to ignore.”3 However, it should be noted that Article 56 of the UN Charter calls on Member States to ‘take joint and separate action’ and submits that the provision does not define action and it may therefore involve forcible action. Further, it can be argued that Article 4(h) intervention is invariably a response to grave circumstances involving mass atrocity crimes and as such the use of force is inevitable.4 It is for this reason the High-Level Panel posited that “the challenge of stopping a Government from killing its own civilians requires considerable military deployment capacity.”5 Hence Hubert has noted that:

[T]he challenge is to enhance the capacity of soldiers to halt mass killings in non-permissive environments. These skills are needed not only to halt a future genocide, they are becoming a part of regular peacekeeping as mandates now routinely include authorization for the use of force to protect civilians under attack. Providing effective protection requires rules of engagement, military doctrine and pre-deployment training that differ from traditional peacekeeping or war-fighting. Enhancing military preparedness to protect humanitarian corridors, defend safe areas, disarm militias in refugee camps and impose no-fly zones will improve the prospects for mission success.6

The presence of military forces in the conflict zones has a significant deterrent effect. In this case, threats to use military force (show of force) may have one or more of the following objectives: deterring the target from taking certain proscribed actions, compelling the target to cease further such actions, reassuring the target that taking such actions is not necessary, or inducing the target to take other prescribed actions. Only threats that carry the credibility that they will be acted on (willingness) and that they will impose sufficient costs to tip the target’s calculus (capabilities) have a likelihood of having a coercive impact. In this connection, what is crucial is first, the sender’s standing credibility for possessing the will and capacity to act and situational credibility as regards the case at hand.7 One of the most credible show-of-presence operations involves the deployment of ground forces to a

3. Ibid.
strategic position, perhaps to bases in a neighbouring country or along a political border. It should be borne in mind that deterrence is the best way to stop atrocities at the lowest cost and risk. Thus, the threat of decisive force should be accompanied by credible political statements. An example of a course of action suggested by experts is that:

One minute past the deadline full spectrum operations will strike the perpetrators: Fiscal assets of the identified perpetrators frozen. Sanctions enacted and maritime interdiction operations (where possible) embargo exports, and only allow food and medicine imports. Targeted country and perpetrator command and control disrupted. Actions will continue until the killings stop.

Applying the theory to the Darfur case, a very clear message telling the GoS to come into line with international, UN-backed demands should be supported by threat of consequences for non-compliance. This is what is conspicuously missing in the Security Council Resolutions such as 1591 and 1593 – a manifestation of use of force or threat of force in case of non-compliance. It should thus be little wonder that the GoS publicly opposed and actively resisted Security Council Resolution 1706 under Chapter VII mandate to use force to protect civilians in Darfur. Even the request that was made by the AU Peace and Security Council to the AU Commission on the Situation in Darfur was weak, as it did not persuasively present the need for a protection element to support the work of the Ceasefire Commission.

However, in October 2004 the AU Peace and Security Council enhanced the deployment of AMIS by further mandating it to improve the security situation in Darfur and oversee the safe return of refugees and internally displaced persons (IDPs) to their homes. Albeit in a compromise mandate, its tasks included to: “Protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the [GoS].” Again, this mandate lacks the credibility of what Jentleson calls ‘coercive threat’ that would persuade the GoS to carry out its obligation under the AU Act as well as in international law. As a result, although the international community, acting through the UN and the AU, has intervened in Darfur with diplomatic, humanitarian, human rights and development assistance, the vast majority of its recommendations remain unimplemented by the GoS, and effective protection for civilians is yet to be secured.

It is for this reason, Annan complained that the world’s peacekeeping strategy in Darfur was ‘not working’ and that AMIS had failed to protect civilians or prevent the crisis from resolving. Annan then went on to lament that ‘the world is doing a sickly half-heart transplant on Darfur with the result that the injury goes septic.’

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2. Jentleson, supra note 3, pp. 32–33.
5. Ibid., paras. 61–64, 67.
deteriorating because it “has not been able to put in as many (military) forces as we had hoped.” In February, 2005, Jan Pronk, the UN Secretary-General’s Special Representative for Sudan, summarised the challenges rather poignantly by saying that AMIS was too small and its deployment too slow to afford real protection to Darfur’s civilians. It is generally considered that the AMIS deployment was ‘chaotic’, characterized by ‘poor logistical planning’ and ‘lack of trained personnel, funds and experience in intervening to protect civilians’. What is needed, therefore, is for the UN and AU to back their resolutions with credible force.

On its part, UN Security Council Resolution 1556 imposed a 30 day deadline for the GoS to comply with the Security Council’s demands and threatened sanctions if it failed to do so. On 2 September 2004, Pronk, the UN’s Special Representative in Sudan, reported that the compliance of GoS with Resolution 1556 was ambivalent. Pronk claimed that the AU Ceasefire Commission had reported that government forces had not breached the ceasefire, a claim hotly disputed by the US. Although there was an emerging Security Council consensus against intervention, the subsequent Resolution 1564 (2004) contained some of these measures but in much diluted forms. It called for an expanded AU presence, reiterated earlier demands for all sides to respect the ceasefire and for the government to disarm and prosecute the Janjaweed, invited the UN Secretary-General to create a commission of inquiry to investigate reported crimes and indicated the Security Council’s intention to ‘consider’ further measures if the government failed to comply.

Significantly, however, the Resolution failed to find Sudan in breach of Resolution 1556, impose measures upon it, or even criticise the government explicitly. Once again, three positions were apparent. On 31 March 2005, however, the Security Council passed Resolution 1593 referring Darfur to the ICC. The Council adopted an ambiguous position in Resolution 1706 (2006). On the one hand, it failed to impose serious sanctions on Sudanese officials and did not publicly contemplate using force to protect civilians or humanitarian aid. On the other hand, it eventually placed limited sanctions on specific individuals, authorised an arms embargo and no-fly zone, and took the momentum step of referring the Darfur case to the ICC.

Recalling the lesson learnt from Rwanda in 1994, it is clear that a more decisive and robust demonstration of international force at that time of initial formation of the UN Assistance Mission in Rwanda (UNAMIR) might have restrained the extremist forces directly, and at any rate sent signals to the effect that the international community was fully behind the peace accords. As in Bosnia, the Security Council responded to the genocide

4. The Report of the High-Level Mission in Darfur, supra note 194, para. 77 (2) and para. 77(3) (h).
7. Ibid., p. 145.
in Rwanda by engaging in criminal investigation and imposing criminal sanctions after the fact.\(^1\) Lepard counsels that there needs to be a continuing dynamic between the two approaches of enforcement and negotiation, the challenge for policymakers is to decide when a situation demands the proactive use of force to defend certain standards of international human rights and humanitarian law or protect civilians and when it requires the encouragement of negotiation and compromise.\(^2\)

Yet, in Bosnia, the UN acted early given that the decision to put the UN headquarters in Sarajevo was made before the war in Bosnia broke out. The early action was intended to demonstrate UN’s resolve to prevent war from spreading from Croatia to Bosnia. However, such resolve was weak as the UN Mission in Bosnia was for peacekeeping not peace enforcement. The UN could not act through coercion or through deterrence. Thus, the UN acted early but ineffectively. Its action was not decisive nor, until three years later, backed by a willingness to use force commensurate with the situation.\(^3\) This explains why the ASF may need to have credible capacity for deterrence and compellence as well as coercive inducement where need be. At the same time, it is essential to recognise the inherent limitations on the use of military force. Force alone is incapable of achieving long-term improvements in human rights conditions in a given country and the willingness of the parties themselves to respect human rights. The point being made here is, for example, that decisive and persuasive international pressure should be exerted on the GoS from various fronts to get it to consent to the deployment of a properly resourced and mandated UNAMID.\(^4\) According to Hinote:

> The primary goal of military intervention in stopping mass atrocities is to prevent the atrocities from occurring, and if they do occur, to convince the perpetrators to stop the violence as soon as possible. Put another way, in stopping mass atrocities, coercion is primary – brute force is secondary. If coercion does not work (i.e. the perpetrators begin the atrocities and cannot be compelled to stop), and intereners must resort to brute force, many atrocities will occur before brute force can take effect.\(^5\)

As a matter of strategy, the intervention tasks that may be prioritized are: first, stopping the killing; second, ensuring the overall protection of the intervening community as well as that of the population; and third, creating a security environment that sets the conditions for a transition to an integrated, sustainable effort that transforms the host nation and prevents the return of egregious human rights violations.\(^6\) It is true to say that peacekeeping cannot prevent conflict and provide security for post-conflict reconstruction. It is also easy to notice that peacekeepers did not prevent Serbian ‘ethnic cleansing’ of Bosnian Muslims or the massacre of Muslim men and boys of military age in Srebrenica. Peacekeepers could not halt the rampaging of the ‘West Side Boys’ prior to the landing of the British paratroopers in Sierra Leone, nor prevent the *genocidaires* in Rwanda. Peace-

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5. Hinote, *supra* note 129, p. 31 (the emphasis in the original has been omitted).
keepers in AMIS could, at most, discourage but could not stop the Janjaweed waging war on defenceless civilians in Darfur. Indeed, AMIS personnel themselves have been abducted and murdered. Rather than functioning as the peacekeeping mission it was anticipated to be, for Abass, AMIS looked “more like something between a lacklustre Boy Scouts contingent and a maleficent civil defence corps.”

Hence, there is an additional requirement for military intervention forces that are strong enough that they do not need the consent of the parties, the cooperation of the offending government, or self-restraint of killers if there is no other way to stop mass atrocity crimes. To limit the international community to the ability to end mass atrocities only under permissive conditions is to ignore that mass atrocities occur under non-permissive conditions. The point is that peacekeeping might be enough to keep peace between two obliging sovereigns but is not enough to keep a vicious sovereign from warring on its own people.

For these reasons, the ASF need to have the ‘capability to protect’. Having the capability to stop mass killing would increase pressure on States and groups to desist from atrocities or risk coercive intervention. A government that is condoning or abetting mass killing, like the GoS, would likely be more amenable to cooperation if it knew that the international community could act decisively and effectively to stop the killing whether it cooperates or not. This will require the ASF to have military superiority over opposing forces because of the presumption of armed opposition and the need to deter opposition. Superiority of ‘humanitarian intervention’ over opposing forces is achievable. More often than not, the perpetrators of mass atrocities are killers but not fighters, in the sense of disciplined troops prepared to stand against combat forces. Rag-tag Bosnian Serbs, machete-wielding Hutus and militia in the erstwhile regime in East Timor (as Timor-Leste was then called) all retreated when confronted by trained troops. Even the Janjaweed largely constituted of ex-convicts and outlaws find it easier to wage war on civilians in the form of rape and killing in Darfur.

AMIS exposed that there is still the problem of insufficient expertise or resources to carry out the intervention in a timely and effective manner. The success of AMIS was significantly compromised by logistical difficulties and troop shortages. For example, the Rwandan and Nigerian troops making up the bulk of the AU observer force had no armoured vehicles to protect themselves from the militia attacks, which meant that protection of the civilian population had to be weighed against the daily concerns about the troops’ own safety. It has thus been recommended that to carry out their mandate, the ASF should have the fundamental capacity to operate, including sufficient equipment, manpower and transport. The ASF should not be so at risk themselves that they cannot provide security to civilians.

3. Ibid.
Again this point reflects why it is imperative that the ASF should have a capability to protect. As such, Gompert advocates the concept of a ‘humanitarian intervention’ partnership between the AU and Western powers such as the EU, NATO and AFRICOM, where Western powers should be steady wholesalers instead of inconsistent retailers of security.\(^1\) Thus, this partnership should not be \textit{ad hoc} but institutionalised to ensure the success of the ASF; deter opposition to them and even reduce the need for escalation. It appears that when western powers have shown early interest, deterrence has been effective.\(^2\) By way of illustration, the arrival of the US Marines in Liberian waters clearly helped convince Charles Taylor to exit the country and pave the way for the institution of the UN Observer Mission in Liberia (UNOMIL). The same was the case with NATO’s decisive action against Serbia designed to deter attacks against ethnic Albanians living in Kosovo and to pressure the Serbs. The corresponding US Congress pressure on Yugoslavia led to the arrest of Milošević before the March 31, 2001 deadline in order to continue receiving US economic aid.\(^3\)

Similarly, apart from the international pressure against Indonesia,\(^4\) Australians used bluff to bolster their intervention in Timor-Leste in 1999 to stop mass atrocities. The Australians did not have the forces ready to deploy on the scale called for in their planning, so they used their understanding of Timorese culture to threaten perpetrators with very severe consequences if they did not stop their actions before the Australian military could intervene. To develop such relevant cultural knowledge or effective ways of deterrence, planners should connect with other area experts, Inter Governmental Organisations and relevant individuals for the targeted state. As for the military, useful flexible deterrent options such as exercises within the region, fly-overs, naval manoeuvres or other unambiguous shows of force can both enhance deterrence and enable follow-on options.\(^5\) This is the whole essence of ‘persuasive prevention’ – employment of proactive and persuasive strategies to achieve effective deterrence and compellence against perpetrators of mass atrocity crimes.

Building upon the momentum of the World Summit Outcome endorsement, the UN Security Council affirmed R2P in Resolution 1674 (2006), which focuses on the protection of civilians in armed conflicts. It was the first instance in which the Security Council endorsed R2P, a step that has a major significance since it is the global body with the primary responsibility for dealing with threats to international peace and security, including the mass atrocity crimes outlined in Article 4(h) of the AU Act. Although the scope of the Security Council resolution is not meant to focus specifically on R2P, Resolution 1674 requires specific steps to be taken by States and the international community in order to protect civilians, such as ending impunity and prosecuting those responsible for mass atrocity crimes as well as ensuring the implementation of UN mandates regarding the protection of civilians and clear guidelines on what missions can do to achieve this goal.\(^6\)

The greatest problem in ending impunity for mass atrocity crimes under Article 4(h)

\(^1\) Ibid., p. 13.
\(^2\) Hinote, \textit{supra} note 129, p. 11; \textit{see also} Carr Center MARO Project, \textit{supra} note 267, p. 13.
\(^3\) Lepard, \textit{supra} note 17, p. 20.
\(^4\) Evans, \textit{supra} note 9, p. 63.
\(^5\) Hinote, \textit{supra} note 129, pp. 11–12.
is currently how to ensure the arrest and surrender of individuals sought by the ICC. In this regard, commentators have recommended the creation of an international framework akin to an ‘International Marshals Service’, institutionalising, inter alia, the principle of *aut dedere aut judicare* and entities that can execute an arrest. This is the role that can be played by the ASF in Africa. To this end, the ASF should “trade expertise on strategies for arrests and explore which governments or alliances or organizations might have an interest in effectuating arrests without having to commit in advance to arresting any particular indicted fugitive.” While the problem of military intervention is largely political and legal in nature, there are also military challenges as to how to intervene, i.e., how to carry out, what Hinote calls a ‘campaign to protect.’ Thus, from a military perspective, the ASF needs to take practical steps that can make action go more quickly and effectively. These would buttress the need for adopting a military doctrine and creating standing operational plans for intervention pursuant to Article 4(h).

In a general sense, as part of guidelines for the doctrine in the context of halting mass atrocity crimes under Article 4(h) of the AU Act, there are four general possibilities when the ASF can use its military force. First, if indications of looming atrocities, the threat of force can deter the potential perpetrators from committing the atrocities. Second, if the commission of atrocities has begun, the threat of force, or its actual use, can compel perpetrators to discontinue the act. Third, if atrocities are ongoing, military force can defend the victims. Finally, military force can be used offensively against the perpetrators or destroy their resources, including equipment and infrastructure, needed to continue the violence. On the basis of these four general possibilities, the ASF can develop several specific military options for stopping mass atrocities in terms of Article 4(h).

These options can stand alone, but success in Article 4(h) intervention will be much more likely if interveners weave several options together into a coherent campaign that also includes humanitarian, diplomatic, economic, and related efforts. Although each of these military options can be implemented in isolation, that course is likely to be ineffective, especially if the situation crosses over into violence. A more effective approach will be to construct campaigns that weave several of these options into a coherent whole. The goal is for the different mechanisms for force incorporated in the options – deterrence, compellence (and where necessary, inducement), defence, and offence – to complement each other, increasing the likelihood that military force will stop the violence. It may become easy to implement intervention pursuant to Article 4(h), if there is a general template for such intervention. It should be stressed that any coercive intervention pursuant to Article 4(h) is but one element in a continuum of intervention, which begins with preventive efforts and hinges on the cooperation of States and the international community.

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1. Evans, *supra* note 9, pp. 5–6.
2. Ibid., pp. 5–6.
4. Ibid.
5. Ibid., p. 8.
6. Ibid., p. 9.
3.4. Taking Article 4(h) Seriously: The Obligation to Cooperate

When the Security Council took the momentous step of referring the situation in Darfur to the ICC Prosecutor under Chapter VII of the UN Charter on 31 March 2005, Resolution 1593 (2005) explicitly directed the “[GoS] and all other parties to the Conflict [to] cooperate fully with, and provide any necessary assistance to, the [ICC] and the Prosecutor.” However, the GoS has repeatedly done the opposite and reiterated its refusal to cooperate with the ICC’s attempts to apprehend two principal suspects, recently including the indicted President Omar Al Bashir. Considering the international community’s response to Sudan’s open defiance of Resolution 1593, executing the ICC arrest warrants will therefore require stronger international support for the ICC. Grono has aptly captured the concern and suggested a solution:

While one might not expect China or Russia to be at the forefront of the ICC’s supporters, one certainly could have expected a more robust response from, say France and UK, who pushed for the [UN Security Council] referral to the ICC. This complete absence of international support for the ICC is shameful, and does [not] bode well for the future success of the ICC if it is not reversed, soon.¹

This suggestion points to the need for international cooperation to ensure the protection of populations at risk.² Article 48(2) of the UN Charter requires members to carry out the decisions of the Security Council under Chapter VII of the Charter directly and through their action in the appropriate international agencies of which they are members, such as the AU. Any actual circumvention by States will constitute breaches of obligation, since members of the UN have agreed to accept and carry out decisions of the Security Council in Article 25 of the UN Charter. Following the Unilateral Declaration of Independence (UDI) by a small minority of settlers in the then British colony of Southern Rhodesia, the Security Council adopted a Resolution 216 (1965) condemning the UDI and calling on “all States not to recognize and to refrain from rendering any assistance to this illegal regime.” The Security Council warned Members that a failure to comply with sanctions constituted a violation of Article 25 of the UN Charter.³ This is in line with the above suggestion, which maintains that ensuring compliance requires pivotal states to come forward, placing the issue high on the international agenda, orchestrating an international response and offering to carry a significant portion of the political and financial burdens entailed.⁴ In this way, key states and their allies might use a mixture of coercive measures to elicit host state consent, making it harder for traditional opponents of intervention in the Security Council to block action.⁵

An example of this sort of action was the use of economic pressure by the US to persuade the Indonesian government to consent to the deployment of an Australian-led and UN-authorised force into East Timor (as Timor-Leste was then called) in 1999. To a large extent, it seems that Indonesian consent was granted because of US pressure. It is doubtful if the Security Council would have authorised enforcement action if Indone-

¹ Grono, supra note supra note 116, p. 13.
² Bellamy & Williams, supra note 278, pp. 144–160.
³ Article 25 of the UN Charter states that the UN Member States “agree to accept and carry out the decisions of the Security Council in accordance with” the Charter. See SEC/RES/216(1965) (12 November 1965).
⁴ Bellamy & Williams, supra note 278, pp. 144–160.
⁵ Ibid., pp. 144–160.
sian consent was not forthcoming. This point is drawn from the practice of the Security Council – Somalia and Haiti are the only countries so far where the Security Council authorized enforcement action without the consent of the target state, albeit the state functions being non-existent at the time in these countries. Article 93 of the Rome Statute requires States Parties to assist the ICC by cooperating in relation to an investigation and prosecution that are underway before the ICC. The duty to cooperate comes to the fore here considering that although the ICC has issued indictments for the leadership of the LRA, the Office of the Prosecutor continues to seek the cooperation of the international community for the arrest and surrender of the suspects. The same is true with the three indictments in Darfur at the time of writing.

If Article 4(h) and R2P are to be taken seriously, for example, in light of the close ties with the GoS, Russia or China’s obligation to cooperate could go a long way to put much needed pressure on the GoS to accept an international force. With the codification of the right to intervene in Article 4(h), there is no better entity to take a pivotal role than the AU. Feinstein has revealed that both African and Western governments are waiting to see “who makes the first move.” Western nations with spare capacity have not been volunteering to support action in Darfur partly out of deference to the AU, but partly also because they want an unambiguous message from the AU that outside support is in fact wanted – something the AU has not yet signalled. It follows that the AU must take a pivotal role to share its responsibility for the protection of civilians in Darfur with external actors, which, in turn, must commit resources to this task. This suggestion is supported by Article 7, paragraphs 2, 3 and 4 of the PSC Protocol, which provides that AU States are bound by the decisions and actions of the PSC and “shall extend full cooperation to, and facilitate action by the [PSC] for prevention, management and resolution of crises and conflicts.”

The UN General Assembly adopted Resolution 2840 (1971) on War Criminals affirms that a State’s refusal “to cooperate in the arrest, extradition, trial, and punishment” of persons accused or convicted of war crimes and crimes against humanity is “contrary to the [UN Charter] and to generally recognized norms of international law.” In addition, in 1973 the General Assembly adopted Resolution 3074 on Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity. However, no specialized international convention has been passed on that subject, and, therefore, the duty to prosecute or to extradite, while argued for by scholars, must nonetheless be proven to be part of customary international law in the absence of a specific convention establishing such an obligation.

2. Ibid.
In light of the significance of cooperation as manifested by the defiance of the GoS, the AU may need to institutionalise cooperation and devise pragmatic strategies to implement Article 4(h) judicially. The Darfur crisis has exposed that the AU States need to take measures to cooperate in the detection, arrest and extradition of individuals suspected of falling within the jurisdiction of the ICC, particularly as embodied in Article 4(h). This probably explains why in the Blaski case, the ICTY expressly stated that Article 29 of the ICTY Statute, imposing upon States a duty to cooperate with the ICTY, was valid *erga omnes partes.* As such, the AU may need to provide guidelines to institutionalize the principles of cooperation as outlined in General Assembly Resolution 2840(1971) and 3074 (1973).

The causes of the conflict in Darfur are complex, but it is clear that the root causes are economic. Yet, the international community had been unwilling to make preventive investment to alleviate Darfur’s developmental imbalances. While the Security Council as a body has the primary responsibility for the maintenance of international peace and security, paradoxically, commentators have documented that some of the individual member states on the Council are also actively involved in Africa’s wars. Of the P5, for example, commentators indicate that the US backs the government side in Somalia whereas France is an ally of Chad, which in turn is alleged to back rebels in Sudan. Among alternate members, according to Doyle, “Libya”, which holds a temporary seat on the council at the time of writing, “has over the years been deeply involved in the conflicts in Darfur in western Sudan.” Doyle informs that China and Russia have also sold arms to belligerents in Africa. In a similar vein, the former Prosecutor of the SCSL, David Crane, has revealed that without foreign support, including gun runners and other criminal organisations, the rebels in Sierra Leone could have been a weaker force.

The idea of ‘obligation to cooperate’ is rendered even more credible, for example, considering that the Rome Statute establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by providing the means for the commission in terms of Article 25(3) (c) of the Rome Statute. In this vein, Amnesty International has submitted, and rightly so, that providing weapons used to commit one of the crimes for which the ICC has jurisdiction may give rise to individual criminal responsibility.

According to Article 16 of the Articles on State Responsibility, a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if, first, that state does so with knowledge of the circumstances of the internationally wrongful act; second, the act would be internationally wrongful; third, the act would be internationally wrongful if it was committed in accordance with the provisions of the Rome Statute.
ally wrongful if committed by that State. This is clearly significant in terms of extraterritorial application of human rights obligations. However, Crawford is of the view that Article 16 requires that the aiding or assisting State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. The logical deduction is that where one State is aware or could reasonably expect that its assistance to an errant state may facilitate the commission of the crime this would imply that both the donor state and the errant state are responsible for the wrongful act.

The ILC Articles on State Responsibility endorse the idea that certain breaches of international law may be so grave as to trigger not only a right, but also a certain obligation of States to foster compliance with the law. However, the ILC limited this principle to *jus cogens* norms some of which are embodied in Article 4(h) of the AU Act. The ILC specified that such breaches would entail two sets of consequences: first, a positive obligation of States to cooperate to bring the serious breach to an end through lawful means; and, second, a negative obligation of States not to recognise as lawful a situation created by the serious breach and not to render aid or assistance in maintaining that situation.

Stahn notes that R2P takes the idea of responsibility even further than the threshold set by the ILC in that it does not link the idea of a collective international responsibility to a double qualifier, i.e., serious breaches of peremptory norms such as genocide, but rather extends that idea to all forms of ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. Stahn also notes that the targeted obligation to cooperate to end the breach is transformed into a general responsibility to use ‘diplomatic, humanitarian or other peaceful means’ or collective enforcement action to help protect populations from mass atrocity crimes. Against this backdrop, Stahn is of the view that R2P as set forth in the World Summit Outcome Document is meant to entail positive obligation in the sense of Article 41(1) of the ILC Articles on State Responsibility and it marks an even more progressive development of international law.

Today, it is beyond dispute that the prohibitions on genocide and a number of specific acts that may constitute war crimes or crimes against humanity are considered peremptory norms of international law. Article 41 of the ILC Articles on States Responsibility indicate that, when a State commits a serious breach of a peremptory norm, the international community should cooperate to bring the breach to an end using lawful means.

In this context, Luck is of the view that while “the third pillar of R2P does not of itself, impose new legal obligations on the international community in cases of genocide, war crimes, ‘ethnic cleansing’, or crimes against humanity, it is consistent with evolving state

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6. However, as the ILC itself acknowledges in its commentary on the Draft Articles, it is “open to question” whether a positive duty of cooperation currently exists, and Article 41 “in that respect may reflect the progressive development of international law,” *see* Crawford, *supra* note 326, p. 249.
practice toward enhanced cooperation in such situations."1 This assertion is in line in Principle 4 of the Princeton Principle on Universal Jurisdiction which stipulates that:

A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states in investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and under-taking such other necessary and appropriate measures as are consistent with international norms and standards.2

In the same vein, a State, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another State, provided that the requesting State has a good faith basis and that the evidence sought will be used in accordance with international due process norms.3 The obligation to cooperate would therefore entail that the international community must ensure that the Security Council resolutions are enforced and punitive measures applied. In terms of ‘persuasive prevention’, this entails that the international community should heed the early warnings, seize the opportunity at every corner to engage in conflict resolution; send a unified and resolute message to the concerned parties; and apply credible pressure on the target state. Political constraints, involving delicate balances of power, often with the spectre of war or other violence, frequently prove to be a very real obstacle to the pursuit of accountability. In order to surmount political constraints, a set of facilitative provisions may provide that AU Member States foster accountability as well as intervention pursuant to Article 4(h). As such the AU should establish guidelines to oblige Member States to cooperate, under specified circumstances, AU States bear a responsibility to participate in the provision of such assistance and cooperation in overcoming political constraints on accountability as well as intervention in terms of Article 4(h).4


As it stands today, there is no rule of international law that would justify a cross-border use of force, whether in the form of ‘humanitarian intervention’ or state of necessity, to end the commission of human rights violations in another State. It is true that the claim for a ‘right to humanitarian intervention’ is still nebulous in international law. However, it is also true that a consistent practice of such intervention is discernible at sub-regional as well as regional level in Africa in response to widespread breaches of basic human rights obligations. The AU has defined the legal horizon as regards enforcement by consent to prevent or stop mass atrocity crimes in Article 4(h), with or without UN mandate. Following the incorporation of the right to intervene in Article 4(h) of the AU Act and the accompanying restatement of such obligations in the World Summit Document, there is not only a legal obligation but also a political commitment to protect populations at risk from mass atrocity crimes in Africa. To be effective, the AU will need to outline guidelines on how intervention will be authorised and on mechanisms for its implementation. While there is inconsistent authorization of enforcement action by the UN Security Council, the legality of intervention without the Security Council authorisation by the AU is still questionable.

There can be no doubt that the thresholds for intervention under Article 4(h) are serious crimes under international law, which are subject to universal jurisdiction. Enforcement of such _erga omnes_ obligations against individual perpetrators does not seem to impair the territorial integrity or political independence of a State in the sense of the prohibition of use of force under the UN Charter. The AU may need to elaborate a robust regime for responsibility applicable to mass atrocity crimes under Article 4(h). The essential features of such regime would relate to the resort to armed force by the ASF to pursue perpetrators. The goal of resort to military force would be to impose cessation of criminal conduct, bring perpetrators to justice, restitution, and the implementation of far-reaching guarantees against repetition. Supplementary obligations for AU States may include non-recognition, abstention regarding assistance to the author state, obligation to cooperate, and not hinder the exercise of reparation and countermeasure rights, implementation of the _audit dedere et aut iudicare_ principle, exercise of universal jurisdiction, taking part in lawful measures decided or recommended by the AU or the international community, and facilitating the adoption of lawful measures to cope with emergency situations, among others.

An errant government will only change its abusive policies if it calculates that the international repercussions for non-compliance outweigh the domestic costs of cooperation. In this connection, Grono has seen that: “The international community, with its disparate interests and varying levels of outrage, has expressed shock and horror, and applied some pressure – but lacks the political will to apply enough sustained pressure on the Sudanese regime to change its calculus of self-interest.” In addition, Black and Williams have noted that:

Governments and international organizations, up to and including the UN Security Council, have also come under sustained pressure to “do something” to relieve suffering in Darfur and negotiate a sustained end to the conflict. In practice, these pressures have not always been very specific about the type of desired action, and have at times contributed to hasty and ill-conceived agreements driven by high-level negotiators being “parachuted” into the region for short periods of time. The best example was the final negotiating session for the failed Darfur Peace Agreement in May 2006.1

Hence what is needed is ‘persuasive prevention’ to compel a recalcitrant government or rebel group to end their abusive policies. The AU may seem to have engaged in persuasive prevention when, for example, at its annual summit in January 2007, the AU refused for the third successive year to give its revolving chairmanship to Omar Al-Bashir, the Sudanese leader, due to the deteriorating situation in Sudan. Instead, the AU allocated the chairmanship to John Kufuor, the then President of Ghana, whose country had emerged well from the application of the African Peer Review Mechanism (APRM).2 The point is to ostracise perpetrators and stigmatise the commission of atrocities on the continent. In this way, deviant States should feel the watchful glare of the international community and be sufficiently afraid of Article 4(h) intervention that they should voluntarily cease their policies of mass atrocities against their own citizens.3 For this reason, diplomacy backed up by force and the threat thereof is a viable option. Only threats that carry the credibility that they will be acted on and that they will impose sufficient costs to tip the target’s calculus have a chance of having coercive impact.

It is also crucial that the ASF should have the capability to protect which entails the credibility for possessing the will and capacity to act, including the situational credibility as regards the case at hand to enforce accountability regimes against the perpetrators of human rights abuses. In the same vein, the timely and preventive deployment of UNPREDEP may be emulated as a model for the ASF for deterrence or compellence in order to prevent jus cogens crimes in Article 4(h) of the AU Act. However, the most that can be achieved through the use of military force is to stabilise the situation so that a space can be created for a political process rather than winning through military means alone. Taking UNPREDEP as a model, military force was deployed in three phases as a preventive measure and involved both military and political or civilian mandates including a humanitarian dimension. In so doing, international preventive action did not threaten nor diminish Macedonia’s national sovereignty; indeed, Macedonia invited UNPREDEP.4

Truly, respect for human rights is a viable and less costly method of conflict prevention than reaction after violence has erupted. To this end, human rights monitoring can constitute an excellent tool for early warning and preventive action. This brings to the fore the fact that the AU should develop early warning systems which are the cornerstone of preventive action. Although the AU may have limited resources, not all action is costly, for instance ‘persuasive prevention’ to ensure compliance with erga omnes human rights and IHL obligations. The AU right to intervene offers the prospect of functioning as a deterrent for serious human rights violations. Potential perpetrators are now aware that

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2. Evans, supra note 9, p. 90, fn. 34.
they cannot pursue their atrocious paths unhindered because they might face forcible Article 4(h) intervention. One of the bedrock legal assumptions – and certainly one that has informed this discussion – is that the conditions for intervention in Article 4(h) are serious international crimes subject to universal jurisdiction. Therefore, one possibility for intervention under Article 4(h) may be through ‘persuasive prevention’ by way of enforcement of *erga omnes* obligations to prevent *jus cogens* crimes.

In order to shift from the realm of mere rhetoric to the realm of doctrine, policy and implementation of Article 4(h) and R2P, the missing link is a calculus for ‘persuasive prevention’. To effect ‘persuasive prevention’ the AU may need to consider the following: firstly, adopting a legally binding instrument for ensuring adherence to human rights and ending impunity. This legal instrument should institutionalise and advance the universal but scattered obligations on the prevention of, and accountability for, mass atrocity crimes and enforcement of reparations. The Organization of American States (OAS) has developed impressive jurisprudence especially on the fight against impunity from which the AU can borrow a leaf. For instance, the OAS General Assembly adopted its Resolution on the Promotion of the Rome Statute as well as to co-operate with the ICC in, *inter alia*, investigation, prosecution, and punishment of the perpetrators of *jus cogens* crimes. Africa, probably more than any other continent, needs such kind of a resolution if authors of atrocities are to be deterred from committing *jus cogens* crimes outlined in Article 4(h) of the AU Act.

Secondly, the AU should establish an institution to oversee the implementation of IHL on the continent. Although the AU human security architecture constitutes early warning mechanisms and somewhat early response mechanisms, it does not have adequate preventive mechanisms. While the protection of civilians is a responsibility of States, often it is the government itself that perpetrates abuses. However, governments are not the only violators, considering that many abuses occur in rebel-held territory to which the government has no access. The myriad armed conflicts in Africa, a continent in perpetual turmoil, justify the need for an IHL body to complement the Geneva-based ICRC. The other motivation for establishing an IHL monitoring body is that since the conditions triggering intervention under Article 4(h) invariably take place in armed conflicts, they can effectively be prevented by such a body.

While emphasis is put on early warning, what is needed most is corresponding early action to prevent mass atrocity crimes. Making the transition from efficient early warning to effective timely response demands effective institutional capability. The proposed IHL body may be supported by the ASF, which has a legal basis to act as a continental police force, and with a network of courts, would offer warlords no refuge on the continent. The prospect that they may be prosecuted anywhere on the continent or, indeed

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3. The XXVI OAS General Assembly Resolution AG/RES. 2176 (XXXVI-O/06) on the Promotion of the International Criminal Court.
5. Evans, *supra* note 9, pp. 175–199.
by any state worldwide, in respect of mass atrocity crimes may be a serious deterrent to potential perpetrators. In the same vein, in the absence of a monitoring organ to ensure the implementation of the Genocide Convention, Schabas suggests that the formation of a ‘Committee on Mass Atrocity Crimes’ is a progressive idea that the AU may need to take up given that the continent has been the ground for genocide and mass atrocities as outlined in Article 4(h). However, the AU may need to establish a ‘Committee on Mass Atrocity Crimes’ to cover all the heinous crimes in Article 4(h). Target States must provide to such an institution timely reports of steps they have taken towards implementing international obligations to prevent mass atrocity crimes. The monitoring body, in turn, should be directed to publish the target State’s report as well as its own assessments of the State’s efforts. The crucial point would be to provide a mechanism where recommendation of such a committee would be binding on AU States.

Thirdly, the AU may need to formulate a doctrine for the deployment of the ASF for timely and effective implementation of Article 4(h) of the AU Act. More significantly still, in order to carry out a ‘campaign to protect’, the ASF should have ‘capability to protect’. In this case, where appropriate and within their mandates the ASF should have a credible deterrent capacity. A timely decision by the AU would enable the ASF to protect civilians with an appropriate mandate and adequate resources. To avoid reinventing the wheel, the AU should liaise with NATO as regards the formation of the NATO Response Force (NRF) as well as the EU on the EU Battle-Groups. This underscores the need for the ASF to have a clear-cut, and not ad hoc, working relationship with the EU Battle-Groups and NRF, which are exceptionally well placed to respond to fast-moving mass atrocity crime situations. The NRF may need to assist the ASF in developing an ongoing best practices and lessons-learnt capacity on peacekeeping for the AU. AFRICOM and the UN Peace and Support Team (PST) are other ready and willing partners in this regard. Further, if the UN is to continue to rely on the involvement of regional organisations such as the AU, as it needs to, then it must commit more deeply to developing their capacity and capability to protect. To this end, The UN should develop the ASF’s capacity and capability to protect through the ‘Ten-Year Capacity-Building Programme for the AU’. Fourthly, the AU should institutionalise the ‘obligation to cooperate’ in the enforcement of erga omnes obligations outlined in Article 4(h). AU States should cooperate with, and render assistance to, the ICC and other domestic courts in relation to investigations and prosecution of mass atrocity crimes under Article 4(h) of the AU Act. At the end of

2. The suggestion was made by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities; Schabas, supra note 198, p. 7.
4. Hinote, supra note 129; Gompert, supra note 288.
7. Mepham & Ramsbotham, supra note 200, p. 58; Powell & Baranyi, supra note 150, p. 5.
the day, the idea is to stigmatise the commission of such *jus cogens* crimes on the African continent considering that legal, political as well as institutional challenges still stand in the way of the AU to implement the right of intervention under Article 4(h). By way of caution, however, military force is only one part of a comprehensive solution for halting mass atrocity crimes. Any successful effort will require the threat of force or its actual use to deter or stop the violence, but this is not sufficient for addressing the root causes or achieving a lasting solution. In the short run, humanitarian efforts are often necessary to meet the populations’ basic needs. In the long run, diplomatic and economic efforts are needed to create and sustain the momentum toward a lasting solution for ending mass atrocity crimes.¹ This underscores the role of the New Partnership for Africa’s Development (NEPAD) and Conference on Security, Stability, Defence and Cooperation in Africa (CSSDCA) in promoting good governance and rule of law, vital ingredients to the protection of human rights and prevention of mass atrocity crimes.²

¹. See Hinote, *supra* note 129, p. 5.
Primary Material

A. Other Relevant Reports and Documents


University of California, *The Responsibility to Protect (R2P) – Moving the Campaign Forward*, Human Rights Center, Region, Politics and Globalization Program International Human Rights Law Clinic, Berkeley, October 2007

II. Secondary Material

A. Articles


B. Books


Serveau, Jocelyne, ‘Coercive Inducement: Normative Dilemmas and Historiographical Debates, Concordia University, <www.jha.ac/articles/a090.htm>

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2. Maja Naur, Social and Organisational Change in Libya. 1982, 33 pp
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