The conundrum of conditions for intervention under article 4(h) of the African Union Act

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Introduction

The justification for intervention in terms of article 4(h) of the African Union Act is grave circumstances that constitute serious human rights violations in the form of genocide, war crimes and crimes against humanity. Yet, acts that shock the conscience and elicit a basic humanitarian impulse remain politically persuasive. A practical example of this is the widespread human rights abuses that occurred in the Darfur region of Sudan, which tests the efficacy of the AU’s right of intervention as well as the commitment to the responsibility to protect (R2P) norm. Thus, the question which this discussion seeks to address is how and when the AU should implement article 4(h). A related question is when the international community should take on this ‘responsibility to protect’. Conceivably,

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the legitimacy of the AU right of intervention will depend on how the AU answers the question as to when and how it should intervene in a member state. The present discussion will not dwell on ‘second-tier intervention’ which involves intervention to restore peace and stability (although it does beg the question as to whether it will focus on state security or human security) and ‘third-tier intervention’ or intervention by invitation (which could spark a debate on whether or not it should be at the request of third states or the state in question) (Kioko 2003:816; Cilliers & Sturman 2002:5; Baimu & Sturman 2003:4).

Human rights violations as a threat to or breach of international peace and security

The practice of the Security Council has shown that human rights violations may under certain circumstances be regarded as threats to the peace, and that rampant and egregious violations of essential human rights may themselves constitute ‘breaches’ of the peace. According to Lepard (2002:177) a definition of ‘peace’ that includes the absence of widespread and severe violations of fundamental human rights is justifiable because it recognises a ‘moral equivalence between war and human rights violations that have a similar impact to war on the welfare and protection of human rights’. Expanding the permissible range of threats to peace to include human rights violations threatening ‘international peace’ allows greater consistency than a ‘trans-boundary effects’ test. Given that such a test is not explicitly required by the text of the UN Charter, it should not be used to allow absurd results from a moral point of view.

According to the trans-boundary effects test, losses of life on the same scale in different countries may not lead to lawful Security Council jurisdiction under chapter VII merely on the basis of whether they produce refugee flows across borders, spill-over effects or are likely under the circumstances to provoke intervention by particular states. Lepard (2002) counsels that such inconsistencies could be avoided by an interpretive approach focused on preserving human life and safeguarding other essential human rights. In any case, the debate is driven the question of when the situation ceases to be essentially a domestic matter calling for international intervention.

When does a situation cease to be ‘essentially a domestic matter’?

Although the inchoate notion of ‘humanitarian intervention’ is starting to gain international legal salience, it is still a controversial concept in international law. Similarly, the right of the AU to intervene in a member state in the face of grave circumstances presents questions regarding sovereignty turning on the issue of when the protection of a state’s citizens ceases to be a domestic issue. Put bluntly, the crucial question is how to determine the deterioration or tolerance threshold after which a situation ceases to be a matter essentially within the domestic jurisdiction of a state. For instance, in spite of the humanitarian rationale the ECOWAS intervention in Liberia in 1990 was beset by
acrimony and controversy as some ECOWAS member states, notably Côte d’Ivoire and Burkina Faso, contested the political and legal basis of the intervention. They argued that the Liberian crisis was an internal problem that did not require regional military intervention (Aboagye & Bah 2005). In the words of Ekiyor (2007:4):

In relation to prevention of genocides and war crimes, one key question asked on the continent is what is an extreme circumstance? The international community was slow to intervene in the Liberian conflict in 2003, though evidence of widespread killings by government and rebel forces was clear. The subjectivity in assessing extreme situations undermines the importance of implementing [R2P]. The argument that Iraq was an extreme case, while Liberia was not, raises scepticism that interventions under R2P will also be based on the geostrategic value of countries requiring preventive intervention than on the need to protect civilians.

The questions of threshold that the notion of R2P raises are similar to those brought to the fore by article 4(h). In promulgating the principle of R2P, the International Commission on Intervention and State Sovereignty (ICISS) set a very high threshold for humanitarian intervention, only to be considered in the face of ‘large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation’ (Evans & Sahnoun 2000:34–36, parr 4.32–4.43). In fact, the ICISS proposed the following ‘conscience-shocking situations’ as justifying military intervention for humanitarian protection: acts defined by the provisions of the 1948 Genocide Convention (UN 1948), the threat or occurrence of large-scale loss of life, diverse manifestations of ‘ethnic cleansing’, crimes against humanity and violations of international humanitarian law, and situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war.

The point, however, is that every life counts and should therefore be protected. In addition, in terms of the obligations under the UN Charter, every sovereign state has the duty to save succeeding generations from the scourges of war (and certainly human rights violations). Therefore, to suggest that the international community should not intervene until ‘conscience-shocking situations’ have occurred, may be a misstatement of gargantuan proportions. This is particularly so with respect to the high threshold for crimes against humanity, requiring as it does ‘widespread and systematic attack’ and that of war crimes, which require ‘a plan or policy or as part of a large-scale commission’ of the crimes. The same applies to genocide which requires a specific intent (dolus). It is understandable, however, that the rationale behind limiting the threshold to serious violations is not to dilute the attempt to protect civilians against massive savagery, but rather to reduce the possibility of abuse of the right to launch humanitarian interventions. This underscores the need for a definitive threshold for deciding upon and exercising the right of intervention under the AU Act.
Certainly, the international community should not wait for an all-out large-scale war with its accompanying devastation before condemning and punishing its perpetrators. Thus, although the rule against intervention in internal affairs encourages states to solve their own problems and prevent them from escalating into a threat to international peace, the ‘just cause’ theory provides a benchmark for determining when rules protecting sovereignty should yield to intervention to protect the rights of individuals at risk. Drawing from the provisions of the UN Charter, the AU Act and views of various scholars, a common yardstick for a legitimate intervention is therefore to save humanity from atrocities (Danish Institute of International Affairs 1999). The AU Act is precise in article 4(h), which provides for the right of intervention in cases of war crimes, genocide and crimes against humanity. Yet, apart from being silent on how to intervene, article 4(h) is also incomplete on how to decide when to intervene.

International human rights and humanitarian law instruments provide clear definitions of war crimes, genocide and crimes against humanity, but there is a lack of consensus on what constitutes grave circumstances. The experience from the Rwandan genocide and the Darfur crisis, clearly attest to the fact that valuable time may be expended on debating labels for the ominous events, rather than taking action. Concepts such as ‘grave circumstances’, ‘supreme humanitarian emergency’ and ‘severe violations of international human rights and humanitarian law’ may be prone to subjective definitions. There is evidently a need for intervening states to make a convincing case to the effect that the violations of human rights within the target state have reached such a magnitude that they ‘shock the conscience of humanity’. However, this leads to the question as to how many people must die before humanitarian intervention can be justified. Certainly, it should not the numbers that get killed or tortured that matter.

In this regard both Wheeler (2000:34) and Kindiki (2005:285) suggest that a supreme humanitarian emergency exists when the only hope of saving lives depends on the outsider coming to the rescue. Although the AU Assembly of heads of state and government (the AU Assembly) can decide on intervention on its own initiative or at the request of a member state pursuant to article 4(j), the provision does not spell out a clear-cut threshold that would warrant intervention. The various thresholds for intervention under article 4(h) is examined below.

**The thresholds for intervention under article 4(h) of the AU Act**

**War crimes: the challenges of victor’s justice**

Although the AU has provided for war crimes as a threshold for intervention, accountability for war crimes is limited to armed conflict. The 1949 Geneva Conventions
and 1977 Additional Protocol I thereto provide protection for non-combatants during armed conflicts.\footnote{In elaborating the Geneva Conventions, Additional Protocol I defines ‘war crimes’ as grave breaches of the Conventions or the Protocol. The Rome Statute of the International Criminal Court (ICC) has filled the protection gap in internal armed conflicts by dealing with criminal responsibility for grave breaches in common article 3 and protocol II. Following the Tadi case (interlocutory appeal, par 94), war crimes may be perpetrated in the course of either international or internal armed conflicts. War crimes are serious violations of customary or, when applicable, treaty rules concerning international humanitarian law (Ratner & Abrams 2001:82, 98–99).}

War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against members of the enemy armed forces. Conversely, crimes committed against friendly forces do not constitute war crimes. Criminal offences, if they are to be considered war crimes, must also have a link with an international or internal armed conflict (Cassese 2003:739–740.). It is noteworthy that no statutory limitation applies to war crimes. Yet the lack of any exact, objective criterion defining armed conflict poses challenges for determining when a conflict begins, although it is generally agreed that it involves the use of armed forces, as opposed to police, and the actual firing of weapons (Ratner & Abrams 2001:84).

The grave breaches provisions serve to criminalise a core set of violations of the Geneva Conventions by mandating that states enact penal legislation and then extradite or prosecute offenders.\footnote{In practice, however, the picture that emerges of a common attitude towards war crimes in history is that in a just war, there can be no war crimes; one side’s heroes are the other side’s war criminals. There is an African saying that ‘as long as lions do not have their own historians, hunting stories will continue to glorify the hunters’. Looking at the spectrum of justice of warfare, this proverb proves to be absolutely correct. The natural tendency of those in power, particularly military leaders, is to glorify their deeds, often by creating myths centring round heroes. States have proved to be reluctant to prosecute their own soldiers for war crimes unless they are especially heinous and publicised, ‘they have thus justified impunity, or a small administrative punishment, on the exigencies of warfare’ (Ratner & Abrams 2001:106). In addition, states often hesitate to prosecute the opponent’s soldiers if the opponent is still holding some of their prisoners, for fear of reprisal. According to Ratner and Abrams (2001:106–107):}

[A]s with interstate war crimes, the prospect of actually achieving individual accountability will depend heavily on the belligerents themselves … If government forces succeed in putting down a rebellion, they would seem prone to prosecute only the losers for violations of domestic law, rather than investigate the actions of both sides for war crimes. If the rebels are successful, they might choose to address only the accountability of the former government and its military forces.
Ratner and Abrams (2001:106–107) also lucidly explain the accountability dilemma in an intrastate conflict thus:

Moreover, the nature of intrastate conflict means that generally only the government at best will have functioning courts. This makes it less likely that the opposition forces will be able to try their officials for internal war crimes and perhaps more likely that the government will direct its prosecutions toward opposition figures rather than own military personnel. In the event an international tribunal is established it will again depend upon the parties’ co-operation in handing over officials, who will doubtless attempt to justify their acts based on military necessity.

Though prohibited, war crimes continue to be committed with impunity. Contrary to the aims and aspirations of the ‘peoples of the UN’, the scourge of war continues to generate untold abuses to civilians while most of the abusers have gone unpunished. Experience shows that perpetrators of atrocities are often rewarded with access to political power. In the Democratic Republic of Congo (DRC), for instance, the former warlords were safely ensconced in the transitional government. Therefore, until the responsibility for ensuring civilian protection is respected by states and non-state actors, the norm of responsibility to protect will remain an ideal.

Hence, the establishment of the ICC is a quantum leap towards the protection of human rights given that it can ‘deter future war criminals, and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity’. The same holds true for the ad hoc International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as international criminal tribunals and the Special Court for Sierra Leone (SCSL).

Thus, today, the international community no longer tolerates situations in which war crimes go unpunished. Furthermore, the Geneva Conventions and Additional Protocols provide for certain formal mechanisms to monitor compliance with the law during hostilities. It is clear from the wording of article 4(h) that the insertion of the right of intervention in the AU Act was reaction to the crimes committed against civilians in armed conflicts on the African continent. However, intervention to prevent war crimes will be problematic to implement if the loopholes to check war crimes are not addressed.

According to Greenwood (2003:820) the most important means of ensuring compliance with international humanitarian law is ‘scrutiny by, and pressure from, third parties’. The reasoning is that a warring state will often be heavily dependent upon the goodwill of neutral states, which may well be jeopardised by allegations of atrocities. Such allegations can also have a negative effect on public opinion in the belligerent states.
themselves. Pressure of this kind operates outside the law itself, since the law makes no express provision for it (Greenwood 2003:820–821). It is in such areas where ‘pressure operates outside the law’ where the AU needs to intervene to fill the protection gap. This argument is validated by the fact that the diminishing impact of the ‘protecting power’ system has shifted the burden to the International Committee of the Red Cross (ICRC) to assume the humanitarian functions. Where the ICRC is granted access it operates strictly on a confidentiality basis and its reports are not made public. Although the ICRC has at times been successful in private persuasion where it detected violations, it cannot be used to mobilise public opinion to put pressure on the state committing the violations.

The AU has several options for tying the loose ends in the protection of civilians in armed conflicts, including but not limited to establishing a committee to oversee the compliance with international humanitarian law; ensuring that countries have made a declaration pursuant to article 90 of the Additional Protocol I to the Geneva Conventions which recognises the competence of the International Fact-finding Commission; ensuring that countries at risk declare a state of emergency pursuant to article 4 of the International Covenant on Civil and Political Rights (ICCPR) or else do not breach human rights; creating a standing police capacity for the AU within the African Standby Force that will ensure that perpetrators of war crimes are brought to justice (regardless of whether they are from the government or the insurgents); strengthening the link between the AU and the ICC; establishing a proactive disarmament regime; and establishing an obligatory dispute resolution mechanism.

**Genocide: numerical issues and evidentiary problems of intent**

Although article 4(h) of the AU Act lists genocide as a condition for intervention, problems remain regarding the *actus reus* (unlawful act) and *mens rea* (intention to commit crime) of genocide, the nature of protected groups and the quantitative dimension of the crime. However, much debate about genocide revolves around the proper definition of the word. Indeed, the concern about their inability to prevent or halt the Rwandan genocide led the then OAU heads of state and government to set up an international panel of eminent personalities to investigate the 1994 genocide in Rwanda and surrounding events (OAU 2000). This panel blamed the neighbouring countries, but also the erstwhile OAU, the UN and the international community at large for failing to call the killings in Rwanda by their proper name, namely genocide, and for failing to stop the violence. According to article 6 of the Rome Statute genocide refers to the intentional killing, destruction or extermination of groups or members of a group. Genocide acquired autonomous significance as a core crime upon the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the General Assembly, a day before the proclamation of the Universal Declaration. Article
I of the Genocide Convention contains an obligation to prevent acts of genocide and to punish persons guilty of genocide, within a state’s own jurisdiction (Schabas 2002:30).

The International Court of Justice (ICJ) has recognised that the prohibition of genocide is a customary legal norm *erga omnes* (obligations towards all other member states of the international community) that also has a status of *jus cogens*, that is, peremptory norms that may neither be derogated from by international agreement nor *a fortiori* by national legislation (Cassese 2003:744). As Schabas (2000:3–4) noted, the ICTY and the ICTR consider genocide to be the crime of crimes. Similarly, in its advisory opinion on *Reservations to the Convention on Genocide*, the ICJ (1951:15, 24) held that ‘the principles underlying the Convention are principles which are recognised by civilized nations as binding on states, even without any conventional obligation’. Apart from being endorsed by the Security Council in resolution 808(1993), this position has been echoed in the ICTR case of *Akayesu* (par 495) and ICTY case of *Krsti* (par 541). At the level of state responsibility, it is now apparently accepted that customary rules of genocide impose *erga omnes* obligations and at the same time confer on any state the right to require that acts of genocide be discontinued. Further, those rules are *jus cogens*.

Although still controversial, article II of the Genocide Convention has lent stability to the definition of genocide as constituting any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (Glaser 1970:15–16):

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group

Genocide is thus comprised of three main elements: first, the commission of at least one of the acts listed in the definition, second, the act should be directed at the specified groups and third and importantly, the intention should be to destroy the group wholly or partially.

It follows from the language of article II that the act of genocide involves the commission of certain acts against specified (stable and permanent) groups with a specific intent and does not require the complete annihilation of a group. The Convention confines itself
to the physical destruction of groups to which persons normally belong ‘involuntarily’, often by birth. This explanation derives from the opinion of the International Law Commission (ILC) that the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership of a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual of a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target of this type of criminal conduct. In short, at the heart of the definition is the fact that the perpetrator has identified the group for particular destruction. The test is subjective and not objective (Schabas 1999:3).

The language of the Convention in the chapeau of article II is that genocide must aim at the destruction of the group ‘in whole or in part’ giving an impression that ‘… there must be some quantitative threshold where mass murder turns into genocide’ (Schabas 2000:40). On the basis of the argument by Schabas, the quantitative test is more than merely a numbers game. The term refers to the genocidal intent and not to the physical act. Given that genocide is a crime of intent, ‘the real question is what is the purpose of the offender, not what is the result’ (Schabas 1999:3). Thus it is not necessary to have the intension of achieving the complete annihilation of a group, although the crime of genocide does by its very nature seem to require the intention to destroy at least a substantial part of the group. The actual result, in terms of quantity, will nevertheless be relevant in that it assists the trier of fact to draw conclusions about intent based on the behaviour of the offender. The greater the number of actual victims, the more plausible becomes the deduction that perpetrators intended to destroy the group, in whole or in part.

The number of victims may vary depending on the nature of the group and the proportion they represent of the group’s total population (Schabas 1999:3). According to Bassiouni (1994:279, 323) the protected group may be defined qualitatively as well as quantitatively or, put differently, ‘significant’ rather than a ‘substantial’ part of the group must be targeted. The total number per se may be a strong indication of genocide regardless of the actual numbers killed. Using the ‘significant group’ approach, the test is whether the destruction of a social class or level threatens the group’s survival as a whole. The involvement of a government is not required and genocide may be committed without an organised plan or policy of a state or similar entity. However, according to the Kayishema case (par 94) the existence of a plan or policy may form strong evidence of the existence of the specific intent for the crime. This is evident from the fact that article IV of the Geneva Convention holds that persons committing genocide or any of the other acts outlined in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.
The Akayesu case confirmed that the enumeration of genocidal acts in article II of the Geneva Convention is exhaustive as opposed to illustrative, and that the term clearly includes bodily or mental torture, inhumane treatment and persecution. In this case, the ICTR found the accused guilty of genocide for acts of rape and mutilation. The Akayesu case contained the landmark decision which defined rape as an act of genocide when committed with the intent to destroy a particular ethnic group (Akayesu case, judgment, par 516). Practitioners have suggested that in determining whether an act is genocidal, it will be guided by the Geneva Convention’s primary focus on preventing the physical destruction of groups. The ICTY and ICTR have held that the defendant must possess the specific intent to be guilty of genocide; if he merely knew his actions would further the destruction of the group but did not have the specific intent to do so, he can only be found guilty of complicity in genocide (Akayesu case, judgment, parr 485, 538–548; Ratner & Abrams 2001:32–37). The intent to destroy should be directed at the group as a protected group (Ratner & Abrams 2001:38).

However, determining what constitutes genocide and what is merely criminal or inhuman behaviour is not a clear-cut matter. Furthermore, in nearly every case where accusations of genocide have been made, partisans of various sides have fiercely disputed the interpretation and details of the event, often to the point of providing wildly different versions of the facts. This debate is reminiscent of the Rwandan genocide of 1994, when valuable time was expended on debating labels for the terrible events that had taken place in that country. An accusation of genocide is certainly not to be taken lightly and will almost always be controversial. This reflects the sentiments of Beckman (2005:135) when he says that genocide has ‘a clear legal definition and it certainly constitutes a very severe accusation’. He argues that the hesitation to ‘use the very word – genocide – [is] undoubtedly governed by political considerations, though in a legal context’. The implications are that admitting to the occurrence of genocide means that the commitment and responsibilities under article VII of the Genocide Convention are invoked. Although the Genocide Convention does not impose any right or duty to intervene, it obligates states parties to ‘call upon the competent organs of the UN to take action to suppress acts of genocide’. This is possibly why many states deliberately played down the scale of the killing in Rwanda, fearing that an acknowledgment that genocide was occurring would create a legal (and moral) obligation to intervene (Schabas 1999:6; Mepham & Ramsbotham 2007:2).

Historical evidence shows that the welfare of civilians has been overshadowed by the narrow national self-interest of one or more of the permanent members of the UN Security Council, coupled with lack of international consensus on what constitutes genocide. This has played into the hands of the protagonists, to the detriment of the civilian population, who continue to bear the brunt of serious violations. Such dithering on the part of the international community, exacerbated by the lack of a common mechanism to verify the existence of genocide, reinforces the need for AU action that
would rapidly and effectively arrest any genocidal intent on the continent (Report of the High Level Mission in Darfur). While arguing that the situation in Darfur certainly warranted more concrete international action, Bah (2005:32–42) poignantly asks:

If the killing of approximately 75 000 [as it was then, now 200 000] innocent civilians and the displacement of [2,5] million do not constitute genocide, then what does? How many more people would have to be slaughtered and driven from their homes before the international community responds appropriately?

The situation in Darfur is further complicated by the rather ambiguous report of the UN International Commission of Inquiry on Darfur. For instance, while the report acknowledged that war crimes had been committed, it added that this did not constitute genocide and concluded that in some instances individuals, including government officials, may have committed acts with genocidal intent. In this respect the report falls short of expectations and could have the unintended effect of deflecting international attention from the real issue on the ground, which is justice for the innocent victims. In contrast, the US Congress observed that ‘the atrocities in Darfur, Sudan, are genocide’ and called on the members of the UN ‘to undertake measures to prevent the genocide’.5 This shows that the tougher issue is not whether to intervene, but when and how. That is the question with which the international community still grapples. This will also be the question that will occupy the AU. The enforcement mechanisms envisaged by the Genocide Convention are ineffective since it contemplates trials before the courts of the state in whose territory the genocide has occurred, or before an international penal tribunal pursuant to article VI. Yet history is witness to the fact that the hand of the state or those who wield state-like power is visible in every modern-day genocide, a fact that will make national prosecutors reluctant to act (Jallow 2007).

The definition in the Geneva Convention does not include cultural genocide, in the form of for instance the destruction of the language and culture of a group or the extermination of a group on political grounds. By the same token, the limitations of the definition of genocide, particularly the restricted list of protected groups and intent requirement, pose significant hurdles to making a case of genocide where it is difficult to determine whether victims constitute a cohesive group as protected by the Convention, for instance where a religious sect overlaps with a political group as in the case in the Darfur region of Sudan. In advocating for the expansion of the definition of genocide, Ratner and Abrams (2001:44–45) find no justification in the definition for including groups based on religion, nationality and ethnicity while excluding those based on political views, social status or economic station:

[T]he decades since the Genocide’s adoption have seen several episodes of mass killing ... which in large part fall outside the Convention’s
ambit, yet which from today’s perspective are in many respects morally indistinguishable from those that do fall within it … with the end of the Cold War and the nearly universal professed commitment to a core corpus of human rights, the least denominator that prevailed in 1948 has certainly increased.

Although the ICTR expressed judicial activism in expanding the interpretation of the definition in the Akayesu case, judicial interpretation is contentious coupled with political hurdles to amend the Convention. In this regard Ratner and Abrams (2001:45) see the most promising route for the evolution of the international law on genocide to be through expansion of customary law. They therefore suggest that states could expand the definition of genocide under their domestic laws and press for recognition of a more expansive interpretation of the crime in international fora. If it accepts this recommendation, AU member states could expand their interpretation with regard to article 4(h) to encompass the mass destruction of any human collective, based on any core element of human identity, in order to enable it to address all forms of this most heinous of international offences.

From the perspective of article 4(h) of the AU Act, a member state of the AU can use the provisions of article VIII and (subject to jurisdictional requirements) article IX of the Genocide Convention to act as a ‘whistleblower’. The whole idea is to prevent or suppress genocide and not necessarily react after the fact, as has been the case in the past. If such an approach is followed, however, the question to be answered is which would be a most competent organ of the UN to follow up the complaint and what would the role of the AU be. It is conceivable to assume that article VIII of the Genocide Convention permits the Security Council to authorise military intervention to stop genocide, even more so when informed of such situation by states party to the Convention. As the Security Council is generally the UN organ with the primary responsibility for peace and security, its approval would be needed before any concerted international effort might be launched. In this regard the UN Charter with its rules on the use of force remains the governing body of law in terms of which article VIII of the Genocide Convention is implemented (Saul 2002:527; Orentlicher 2005).

In addition, the General Assembly could request the ICJ, in accordance with article 96 of the UN Charter, to give an advisory opinion on the legal question relating to the commission of genocide by a member state. Although the opinions of the ICJ do not bind the organs that request for them or the members of the UN unless there is a prior express agreement to that effect, they serve to enlighten a requesting organ ‘on the course of action it should take’. It is true that according to the ICJ’s jurisprudence, a state’s consent is not necessary in advisory proceedings and that therefore ‘no state, whether a member of the UN or not, can prevent the giving of an Advisory Opinion which the UN considers desirable in order to obtain enlightenment on the course of
action to take’. It is noteworthy that referring a matter to the ICJ does not preclude it from being discussed by the Security Council, since it is a settled principle that the ICJ may adjudicate on the legal aspects of a case, the subject matter of which was under the active consideration by the Security Council, under chapter VII of the Charter (DRC v Uganda; Ntanda-Nsereko 2002:497–521, 509).

Yet time is of the essence in preventing genocide and the issue of time to decide in a given case whether or not a proposed intervention would be justified is dealt with under the ICJ statute and rules of procedure. These matters are of the highest urgency, and a decision to intervene under article 4(h) cannot possibly await the decision of the ICJ. In this connection Harhoff has suggested that the way out is to institute a new ‘quick procedure’ under chapter IV of the ICJ statute, by which a specially designated chamber of the Court would be asked to render an advisory opinion on the matter within a certain (short) time frame, at the request of the Secretary-General (Harhoff 2001:109–112, 111). However, given the uncertainty of the Secretary-General’s authority to request advisory opinions from the ICJ and the possible reluctance of the Council to see its inherent authority to prescribe the use of force pass to another UN organ, this option might not gain immediate support (Harhoff 2001:109–112, 111). Another option would be to bring the question of genocide before the African Court of Human and Peoples’ Rights (ACHPR) pursuant to article 3 of the Protocol establishing the African Court of Human and Peoples’ Rights (ACHPR Protocol). This article extends the jurisdiction of the Court to all cases and disputes submitted to it on the interpretation and application of the Charter, the Protocol establishing the Court and any other relevant human rights instrument ratified by the states concerned (including the Genocide Convention).

It is clear from its title that the Genocide Convention is concerned with both prevention and punishment. However, Schabas (1999:2) has noted that it is ‘the second prong of its mission – punishment – that has received the most attention … What the convention means by preventing genocide remains enigmatic, but defining it is an urgent priority, given the recent failure to stop genocide in Rwanda’. Therefore, according to the framers of the Convention and cognisant of the mission of the UN Special Advisor for the Prevention of Genocide, the AU should focus on prevention and response to a potential genocidal action and generate political support where needed. To achieve this, the AU needs to build a human security architecture with a vigilant early warning and corresponding early response instrument. In this regard the AU human rights institutions should work closely with, and co-ordinate the relationship between the AU and the international community as well as with the UN bodies in general.

**Can intervention prevent crimes against humanity?**

The term ‘crimes against humanity’ has come to mean something atrocious committed on a large scale. This is however not the original meaning nor is it the technical definition.
The template definition of ‘crimes against humanity’ is contained in article 6(c) of the 1945 Charter of the International Military Tribunal (IMT) (also known as the London Charter) which conceived them as murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations, before or during a war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, regardless of whether they are in violation of the domestic law of the country where they were perpetrated. In the *Erdemovic* case, the ICTY decided that crimes against humanity are serious acts of violence that harm human beings by striking at what is most essential to them: their lives, liberty, physical welfare, health and dignity. The Trial Chamber stated that these crimes ‘are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment’. It said that these crimes also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated (*Erdemovic* case, par 27–28). It is therefore the concept of humanity as a victim which essentially characterises crimes against humanity.

Considering the novelty of the international legal concept of crimes against humanity in the immediate post World War II era and insofar as these crimes transcend the ambit of ordinary war crimes, Dinstein (2000:373, 393) argues that article 6(c) of the London Charter was not declaratory of customary international law at the time of its adoption. This view is supported by Cassese (2003:741–742), who suggests that the correct view seems to be that article 6(c) constituted new law, as explained by both the limitations to which the new notion was subjected and the extreme caution and reticence of the Tribunal. Although there has been no specialised international convention since then on crimes against humanity, crimes against humanity have been included in the statutes of the ICTY (art 5) and ICTR (art 3), as well as in the ICC statute (art 7).

The central dimension of crimes against humanity is that they are directed against the civilian population as such, rather than against individual civilians in isolation. The term ‘civilian’ in this context is generally regarded as the antonym of combatants, as articulated in article 48 of the Additional Protocol I. Drawing from the judgment in *Tadić*, a wide definition of civilian population is intended given that the emphasis is not on the individual victims but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population (*Tadić* case, par 123; *Akayesu* case, par 579; *Kayishema and Ruzindana*, par 123). The presence of some non-civilians in the midst of a targeted population which is of predominantly civilian nature does not change the overall civilian character of the population.

Crimes against humanity are not isolated or sporadic occurrences, but are part either of a governmental policy or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced to by a government or a de facto authority. The International Law Commission set two general conditions for acts to qualify as crimes against
humanity, namely the inhumane acts must be committed in a systematic manner (meaning a preconceived plan or policy) and secondly, they should be committed on a large scale. Each individual offence will either be a particular instance of crime frequently repeated or be part of a string of such crimes (widespread practice), or be a particular manifestation of a policy or a plan drawn up or inspired by state authorities or by an entity holding de facto authority over a territory, or of an organised political group (systematic practice). The jurisprudence of the international criminal tribunals points to the fact that the requirement that the occurrence of crimes be widespread or systematic is a disjunctive one (International Law Commission 1996).

While there is a requirement that such offences must take place on a large scale, one of the most significant elements is that such offences should at least be tolerated by a state, government or entity. The emphasis on government endorsement is justifiable because of the focus of human rights and international humanitarian law on protecting individuals from those with power over them, but it is equally clear that profit-driven entities may commit horrendous acts as well (Cassese 2003:741–742; Ratner & Abrams 2001:79). In the Tadić and Jelesic cases, however, the ICTY has acknowledged that a single act might qualify as a crime against humanity if it were part of such an attack. In this sense the need to establish a systematic – even if not widespread – course of conduct seems to indicate that simply the occurrence of a couple of reprehensible acts would not suffice, but rather that there must be a clear pattern of behaviour. This was clear in the Finta case where the Canadian Supreme Court propounded that what distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions, which are essential elements of the offence, are undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race (Tadić case, judgment, parr 645–649; Jelesic case, judgment, par 53; Finta case, 1994: 814).

To a large extent, many concepts underlying this category of crimes derive from, or overlap with, those of human rights law laid down in standard provisions of international human rights instruments. There are at least 11 international instruments defining crimes against humanity, but there are slight differences in their definitions of the crime and its legal elements. However, what all of these definitions do have in common is that they refer to specific acts of violence against persons, irrespective of whether the person is a national or non-national and irrespective of whether these acts are committed in time of war or peace. Furthermore, these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the ‘widespread or systematic’ conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.

What emerges from tracing the numerous definitions of crimes against humanity from 1945 to 1998 is according to Dinstein (2000:382–383) ‘that their precise outlines
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are by no means engraved in stone: they seem to change with the *Zeitgeist*. On this basis, he argues that given the constant modifications, it is doubtful that any particular definition of crimes against humanity has necessarily acquired the status of customary law although the core crimes such as murder, extermination, enslavement and similar inhumane acts perpetrated against the civilian population have certainly attained customary international law status. On the basis of the foregoing, it is therefore correct to contend that core crimes constituting crimes against humanity constitute customary international law and are also deemed to be part of *jus cogens*, which is the highest standing in international legal norms.

Thus, crimes against humanity constitute a non-derogable rule of international law. The implication of this standing is that they are subject to universal jurisdiction, which means that all states can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It also means that all states have the duty to prosecute or extradite, that no person charged with that crime can claim the ‘political offence exception’ to extradition, and that states have the duty to assist each other in securing the evidence needed to prosecute. Furthermore, no perpetrator can claim the ‘defence of obedience to superior orders’ and no statute of limitation contained in the laws of any state can apply. Lastly, no one is immune from prosecution for such crimes. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.

The list of the specific crimes contained within the meaning of crimes against humanity has been expanded since article 6(c) of the IMT Charter to include rape and torture, in articles 5 and 3 of the respective ICTY and ICTR statutes. The statute of the ICC also expands the list of specific acts, adding the crimes of enforced disappearance of persons and apartheid. Further, the ICC statute contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture and forced pregnancy. Although crimes against humanity overlap with genocide and war crimes to some extent, crimes against humanity are distinguishable from genocide in that they do not require intent to ‘destroy in whole or in part’, as cited in article II of the 1948 Genocide Convention, but only the intent to target a given group and carry out a policy of ‘widespread or systematic’ violations. As a corollary of the Tadić case, crimes against humanity are also distinguishable from war crimes in that they do not only apply in the context of war but in both war and peace. Crimes against humanity are strictly confined to acts hostile to the civilian population as opposed to war crimes, which are usually directed against combatants no less than civilians. Further, crimes against humanity, unlike war crimes, postulate widespread or systematic criminal action (*Tadić Interlocutory Appeal*, parr 140–141; *Tadić case*, merits, par 627; Dinstein 2002:393).

The daunting task for the AU in terms of article 4(h) therefore is how to ensure that all perpetrators of crimes against humanity, be it states or non-state actors, do not get away
with impunity. Yet, in case of crimes against humanity, more often than not there are difficulties in bringing perpetrators to justice. For example, apart from the current case of Darfur, renegade General Laurent Nkunda has been accused of crimes against humanity in the DRC for his role in the massacres committed in Kisangani in May 2002. At the time of writing, however, the DRC government has not yet arrested him let alone brought him to trial. Furthermore, despite allegations of crimes against humanity in the DRC, a UN investigation team, led by the chief of the human rights section of the UN Mission in the DRC, which was dispatched to investigate reports of the massacre of the Banyamulenge ethnic group, found no evidence to support the allegations. The implication is that unless interventions are progressively shifted from emergency reactive activities to proactive initiatives, such as deterring would-be authors of crimes against humanity, the international community will continue to witness impunity of perpetrators of atrocities.7

Accordingly, the AU intervention regime needs to develop a concerted approach aimed at intervention to prevent crimes against humanity through conflict resolution measures, with targeted strategies where conflicts are simmering, or peer pressure where systematic patterns of human rights violations are revealed. At the same time there is a need to deter would-be perpetrators while gathering evidence for possible prosecution of violators. If humanity is to be protected from crimes against humanity, then perpetrators of human rights violations must be brought to justice at all costs. This may seem to be an unrealistic demand, but it is not. It is mainly a matter of political will, and political will is influenced by outside pressure. This underscores the important roles of the Continental Early Warning System (CEWS) and the African Peer Review Mechanism. Regional cooperation between judicial authorities must be further enhanced to overcome the legal problems connected to the principle of non-extradition of the nationals of a particular state. The CEWS must keep a close watch and be actively involved in human rights monitoring and reporting, as well as collection of evidence for possible prosecutions. The AU may in fact need a special committee to oversee the implementation of humanitarian norms in collaboration with the human and peoples’ rights institutions.

Summary: the challenge of a broad definition of the thresholds without opening the door too widely

According to article 7(1)(c) of the PSC Protocol, the PSC shall recommend intervention in a member state in respect of ‘grave circumstances’ under article 4(h) as ‘defined in relevant international conventions and instruments’ of the AU Assembly. Thus, the AU is bound adopt the definition of ‘war crimes’, ‘crimes against humanity’ and ‘genocide’, as enshrined in the Rome Statute of the ICC, the Genocide Convention, the Geneva Conventions and Additional Protocols and the tried and tested definitions in the Statute of the ICTY and the ICTR. However, the lacuna on a common definition of what
constitutes genocide or the threshold of ‘grave circumstances’ involving war crimes
and crimes against humanity may cause a paralysis in deciding on intervention under
article 4(h) of the Act. Defining when abuses are ‘grave’ or when there is a ‘disaster’ is
highly subjective and the nature of the decision, whether it is made by the UN Security
Council or the AU, would inevitably be highly politicised.

However, it is clear that the AU’s right to intervene in a member state, as does the notion
of R2P, specifies that sovereignty implies certain responsibilities on the part of the state
towards its people, and that this imposes some limitations on what a particular government
can or cannot do with respect to its own people. Similarly, the broadening of the concept
of security has fortified the regime for the protection of civilians – unlike the situation
during the Cold War when security was the sole preserve of the state. Human security
means individual freedom from basic insecurities. Genocide, wide-spread or systematic
torture, inhumane and degrading treatment, abductions, slavery, war crimes and crimes
against humanity are forms of intolerable insecurity that breach the human security norm.
Massive violations of the right to food, health and housing may also be considered to fall
in this category, although their legal status is less elevated. A human security approach
means that the AU will contribute to the protection of every individual human being and
not only on regional defence, as occurred under the security approach of nation-states.
These responsibilities require a consistent and optimal use of human rights instruments
in conjunction with the CEWS and the Solemn Declaration and Memorandum of
Understanding on the Conference on Security, Stability, Development and Co-operation
in Africa in order to maximise capacity for early warning and conflict prevention in Africa,
taking the paucity of resources into consideration (Ayodele 2000:59–60).

Indeed, the framers of the AU Act recognised that the AU’s R2P could lawfully override
entrenched norms regarding domestic jurisdiction. In this sense the AU can intervene
in situations involving violations of human rights based on evolving conceptions of
domestic jurisdiction. However, a question that still has to be answered is when the
AU can intervene, in view of the fact that the threshold for intervention, namely war
crimes, genocide and crimes against humanity, is 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 now found in Africa.
Twenty-five AU member states are parties to the Genocide Convention, while Rwanda
has been a state party acceding since 1975 whereas Sudan acceded without reservation in
2005. Yet Rwanda has experienced a textbook example of genocide and the occurrence
of genocide in Darfur is still a subject of hot debate. How does one explain that despite
the fact that well over half the AU members have ratified the ICC Statute, the first four
situations before the ICC are from AU member states?

The AU’s discretion is confined to assessing the existence of legally defined situations as
specified in article 7(1)(e) of the Peace and Security Council Protocol, rather than making
the kind of political finding the UN Security Council would when it establishes a threat to international peace and security. It seems reasonable to suggest that for purposes of intervention, or put bluntly, to prevent the commission of these international crimes under article 4(h), there should be a broader definition for thresholds while retaining the strict definition under international criminal law. This will limit the types of violations of human rights which do not reach the level of grave circumstances as a legitimate cause for intervention.

Article 4(h) in its present formulation seems to suggest that intervention will occur upon the commission of war crimes, genocide and crimes against humanity. This reactive interpretation is not in line with the preventive agenda for the protection of human rights. By the very nature of the crimes in article 4(h) this would imply complicity of the state or of its organs, which calls up the issue of victor’s justice where it is only the vanquished who are prosecuted. Furthermore, article 4(h) is not linked to other extant early warning and monitoring mechanisms such as, for example, the Fact-finding Commission established in terms of article 90 of 1977 Additional Protocol 1 and UN 1235 special procedure. However, article 3 of the ACHPR Protocol is a utility provision for preventing serious violations of human rights such as genocide, as it accords the African Court of Human and Peoples’ Rights wide jurisdictional latitude with regard to the interpretation and application of human rights instruments such as the Genocide Convention and Geneva Conventions.

Notes

1 The four conventions reflect first applicability in all armed conflicts, regardless of any formal declaration of war; second elaboration of basic principles for non-international armed conflict; and third a list of grave breaches for which states are obliged to enact penal legislation and prosecute or extradite individual offenders. The conventions have received near-universal acceptance and have a strong claim to represent customary law. C.f. Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions, par 7 (available at www.icrc.org/eng/party_gc#7) (see UN 1993:10).

2 It states in the pertinent section: ‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ... Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned’. GC I, art 49, GC II, art 50, GC III, art 129, GC IV, art 146.

3 The Rome Statute of the ICC entered into force on 1 July 2002 in accordance with article 126 of the Statute; see Secretary-General Kofi Annan, commenting on the adoption of the ICC Statute on 17 July 1998 in Rome; see generally International Criminal Court Fact Sheet, supra note 360. War crimes tribunals of the Former Yugoslavia and Rwanda have clearly established that criminal liability exists for war crimes during internal armed conflicts and that crimes against humanity extend beyond periods of armed conflict.

4 For instance, in the Jelešić case where the Prosecutor had simply failed to prove the perpetration of genocide in Bosnia in the sense of some planned or organised attack on the Muslim population; see generally Prosecutor v Jelešić, Case no. IT-95-10-T (14 December 1999).
5 However, upon recommendation of the report, the Security Council has finally agreed to forward the issue of Darfur to the ICC. The government of Sudan is under an obligation to co-operate with the ICC by handing over some of its senior political and military officers believed to be behind the alleged war crimes in Darfur (see UN 2005).

6 Customary international law may not require a connection between crimes against humanity and any conflict at all. See Tadić Interlocutory Appeal, supra note 369, par 140–141; see also Prosecutor v Dusko Tadić, para 627.


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