Intervention in Response to Atrocities: The Contribution of the African Union to International Law

By:

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August 12, 2022

There are few provisions of the African Union (AU) Constitutive Act that has received as much attention in academic literature as Article 4(h). While Article 4(h) has yet to be acted upon by the AU, it has been the subject of praise, criticism and speculation as to its meaning. Maluwa, for example, describes Article 4(h) of the Constitutive Act as 'the most consequential normative contribution to international law by African States in recent times.' Yet, in the same volume, Corten and Koutroulis suggest that Article 4(h) does not quite denote what many of its proponents attribute to it. Article 4(h), it will be recalled, provides for the Union to function in accordance with a number of principles, including

> the right of the Union 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.

At the heart of the debate on Article 4(h) of the Constitutive Act is whether it establishes a new and separate exception to the prohibition on the use of force under Article 2(4) of the UN Charter, which is accepted as a peremptory norm of general international law. The Charter provides for two exceptions to this prohibition: the use of force in self-defence or the use of force pursuant to a decision by the UN Security Council. Given the importance of the rule against the use of force, many, including myself, have argued for a restrictive interpretation of any exception (See Hague Lectures; Trialogues). Yet, there may be cases, e.g. Kosovo and Rwanda, where force outside the constraints of the exceptions, restrictively construed, is used to prevent atrocities against populations. In legal terms, this debate is couched in the language of humanitarian intervention and, more recently, the Responsibility to Protect. The debate concerning Article 4(h) arises in the shadows of these cases—which some may term 'hard cases'.

Simply put, does action by a member of the African Union, taken pursuant to a decision of the Summit under Article 4(h) of the Constitutive Act, which action does not constitute self-defence and is not authorised also by the UN Security Council, constitute a breach of the prohibition on the use of force? There are many differing views on this question. I have elsewhere stated that at one end of the spectrum, there is a view that any action pursuant to Article 4(h) which is not endorsed or approved by the UN Security Council falls foul of the prohibition on the use of force and would thus be unlawful and a violation of the prohibition on the use of force. This perspective is based on a strict reading of the law of the Charter on the prohibition of the use of force which permits for only the two recognised exceptions, ie, self-defence and authorisation of the UN Security Council. At the other end of the spectrum, intervention under Article 4(h) may be seen as a new exception to the prohibition on the use of force or even an evolution of existing exceptions, whether through evolutive interpretation of the Charter or evolution of State practice and *opinio juris*. How the rules on the use of force can evolve are discussed elsewhere (See Trialogues 247–260).

I have, however, suggested an alternative, middle-of-the-road approach, under which intervention under Article 4(h) is permissible in terms of the law of the Charter, if the Council has endorsed such intervention. However, in the absence

of an affirmative decision to the contrary, the Council is deemed to have endorsed any action under Article 4(h) if duly authorised by the AU Assembly. This subsequent view would be dependent on the interpretation of Article 53 of the United Nations Charter, which provides that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.' The phrase 'without the authorisation of the Security Council' would seem to imply the necessity of a positive decision by the Council before any action under Article 4(h) could be undertaken. Nonetheless, it is not inconceivable if there is sufficient practice (and acceptance of that practice) for that language to be read as permitting intervention in the absence of an 'affirmative' to the contrary. After all, according to the language of the Charter, abstention by a permanent member should be read as a veto, yet due to practice and the acceptance of that practice, abstentions do not prevent the adoption of resolutions. Given that the rule in question in the current case—the prohibition on the use of force—is *jus cogens*, it would be necessary, in addition to showing the consistent practice of accepting the intervention without an affirmative endorsement, that the rule emanating from that practice is accepted and recognised as peremptory as well (See generally Tladi). Yet, this too, is not an insurmountable hurdle given that the purpose of that practice (and possible rule) would be to prevent atrocities, the prohibition of which is considered *jus cogens*. Whether the law has reached this state (or whether it will in the future) is not at all certain, but it does provide a possibility for addressing the contestation concerning Article 4(h).

However, should this debate be concluded in the future, the inclusion of Article 4(h) in the AU Constitutive Act would have had the effect of bringing back into focus an important issue in international law: the tension, on the one hand, between the peremptory rule of international law prohibiting the use of force and on the other, the normative imperative of protecting people from atrocities that may be perpetrated by their own governments.

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