Intervention with specific reference to the relationship between the United Nations Security Council and the African Union

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Abstract

States often use their sovereignty as a justification to demand the non-intervention of other states in matters that they consider to be in their exclusive jurisdiction. However, due to the role of regional and international organisations and the influence of universal norms and values, the present idea of state sovereignty differs greatly from the classical understanding of sovereignty as absolute. In a growing interdependent world where national boundaries are increasingly permeable, traditional notions of territoriality, independence and non-intervention are losing some of their meaning. As a result of the increasing acceptance that the protection of human rights can no longer be regarded as a purely internal matter and that the international community has a responsibility to protect, the traditional interpretation of article 2(7) of the United Nations Charter is brought into question. In addition, the relationship between the peace and security provisions of the United Nations Charter and the constitutive documents of regional organisations such as the African Union, is not completely clear. The aim of this contribution is therefore to determine to what extent a traditional or strict interpretation of article 2(7) is still relevant in regulating the international relations between states in view of these changing circumstances and, further, to establish the relationship between the United Nations Security Council and regional peace and security bodies, with specific reference to the African Union.

INTRODUCTION

States often use their sovereignty as a justification to demand the non-intervention of other states in matters that they consider to be in their

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exclusive jurisdiction.[1] However, due to the role of regional and international organisations and the influence of universal norms and values, the present idea of state sovereignty differs greatly from the classical understanding of sovereignty as absolute.[2] In a growing interdependent world where national boundaries are increasingly permeable, traditional notions of territoriality, independence and non-intervention are losing some of their meaning.[3] It is becoming more and more difficult to separate actions that have an exclusive effect on one state's internal affairs from those actions that have an impact on the domestic affairs of other states[4] and, therefore, to define the legitimate boundaries of sovereign authority. Consequently, states will have to accept that, particularly in respect of common global issues, sovereignty has to be exercised collectively. The principle of sovereignty and the norms that derive from it must, therefore, be adapted in accordance with changing realities.[5] As a result of the increasing acceptance that the protection of human rights can no longer be regarded as a purely internal matter and that the international community has a responsibility to protect, the traditional interpretation of article 2(7) is brought into question. In addition, the relationship between the peace and security provisions of the United Nations Security Council and regional organisations such as the African Union, is not clear. It is the aim of this contribution to determine to what extent a strict interpretation of

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1 A Bodley 'Weakening the principle of sovereignty in international law: the international tribunal for the former Yugoslavia' 1999 *New York University Journal of International Law and Politics* 420–421. In the past the principle of sovereignty has often been misused by states. In this regard *Our global neighborhood – the Report of the Commission on Global Governance* (1995) 69 notes that states have used sovereignty to shield themselves against international criticism of brutal and unjust policies and in the name of sovereignty they have denied their citizens free and open access to the world.

2 FX Perrez *Cooperative sovereignty from independence to interdependence in the structure of international environmental law* (2000) 46 explains the reason for this shift from the classical approach as follows: 'As it became apparent that the classical understanding of sovereignty as absolute was a threat to the international community, to international peace and to the maintenance of independent nation states itself, a new understanding of sovereignty and of international law emerged.' Also see N Schrijver 'The changing nature of state sovereignty' 1999 *The British Yearbook of International Law* 65; A Kotaite 'Is there a lessening of state sovereignty or a real will to co-operate globally?' 1995 *Air and Space Law* 288.

3 *The Report of the Commission on Global Governance* n 1 above at 68. CC Joyner *International law in the 21st century: rules for global governance* (2005) 292–293 maintains that the forces of globalisation and interdependence combine to make absolute sovereignty in the 21st century more fiction than fact, 'if for no other reason than the economic and political impracticability of operating in foreign relations among thousands of other international actors'.

4 For example, environmental policies made in the USA can have an effect on employment and pollution levels in Rio de Janeiro. See in this regard *The Report of the Commission on Global Governance* n 1 above at 70.

5 *Id* at 71.

article 2(7) is still relevant in regulating the international relations between states in view of these changing circumstances and, further, to establish the relationship between the United Nations Security Council and regional peace and security bodies, with specific reference to the African Union.

INTERVENTION WITH SECURITY COUNCIL AUTHORISATION

The principle of non-interference in the internal affairs of a state is fundamental in international law.[6] Article 2(7) of the United Nations Charter embodies this principle by prohibiting the United Nations from interfering in the internal affairs of a member state. However, enforcement measures of the Security Council under Chapter VII of the Charter constitute an exception to the non-intervention principle. The Security Council may act either under Chapter VI or Chapter VII of the Charter. In terms of Chapter VI the Security Council has the power to make recommendations in addressing disputes which in its judgment do not threaten international peace, but, if continued, are 'likely to endanger the maintenance of international peace and security'.[7] In order to take action under Chapter VII the Security Council has to determine that the particular situation constitutes a 'threat to the peace, breach of the peace, or act of aggression'.[8] Should this be the case, the Security Council can take appropriate measures as provided for in article 40, article 41 or article 42 of the Charter.

(a) Article 40

Article 40 determines that the Security Council may, before taking enforcement action, call upon the parties to comply with provisional measures such as a cease-fire or withdrawal of forces.[9]

(b) Article 41

In terms of article 41 the Security Council may call upon member states to take measures other than the use of force to implement its decisions, including 'complete or partial interruption of economic relations and of rail,

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6 S Rosenne *The perplexities of modern international law* (2004) 241. Article 41 of the Vienna Convention on Diplomatic Relations of 1961 (500 UNTS 95) and art 55 of the Vienna Convention on Consular Relations of 1963 (596 UNTS 261) confirm this principle. Both these provisions determine that there is a duty on consular personnel not to interfere in the internal affairs of the receiving state. This also applies to the head of a state when on an official visit to another state.

7 Article 33 and art 36. See further J Dugard *International law: a South African perspective* (6 ed (2005) 487–489.

8 Article 39.

9 Dugard n 7 above at 490.

sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. Recent examples of such non-forcible measures taken in terms of article 41 is the economic sanctions imposed on Sudan in 2005 in response to its human rights violations in the Darfur region[10] and the sanctions imposed on Iran for its failure to suspend its nuclear programme.[11]

(c) Article 42

Article 42 provides that, should the Security Council decide that the non-forcible measures in article 41 are inadequate, 'it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security', including 'demonstrations, blockade, and other operations by air, sea or land forces' of the member states. The most dramatic and effective action taken in terms of article 42 was that against Iraq in 1991 after its invasion of Kuwait in 1990.[12]

The relation between the prohibition in article 2(7) and the enforcement measures decided upon by the Security Council is not as clear as it seems. Although article 2(7) stipulates that the principle of non-intervention shall not prejudice the application of enforcement measures under Chapter VII, the discretion of the Security Council to intervene is not unlimited. The vote in 2007 by South Africa during its non-permanent tenure on the Security Council against a draft Resolution introduced in the council with regard to the human rights abuses in Myanmar, may serve as an example in question.[13] South Africa *inter alia* motivated its stance by arguing that the draft Resolution fell outside the mandate conferred on the Security Council, namely, to deal with matters that are a threat to international peace and security. The critique against this decision of South Africa essentially entailed that human rights could no longer be regarded as an internal matter, that human rights violations *per se* constituted a threat to international peace and security and that the Security Council Resolutions adopted against South Africa as a result of Apartheid, should serve as examples in this regard.[14] Concerning the discretionary powers conferred on the Security Council by article 39 of the Charter, commentators such as Tladi and De Wet caution

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10 SC Res 1556 (2004), SC Res 1591 (2005). See Dugard n 7 above at 491–492 for further examples of action that has been taken in terms of art 41.

11 SC Res 1803 (2008).

12 See further Dugard n 7 above at 492–493.

13 UN Doc S/2007/14.

14 D Tladi 'Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote' 2008 *African Human Rights Law Journal* 27; 31.

against awarding the council, mainly due to its undemocratic composition,[15] 'unlimited discretion' and argue that international peace means the absence of armed conflict between states and that a threat to the peace thus refers to any situation that may potentially disturb the absence of armed conflict.[16] Although Tladi[17] concedes that international human rights are an important concern of the international community, he maintains that both from a purely legal and a moral or value-based perspective, the role of the council in the case of human rights violations, should be interpreted restrictively. He is of the opinion that bodies such as the United Nations Human Rights Council and the United Nations General Assembly are more appropriate to deal with human rights issues and that these institutions should be strengthened to make them more effective.[18] Tladi[19] concludes that recent calls for the Security Council to act in the absence of a threat to international peace and security will result in the entrenchment of the dominance and attendant illegitimacy of the council, the erosion of the rule of law, the principle of the equality of states and true multilateralism in international law. Dugard[20] also cautions that the Security Council's powers should be exercised with care,[21] but is critical of the fact that the notion that human rights violations may constitute a threat to international peace (as was the case with Apartheid) is seemingly no longer accepted and that these issues should rather be referred to the Human Rights Council.[22]

The argument that human rights issues fall outside the mandate of the Security Council may be criticised for a number of reasons: it is submitted that this idea is exclusively premised on the notion that international law regulates the relationship between states and seems to ignore the increasingly important role of individuals in international law. Consequently, emphasis

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15 *Id* at 29.

16 E de Wet *The Chapter VII powers of the United Nations Security Council* (2004) 144; Tladi n 14 above at 30.

17 Tladi n 14 above at 30.

18 *Id* at 31–32.

19 *Id* at 36.

20 J Dugard 'The future of international law: a human rights perspective – with some comments on the Leiden School of International Law' 2007 *Leiden Journal of International Law* 733.

21 Dugard n 7 above at 494 maintains as follows: 'The Security Council is using its enforcement powers to adopt normative resolutions that are legally binding on all members of the United Nations. In doing so, it has assumed the role of international law-maker. Such legislative role may be justified if it is restricted to action taken under chapter VII, designed to maintain international peace and security and confined to subjects that threaten international peace … Clearly, this legislative role, in which a 15-member Council takes decisions that bind 191 states, must be exercised with care.'

22 Dugard n 20 above at 733.

is placed on adhering to procedural requirements, rather than preventing human suffering as a result of gross violations of human rights. It is furthermore a real possibility that systematic violations of human rights within a particular state, may at least pose a threat to regional peace and security, as a result of, for example, refugees flowing in large numbers to neighbouring countries and the possibility of xenophobic attacks as was recently illustrated in South Africa. Lastly, although it is conceded that the composition of the Security Council is undemocratic and in many respects contradicts the idea of the sovereign equality of states, it remains, at this stage at least, the only organ that can make binding decisions to intervene in states that violate human rights. Both the Human Rights Council[23] and the General Assembly is ineffective to deal with gross and systematic violations of human rights, since their recommendations are not binding on states. If the mandate of the Security Council is interpreted too strict, it will render the council equally ineffective and the only other alternative for states would be to use humanitarian intervention without Security Council authorisation,[24] which will be difficult to regulate and may be abused by states.

Although it is accordingly submitted that the mandate of the Security Council should not be interpreted too narrow so as to not render the council ineffective, its enforcement powers should be exercised with care. In this regard De Wet argues that the discretion of the Security Council is subject to the norms of *jus cogens*, the principles of the Charter and the interaction between these norms. This implies that the Security Council may, for example, not adopt measures that would result in genocide, or violate the right to self-defence or self-determination. In addition, such measures must be confined to the boundaries of core human rights norms, core rules of humanitarian law and core elements of state sovereignty.[25] Enforcement measures have in the past infringed upon the principle of self-determination as well as state sovereignty. For example, with regard to the South African government's policy of Apartheid, the Security Council viewed the acquisition of arms by South Africa as constituting a threat to the maintenance of the international peace and security and decided that all states shall cease forthwith any provision of arms to South Africa.[26] Tladi argues that it is difficult to conceive a Security Council Resolution that does not to

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23 Dugard n 20 above at 733 points out that the Human Rights Council are too politicised and are criticised for awarding a disproportional amount of attention to the situation in the Occupied Palestinian Territory and at the expense of more urgent problems in, for example, Darfur and Zimbabwe.

24 See discussion below.

25 De Wet n 16 above at 370.

26 SC Res 418 (1977).

some extent imply interference in the internal matters of member states. It is therefore futile to argue that a Resolution is invalid simply as a result of a violation of the principle of non-intervention.[27] Such an approach would render the Security Council ineffective and could therefore not be supported. What is however clear is that the influence of article 2(7) has in any case been limited over the years as a result of *inter alia* the internationalisation of human rights and the narrow interpretation of the concept of an internal matter when it concerns the maintenance of international peace and security as the main objective of the Security Council. Although De Wet[28] argues that the purposes and principles of the United Nations serve as limitations on any Security Council action under Chapter VII, it must be emphasised that these limitations should not be construed so wide that it renders the United Nations unable to fulfill its main purpose. It is therefore submitted that any matter which objectively threatens the international peace and security, should override the principle of non-intervention as contemplated by article 2(7). This approach is also in conformity with the increasing belief of the international community that sovereignty implies a responsibility to protect against gross and systematic violations of human rights and that the Security Council may therefore allow states to intervene under these circumstances.[29]

The decision by the Security Council that a particular situation constitutes a threat to the peace, as determined by article 39, is subject to the veto power of the five permanent members[30] of the Security Council.[31] The permanent members have unfortunately often in the past invoked their veto power in an effort to protect their own interests resulting in an undermining of the effectiveness of the Security Council.[32] Although some commentators justify the granting of a veto right to the permanent members in the Security Council by submitting that states which have the greatest institutional responsibility also should have the greatest say in critical disputes,[33] the veto power of the five permanent members of the Security Council seems to be

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27 D Tladi 'Reflections on the rule of law in international law: the Security Council, international law and the limits of power' 2006 *South African Yearbook of International Law* 239–240.

28 De Wet n 16 above at 192.

29 See the discussion below.

30 These members are currently China, France, Russia, the United Kingdom and the United States of America.

31 In terms of art 27(3) of the Charter decisions of the Security Council on matters, which are not of a procedural nature, must be made by 'an affirmative vote of nine members including the concurring votes of the permanent members'.

32 Dugard n 7 above at 486.

33 See B Fassbender 'Article 2(1)' in B Simma (ed) *The Charter of the United Nations: a commentary volume 1* (2ed 2002) 87–88.

in contradiction with the principle of sovereign equality as provided for in article 2(1) of the United Nations Charter, because it allows the five permanent members to impose their will on the entire international community of states.[34] In this regard the decision-making procedure which was followed by the League of Nations, namely a unanimity voting rule,[35] is preferable. All member states of the United Nations are represented in the General Assembly and have one vote each. The General Assembly may only make recommendations.[36] In contrast, the Security Council consists of fifteen members, of which five have the power to veto the decisions of the council, and can make decisions which are binding on the entire international community. In view of the principle of sovereign equality it would rather have been expected that the decisions of the General Assembly should be binding on the international community of states as all member states participate on an equal basis in the decision-making process. It thus seems that the Charter itself to a certain extent undermines the principle of sovereign equality as a result of its very limited membership and the veto power of the five permanent members.

Intervention

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations[37] not only confines the general concept of *intervention* to 'armed intervention' but also includes 'all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements'. The Declaration thus describes intervention both in terms of the nature of the act and its effects.[38] According to the Declaration

> no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the

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34 The legitimacy of the Security Council as a result of its undemocratic composition has been questioned by commentators. See, for example, M Koskenniemi 'The police in the temple order, justice and the UN: a dialectical view' 1995 *European Journal of International Law* 327 who is of the opinion that '[g]iven the Council's composition and working methods, its monopolisation of UN resources and the public attention focused on the Council is problematic. The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly defined competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs'.

35 Dugard n 7 above at 475.

36 See Chapter IV of the United Nations Charter.

37 GA Res 2625 (XXV) 1970.

38 Simma n 33 above at 154.

> subordination of the exercise of its sovereign rights and to secure from it the advantages of any kind.

The element of coercion thus lies at the core of the principle of non-intervention.[39] This was confirmed by the International Court of Justice in the *Nicaragua* case[40] which stated that

> in view of the generally accepted formulations, the principle forbids all States or groups of states to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters on 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 formulation 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 very essence of prohibited intervention is particularly obvious in the case of intervention which uses force.[41]

According to Jamnejad and Wood[42] the requirement of coerciveness properly delimits the principle of non-intervention by removing minor international

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39 M Jamnejad & M Wood 'The principle of non-intervention' 2009 *Leiden Journal of International Law* 346.

40 *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America), Merits,* 1986 ICJ Reports 14.

41 *Id* at par 205. The term *intervention* in art 2(7) was initially interpreted wide to even include discussions and recommendations with regard to domestic matters. However, under classical international law the term *intervention* was commonly defined as 'dictatorial interference' which necessarily implied the use of force or imminent pressure. See Simma n 38 above at 152. Lauterpacht favoured this classical definition of intervention and referred to authorities, such as Brierly, Oppenheim, Verdross and Stowell, who defined intervention as 'dictatorial interference, a peremptory demand which is inconsistent with the independence of the State and which carries with it a threat of compulsion'. See CBH Fincham *Domestic jurisdiction* (1948) 152–153. Fincham concluded that although it seemed that the framers of the Charter used the term *intervention* in art 2(7) in a 'loose and non-technical sense', it was clear that the majority of early writers, including Kelsen, were in favour of the strict interpretation of the term as advanced by Lauterpacht, who submitted that 'intervention is a technical term of, on the whole, unequivocal connotation' (at 153). In the light of modern developments, Simma n 38 above submits that the state of general international law should be taken into account when interpreting the term *to intervene* in art 2(7). Simma, however qualifies this statement by maintaining that such a wide interpretation cannot go so far as to contradict clearly established practice by United Nations organs. See further Simma *id* at 153–156; Fincham *id* at 152–158 for a discussion of the term *intervention* in art 2(7).

42 Jamnejad & Wood n 39 above at 348; 381.

friction from its scope and making it only applicable to those acts that to a certain degree 'subordinate the sovereign will' of another state.[43]

Internal matters

With regard to the question what constitutes an *internal matter*, the Permanent Court of International Justice stated in the *Nationality decrees* case[44] that matters which are purely in the domestic jurisdiction of a state are 'matters which are not, in principle, regulated by international law' and 'with respect to which States, therefore, remained sole judge'. The Court continued that '[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations.'[45] The concept of *domestic jurisdiction* thus does not indicate specific clearly defined matters that are naturally removed form the international sphere. It rather denotes certain areas which, with reference to the specific situation, are not *prima facie* affected by the rules of international law. Since it is essentially a relative concept, it leaves much opportunity for the development of international law. In order to remove a matter from the sphere of domestic jurisdiction, it is sufficient to indicate that this area is regulated only in certain aspects by international law.[46] United Nations practice indicates a substantial reduction of matters within the sphere of domestic jurisdiction.[47]

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43 See further Jamnejad & Wood n 39 above at 367–377 for a discussion of various situations which may or may not involve a breach of the principle of non-intervention.

44 *Nationality decrees in Tunis and Morocco* PCIJ, Series B, No 4 (Feb 7 1923).

45 *Id* at 24. In 1948 Fincham n 41 above at 171–174 referred to the following established tests, although uncertain and speculative, to determine whether the development of international relations has reached such a point that a certain matter is no longer one of domestic jurisdiction but has become a matter of international concern: (I) The existence of treaty obligations covering the substance of the matter remove it from the realm of domestic jurisdiction. (ii) If a particular matter is recognised as governed by international law, it is without exception removed from the sphere of domestic jurisdiction. (iii) Contrary to the view advanced by Lauterpacht, the weight of authority is of the opinion that the mere submission of a dispute to the United Nations is not sufficient to remove it from the sphere of domestic jurisdiction. (iv) It is possible to argue that matters within a state's domestic jurisdiction include those matters which are not yet governed by international law. Conversely, it is also contended that international law regulates residual matters which states do not reserve for their exclusive competence. (v) There is a tendency to regard any matter which has assumed great importance for the Community of Nations as excluded from the domestic jurisdiction of states. (vi) The violation of basic human rights and fundamental freedoms is a ground for the removal of a matter from the domestic jurisdiction of states. (Today it is widely agreed that the protection of international human rights is a concern of the international community and that it no longer belongs to the exclusive jurisdiction of states.)

46 Simma n 38 above at 157.

47 *Id* at 159.

Some of the issues previously protected by article 2(7), do not any longer fall within the ambit of this provision because the rules governing these issues have obtained the status of *jus cogens* or created *erga omnes* obligations. The nature of these concepts is such that a state may not freely, through exercising its legislative competence, violate the particular rule or obligation. States are bound by these rules and obligations, even against their will. The seriousness with which a breach of these rules and obligations is viewed by the international community, is evident from the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)[48] in terms of which a state may be held responsible for such breach, even by a non-injured state.[49] It is suggested that these so-called 'higher norms' introduce a form of international legal sovereignty in terms of which the legislative, executive and judicial conduct of states must constantly be measured against certain international legal norms, especially in the area of human rights protection within their own borders.

In the early years of the United Nations it was frequently debated whether the human rights provisions in the Charter limited the sphere of domestic jurisdiction. Some states contended that the Charter did not create international obligations with regard to human rights and that these matters were confined to the domestic jurisdiction of states.[50] Therefore, South Africa relied on article 2(7) in arguing that its racial policy of Apartheid fell within its exclusive domestic jurisdiction and that article 2(7) took precedence over the human rights clauses in the United Nations Charter. However, the 'stubborn contradiction' between article 2(7) and the human rights provisions in the Charter[51] was addressed in 1971 in the *Namibia Opinion*[52] when the International Court of Justice, with reference to the situation in Namibia, held that the policy of Apartheid violated the Charter:

> Under the Charter of the United Nations, the former Mandatory has pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions,

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48 Report of the International Law Commission, General Assembly Official Records, 56th Session, Supplement 10 (A/56/10) 29 (2001).

49 Also see Dugard n 7 above at 45.

50 Simma n 38 above at 160; Dugard n 7 above at 311–314.

51 Fincham n 41 above at 176.

52 *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Reports 16.

> restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[53]

The protection of human rights has become a global concern. By concluding a vast number of human rights treaties and formulating a considerable body of international human rights law, states have substantially limited their sovereign decision-making competences. Because some human rights have already attained the status of customary international law or even *jus cogens*, it is no longer necessary to allege systematic and widespread violations of human rights in order to remove the shield of article 2(7).[54] The prohibition on the use of force in article 2(4) is widely regarded as *jus cogens*.[55] The opinion has also been expressed that the principle of non-intervention in article 2(7) qualifies for the status of a *jus cogens* norm.[56] Such an argument implies a tension between two higher norms (the applicable human right with *jus cogens* status and the principle of non-intervention) as derogation from either of these norms would be prohibited. Therefore, this approach suggests that a decision whether to intervene in a state that commits gross violations of human rights would require a balancing of these higher norms of equal status. It is however highly debatable whether the principle of non-intervention may be regarded as *jus cogens*. Although it is not an exhaustive list, the International Law Commission did not include this principle in its list of clearly accepted and recognised peremptory norms in the Draft Articles on State Responsibility.[57] Furthermore, as was already mentioned, the Security Council may in certain circumstances take enforcement measures under Chapter VII of the Charter and in this way derogate from the principle of non-intervention. The principle of non-intervention can therefore not be regarded as a non-derogable norm as introduced in the Vienna Convention.[58]

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53 *Id* at 57.

54 Simma n 38 above at 161.

55 Dugard n 7 above at 502.

56 In the *Nicaragua* case n 40 above at 199 Judge Sette-Camara in a separate opinion states that the principle of non-intervention 'would certainly qualify' as *jus cogens*. Contrary to this view, Jamnejad & Wood n 39 above at 358 hold the opinion that non-intervention in itself is not a *jus cogens* norm, but that specific rules that fall within in the principle, specifically the prohibition on aggression, may be *jus cogens*.

57 Note 48 above. See further Jamnejad & Wood n 39 above at 357–359 on the nature of the non-intervention principle.

58 See art 53 of the Vienna Convention on the Law of Treaties, 1969 (115 UNTS 331 (1969); (1969) 8 ILM 679).

Since it is widely agreed today that state sovereignty cannot guarantee complete independence or absolute power over internal matters, some commentators question whether the domestic jurisdiction clause still fulfills its original purpose, namely, to protect the sovereignty of the member states.[59] Accordingly, it is suggested that article 2(7) is increasingly eroded and emptied of substance.[60] Contrary to these submissions, Cassese[61] maintains that the principle of non-intervention gained new strength in the years following the Second World War. Currently, a number of states, including China and Cuba, strongly insist on upholding this principle.[62] Cassese attributes this new life and authority of the principle of non-intervention to the following three developments: first, the introduction of far-reaching limitations on the use or threat of force secured the continuing existence of the principle and provided it with a clearer delimitation. Second, increasing international cooperation and the subsequent expansion of international organisations increases the opportunity for interference in the internal affairs of states. Third, the development of human rights doctrines creates the possibility for states and individuals to pressure other states to comply with human rights standards.[63] These arguments by Cassese may however be advanced to substantiate exactly the opposite: the principle of non-intervention is watered down precisely as a result of greater international cooperation and respect for human rights. States currently relying on the principle of non-intervention in most instances do so in order to justify their own or their allies' violation of human rights. An example in question is the continued 'silent diplomacy' of South Africa on the human rights situation in Zimbabwe, its refusal to condemn the human rights violations in Sudan and Myanmar in its capacity as a non-permanent member of the United Nations Security Council and its initial defence of Iran's nuclear programme.[64]

However, if it is argued that article 2(7) still plays an important role, the question remains whether it should be interpreted differently. Shortly after the creation of the United Nations, Fincham[65] concluded in 1948 that article

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59 Simma n 38 above at 150.

60 *Id* at 171.

61 A Cassese *International law* (2ed 2005) 54.

62 Simma n 38 above at 159 also points out that, although they are in the minority, some states continue to rely on and invoke the domestic jurisdiction clause. Even states that play down the continuing importance of the domestic jurisdiction clause only argue against a rigid interpretation of art 2(7) in the light of contemporary conditions, but do not assert that the non-intervention principle has become obsolete.

63 Cassese n 61 above at 54.

64 As has been reported in the media. See *Rapport*, 20 April 2008, at 20.

65 Fincham n 41 above at 187.

2(7) should ideally be interpreted in a restrictive manner, but acknowledged that such an interpretation would fail to provide states with the measure of protection they may legitimately expect. Simma[66] refers to two contemporary approaches relating to the interpretation of article 2(7). Firstly, some commentators are of the opinion that article 2(7) protects only against the 'direct legal effects' (infringement of state sovereignty) of United Nations decisions in the international order. This approach shifts the focus from specific subject matters and regards article 2(7) as a general protection measure against the United Nations becoming a supranational organisation. However, because the United Nations usually does not intend to take decisions that have a direct legal effect within states (except for peace-keeping measures and anti-terrorism measures), Simma doubts whether such protection is necessary or even desirable. According to the second approach, article 2(7) is interpreted as containing a principle of proportionality. Article 2(7) is generally understood as a rule determining whether a matter is subject to United Nations jurisdiction, but not as a rule to determine the permissible extent of United Nations action when dealing with a matter in its jurisdiction. However, states still rely on article 2(7) when they wish to counteract United Nations action concerning an issue which they perceive to be a domestic matter. An example in this regard is the continuing insistence of Zimbabwe that its internal policies on land ownership and its treatment of human rights are domestic issues.

Although it is clear that it would be premature to argue that the principle of non-intervention has become obsolete,[67] it is also clear that the territorial aspect of sovereignty can no longer completely ensure the state's protection from outside interference or protect its identity. The international order is no longer only concerned with matters between states, but also with matters within states.[68] The traditional distinction between 'domestic' and 'international' is therefore increasingly questioned.[69] Van Staden and Vollaard[70] identify different factors that challenge the traditional notion of

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66 Simma n 38 above at 171.

67 *Id* at 161–162.

68 According to H Schermers 'Different aspects of sovereignty' in G Kreijen (ed) *State, sovereignty and international governance* (2002) 185 states have become so intertwined that the internal matters of one state almost inevitably influence the internal matters of other states. In his opinion no state can therefore isolate itself from the world community.

69 A van Staden & H Vollaard 'The erosion of state sovereignty: towards a post-territorial world?' in G Kreijen (ed) *State, sovereignty and international governance* (2002) 165–166.

70 *Id* at 167–173. AL Khan *The extinction of nation-states: a world without borders* (1996) 119 also identifies three major phenomena that challenge the traditional idea of sovereign borders. He explains as follows: 'First, corporate transnationalism has created a global

sovereign borders: firstly, the forces of market integration and economic globalisation are beyond the control of national governments. Secondly, the impermeability of state borders is increasingly challenged by advancing military technology. States are, for example, not only vulnerable to outside attacks, but many states are to a large extent also defenceless against violent attacks from terrorist movements that operate on a transnational scale. Furthermore, the international protection of human rights outweighs the narrow interpretation of state sovereignty. The classical notion of sovereignty is challenged by the belief that the legitimacy of the exercise of political authority by national governments within their borders is dependent on respect for human rights. As was already indicated, the manner in which a state treats the people within its territorial boundaries is no longer an internal matter for the state alone, but concerns the international community as a whole. In addition to the above phenomena, many states have to cope with so-called international externalities. These externalities refer to activities within states that have negative side effects on the population of other states. Global problems such as overpopulation, food shortage and pollution have caused many to envisage the world as a global village in which the borders of states are fading away. It is also important to note that, apart from external constraints, states themselves limit their own territorial sovereignty by creating and joining supranational organisations, such as the African Union and the European Union, that have the authority to make decisions that are binding on the member states.[71]

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economy by interweaving national economies in such a way that exclusion of an economy from global markets is indeed punishment. Second, the environmental unity of the planet defies national boundaries, forcing the recognition that human civilisation, despite its ethnic and territorial diversification, is rooted in one nature. Third, the information revolution is in the process of transforming traditional notions of territorial communities tied to contiguous geographical areas. Information-driven communities require no geographical contiguity, threatening the core characteristic of the state structure. National laws seem inadequate to contain these phenomena as domestic matters.'

71 According to R McCorquodale & R Pangalangan 'Pushing back the limitations of territorial boundaries' 2001 *European Journal of International Law* 882 it is of vital importance that the tight connection between territorial boundaries and the internal sovereignty of states be untangled. Within the European Union there are currently a series of different levels of political power, although still largely dependent on the boundaries of the states within the European Union. These include local or regional areas, national governments and European Union decision-making bodies that are able to respond to regional, national and European voices. Consequently, the sovereignty or political autonomy of each state within the European Union is not absolute. Because this multi-level, shared sovereignty is not strictly limited to a state's boundaries, the authors are of the opinion that it could be a means to reduce the potential conflict over territory. In this regard C Schreuer 'The waning of the sovereign state: towards a new paradigm for international law' 1993 *European Journal of International Law* 468 is of the opinion

INTERVENTION AND THE AFRICAN UNION

In contrast with the Organisation of African Unity's inability to intervene in states to end gross and massive human rights violations committed on the African continent,[72] the Constitutive Act of the African Union has moved much further towards limiting the sovereignty of member states and, even, in some instances, permitting the involvement of the Union in the domestic affairs of African countries, irrespective of the principle of non-interference by member states in the internal affairs of others.[73] Article 4(h) of the

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that the European regional integration has been successful in controlling abuses of national power. He contends that, because the sovereign state loses its exclusive control and is replaced by a more multi-layered political structure, the potential for conflict inherent in territorial disputes should also diminish.

72 For example, the excesses of Idi Amin in Uganda and Bokassa in the Central African Republic in the 1970's, and the Rwandan Genocide in 1994. See in this regard B Kioko 'The right of intervention under the African Union's Constitutive Act: from non-interference to non-intervention' December 2003 *International Review of the Red Cross* 812–814. Also see NJ Udombana 'The institutional structure of the African Union: a legal analysis' 2002 *California Western International Law Journal* 76.

73 Article 4(g) of the Constitutive Act of the African Union. For the text of this instrument see C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2ed 2006) 4–11. M du Plessis 'The African Union' in Dugard n 7 above at 557. Some commentators (see for example E Baimu 'The African Union: hope for better protection of human rights in Africa?' 2001 *African Human Rights Law Journal* 314; F Viljoen & E Baimu 'Courts for Africa: considering the co-existence of the African Court for Human and Peoples' Rights and the African Court of Justice' 2004 *Netherlands Quarterly of Human Rights* 248) are concerned that the principle of non-interference has been retained in the Constitutive Act of the African Union. Article 4(g) of the Constitutive Act of the African Union confirms the principle of non-interference by any member state in the internal affairs of another. However, art 4(h) limits the right to non-intervention by making provision for 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'. F Viljoen 'The African Charter on Human and Peoples' Rights/The *travau' Préparatoires* in the light of subsequent practice' 2004 *Human Rights Law Journal* 326 is of the opinion that the Constitutive Act of the African Union signals a clear trend away from strict adherence to the principle of non-interference in the domestic affairs of member states. Kioko n 72 above at 819 maintains that the African Union has moved away from the principle of non-interference or non-intervention to, what he refers to as, the doctrine of 'non-indifference'. He refers in this regard to the submission of T Maluwa 'Reimagening African unity: some preliminary reflections on the Constitutive Act of the African Union' 2001 *African Yearbook of International Law* 38 that 'in an era in which post-independent Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes and crimes against humanity'.

Constitutive Act of the African Union confers an institutional right,[74] but not a duty,[75] on the African Union to intervene in the conflicts of member states[76] in certain grave circumstances, namely war crimes, genocide and crimes against humanity.[77] The fact that the Constitutive Act expressly lists the grounds for intervention would probably prevent the uncertainties associated with the broader formulated mandate of the United Nations Security Council. The Protocol on Amendments to the Constitutive Act of the African Union, adopted in February 2003, which is not yet in force, amends article 4(h) by extending the right of the Union to intervene in a member state also to instances of 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon recommendation of the Peace and Security Council'.[78] The expansion of article 4(h) is intended to give the African Union more flexibility to decide on intervention by including situations that threaten regional or national peace and security, thereby further limiting the opportunity of states to advance the objection of non-

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74 Since the African Union has a *right* to intervene, a decision to that effect can only be avoided by a collective decision not to intervene in terms of art 7(1) of the Constitutive Act which determines that '[t]he Assembly shall take its decisions by consensus or failing which, by a two-thirds majority of the Member States of the Union'. See further A Abass & MA Baderin 'Towards effective collective security and human rights protection in Africa: an assessment of the Constitutive Act of the African Union' 2002 *Netherlands International Law Review* 16.

75 See however, the argument by Murithi below which seems to suggest that the African Union does have a duty to intervene in these grave circumstances.

76 Abass & Baderin n 74 above at 15 points out that art 4(h) of the Constitutive Act does not have the same effect as its analogous provision in art 2(7) of the United Nations Charter. While art 2(7) is directed specifically at the United Nations and not at its members (who are restrained from interfering in the internal affairs of other states by the customary principle of non-intervention), art 4(h) restrains the African Union as an institution from interfering in the internal affairs of its member states.

77 Abass & Baderin n 74 above at 24 observe that the inclusion of these crimes, the prohibition of which is either *jus cogens* or obligations *erga omnes*, indicates that African states now 'recognize the inextricable link between an effective collective peace and security system and the observance of human rights of their people in their quest for peace and security on the continent'. According to E de Wet 'The relationship between Art 53 and Art 4(h) CAAU' (lecture delivered at the Second Annual South African International Law Seminar hosted by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law on 'Regional and international law: an African perspective', held at the Old Fort, Constitution Hill on 25 August 2009) this provision may usurp the role of the Security Council under art 39 of the United Nations Charter.

78 Article 4 of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 3 February 2003. For the text of this instrument see Heyns & Killander n 73 above at 12–14. Article 13 of the Protocol determines that the Protocol shall enter into force thirty days after the deposit of the instruments of ratification by a two-thirds majority of the member states.

interference in their internal affairs.[79] The precise meaning of what constitutes a serious threat to the legitimate order and how it relates to the other grounds of intervention in article 4(h) – which are all international crimes in international law – are, however, not clear.[80] Hence, the criteria that the African Union will use to establish the legitimacy of a regime in power in an African state, considered for intervention, is also not certain.[81] Maluwa[82] points out that an analogous situation may be found in the United Nations Charter, since the terms 'threat to the peace', breach of the peace' and 'act of aggression' are also not defined anywhere. However, due to the dynamic character of the Charter, which allows the international community to interpret it in a manner that promotes the fulfillment of the organisation's purposes, the practice of the General Assembly and the Security Council illustrates the possibility to identify and describe these situations without a definition provided in the Charter. He proposes that a similar approach can be expected from the policy organs of the African Union, especially the Peace and Security Council, in interpreting and implementing the Constitutive Act and its protocols. In order to determine the meaning of 'a serious threat to the legitimate order', these policy organs will inevitably have to seek guidance in other relevant norms and instruments.[83]

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79 Kioko n 72 above at 812; 817.

80 E Baimu & K Sturman 'Amendment to the African Union's right to intervene: a shift from human security to regime security' 2003 *African Security Review* 5 maintain that this added ground of intervention is inconsistent with the other grounds in art 4(h), since it aims to protect the security of the state rather than human security. However, C Heyns, E Baimu & M Killander 'The African Union' 2003 *German Yearbook of International Law* 276 fn 120 argues in favour of a people-centered interpretation of the humanitarian intervention provision in the Constitutive Act for the following reasons: 'First, the fact that the AU can only intervene where *legitimate* order is under threat suggests that the AU will not intervene where an *illegitimate* order is under threat from popular uprising. It follows that the AU should not prop up a regime in seeking to cling to power despite losing the mandate of the people through free and fair election. Besides, since the AU has the right to intervene in instances where legitimate order is under threat it is probable that the Union may be required to be proactive and not simply wait for the request of a government under threat or even to seek consent of that state before it intervenes. If this reading of the intervention provision is correct, there is a window of opportunity for the AU to act even in instances where it is not in the interest of the regime in power to have the AU intervene as conspicuously demonstrated by absence of invitation.'.

81 Baimu & Sturman n 80 above at 276.

82 T Maluwa 'Fast-tracking African unity or making haste slowly? A note on the amendments to the Constitutive Act of the African Union' 2004 *Netherlands International Law Review* 218.

83 Maluwa n 82 above at 219 refers in this regard to the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl 5 (XXXVI)) adopted in 2000, text to be found in Heyns & Killander n 73 above at 85–88, and the OAU Declaration Governing Democratic Elections in Africa (AHG/Decl.1 (XXXVIII)), text to be found on the internet at http://www.au2002.gov.za/docs/summit_council/oaudec2.htm (accessed in May 2010).

With the exception of South Africa, the military intervention in 2008 by the African Union Forces in the Comoros Islands[84] was widely supported by the international community. Comoran and African Union troops invaded the renegade island of Anjouan to take control from Mohamed Bacar, whose election has not been recognised by the international community, and help the Union Government of Comoros to re-establish control over the island. According to the then African Union Chairperson, President Jakaya Kikwete from Tanzania, the intervention was justified to save the Indian Ocean nation from disintegration. The precise grounds on which the intervention was based is, however, not completely clear, since the grave circumstances listed in art 4(h) – genocide, war crimes and crimes against humanity – were apparently not present. It therefore seems that the intervention was justified on the basis of the African Union's condemnation and rejection of unconstitutional changes of government, although this is not formulated as a separate ground for intervention in the Constitutive Act.[85] Should the Protocol on Amendments to the Constitutive Act of the African Union have been in force at the time of the intervention in the Comoros, the intervention could probably have been justified on the ground of 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union'. The insistence of the African Union to intervene in the Comoros is further interesting taking into account its reluctance to take similar action in countries such as Zimbabwe where wide-spread human rights abuses have been continuing for some time.

These present uncertainties aside, the Peace and Security Council of the African Union[86] at least now provides a clearly defined mechanism to

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Kioko n 72 above at 816 is of the opinion that in deciding on intervention, the organs of the African Union will have to take regard of the fundamental values and standards as set out in the Constitutive Act, the African Peer Review Mechanism and the Solemn Declaration and Memorandum of Understanding on the Conference on Security, Stability and Development in Africa. He maintains that intervention will only be justified where the intervention conforms to the hopes and aspirations of the African people. According to him it is clear that 'intervening to keep in power a regime that practices bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the values and standards that the Union has set for itself'.

84 Decision on the Situation in the Comoros, Assembly/AU/Dec 186(X).

85 Article 4(p) of the Constitutive Act of the African Union.

86 The Protocol on Amendments to the Constitutive Act of the African Union amends art 5 of the Constitutive Act by adding the Peace and Security Council to the principal organs of the African Union. The Peace and Security Council was subsequently established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, held in Durban, South Africa, 9 July 2002. For the text of this

determine situations in the African context constituting a serious threat to the legitimate order and to take the necessary steps in restoring peace and stability in the member states of the Union, in cooperation with the Security Council of the United Nations.[87] The Assembly of the African Union, as the supreme organ of the Union,[88] decides on intervention on the grounds provided for in article 4(h) of the Constitutive Act and the Protocol on Amendments to the Constitutive Act of the African Union (once it comes into force).[89] The amended article 4(h) stipulates that the Peace and Security Council of the African Union must recommend that the Assembly decides on intervention in the instance of 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union'.[90] However, when the African Union takes a decision to intervene in the internal matters of member states in the interest of peace and security, such conduct of the Union, as a regional arrangement, is subject to the provisions of the United Nations Charter and general international law.[91] Article 53 of the United Nations

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instrument see Heyns & Killander n 73 above at 16–20.

87 Maluwa n 82 above at 219. With regard to its relationship with the Security Council of the United Nations, art 17(1) of the Peace and Security Council Protocol provides that '[i]n fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa'. Article 17(3) furthermore determines that '[t]he Peace and Security Council and the Chairperson of the Commission shall maintain close and continued interaction with the United Nations Security Council, its African members, as well as the Secretary-General, including holding periodic meetings and regular consultations on questions of peace, security and stability in Africa'. If necessary, the African Union will call upon the United Nations to provide financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability on the African continent (art 17(2)).

88 Article 6(2) of the Constitutive Act of the African Union.

89 Article 4(h) of the Constitutive Act of the African Union provides for the right of the Union to intervene in member state 'pursuant to a decision of the Assembly'.

90 Maluwa n 82 above at 219.

91 Abass & Baderin n 74 above at 21. Article 52(1) of the United Nations Charter, dealing with regional arrangements, provides as follows: '1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' Abass & Baderin *id* at 20–21 points out that, although there is no provision in the Constitutive Act of the African Union stating that the African Union is a regional arrangement within the meaning of art 52 of the Charter, the presence of factors such as 'its composition (only African states), the bond between the members (common historical, cultural and political values) and the territorial scope of its operation, the African continent', raises a strong presumption of regionalism. Furthermore, because the predecessor of the African Union, the Organisation for African Unity (OAU), has been treated by the United Nations and

Charter establishes a 'partially decentralised and collective security system'[92] by providing that

> [t]he Security Council shall, when appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council …

It is thus the ultimate responsibility of the United Nations Security Council to determine a threat to or breach of the peace or an act of aggression in terms of article 39 of the United Nations Charter. Therefore, in the case of a regional conflict situation, the Security Council must first make a determination in terms of article 39 before authorising the regional organisation to act.

Precedent, however, indicates that regional organisations tend not to wait for the Security Council to make such a determination.[93] These non-authorised interventions are usually justified by maintaining that it is not always expedient to wait for authorisation by the Security Council and that the council has in some instances not fulfilled its obligations with regard to the maintenance of peace and security, often at the expense of Africa.[94] Abass and Baderin,[95] therefore, contend that as a matter of expediency to ensure an effective execution of the obligations under article 4(h), it must be expected that the Assembly of the African Union will decide when war crimes, genocide and crimes against humanity have been committed and undertake enforcement action without the authorisation of the United Nations Security

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the international community as a regional arrangement within the scope of the United Nations Charter, the African Union, established by the same member states that constituted the OAU, must likewise be accepted as such.

92 Abass & Baderin n 74 above at 21.

93 For example, the North Atlantic Treaty Organization (NATO) intervened in Kosovo in 1999 without prior authorisation by the United Nations Security Council. The Economic Community of West African States (ECOWAS) had regularly in the past usurped the powers of the Security Council, for example, its organisation of peace-keeping forces for Sierra Leone and Liberia without initially consulting the United Nations. See further Kioko n 72 above at 821; Abass & Baderin n 74 above at 22.

94 Abass & Baderin n 74 above 22–23; Kioko n 72 above at 821. Kioko observes that the absence of any complaint by the United Nations Security Council about its powers being usurped by regional organisations may be attributed to the fact that the interventions were in support of popular causes and that the United Nations Security Council had not taken action or was unlikely to do so at that time (at 821). According to Abass & Baderin *id* at 22–23 the absence of protest by the Security Council and members of the concerned regional organisation in the case of such a 'quasi-Article 39' determination, 'must be accepted as a development of new norms of state practice'.

95 Abass & Baderin n 74 above at 22–23.

Council. They furthermore point out that the absence of a provision in the African Union Constitutive Act on the reportorial requirement in article 54 of the United Nations Charter[96] suggests that the African Union does not anticipate any authorisation or supervision by the United Nations regarding its right of intervention in conflicts on the African continent. The authors argue that in instances where the Security Council refuses to intervene in a conflict of a member state, the particular regional organisation may continue to take any action it regards fit in the circumstances. They submit that the future validity of article 53(1) of the United Nations Charter is dependent on the effectiveness of the collective security mechanism embodied in the Security Council. If not, there will be little motivation for states to confer the primary responsibility for the maintenance of peace and security on the United Nations Security Council.[97] It is in any case evident that regional institutions very often act within the same areas that were previously the monopoly of international institutions. For example, with regard to economic issues institutions such as the African Development Bank, the China Development Bank and the Asian Development Bank perform functions that were previously the sole responsibility of the International Monetary Fund (IMF) and the World Bank.[98] In the same vein security issues that were previously entrusted to the United Nations Security Council are also within the mandate of regional security institutions.[99]

The question arises whether a decision by the African Union, to intervene in a conflict of one of its member states, constitutes a violation of article 2(4) of the United Nations Charter, prohibiting the use of force, and the

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96 Article 54 reads as follows: 'The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.'

97 Abass & Baderin n 74 above at 24. D Ninčić *The problem of sovereignty in the Charter and in the practice of the United Nations* (1970) 77 refers to this as the theory of *conditional validity* of the United Nations Charter, the implications of which are far-reaching and, in his view, extremely dangerous. Kioko n 72 above at 822 points out that the huge financial burden and a lack of sufficient military equipment may compel the African Union to turn to the United Nations Security Council to carry out the responsibility for the maintenance of international peace and security.

98 E Sidiropoulis 'New actors in a changing world' *SAII policy briefing* (April 2008) 3.

99 See in general JJ Hentz 'Introduction: 'new regionalism and the "theory of security studies"' in JJ Hentz & M Bøås (eds) *New and critical security and regionalism*: *beyond the nation state* (2003) 3–16.

customary law principle of non-intervention[100] as enshrined in article 2(7) of the Charter. In this regard Murithi[101] suggests that:

> In effect African governments by signing up to the Union have accepted external intervention in the internal affairs in serious crisis situations which basically dilutes the provision found in the UN Charter on the non-intervention in the affairs of a member state. Clearly, there is a need to review this UN provision and the steps taken by the leaders of the African Union can provide a model to the rest of the world about how sovereignty should only be respected only when governments behave responsibly.

The submission by Abass and Baderin[102] in this regard is not very clear, but seems to suggest the following: the Constitutive Act of the African Union establishes a collective basis of intervention, opposed to a unilateral one. The treaty-based consent of states must be interpreted to preclude the operation of article 2(4), since states did not intend that the African Union should use force against their territorial integrity. They, therefore, reach the conclusion that, by ratifying the Constitutive Act, African states have agreed that the African Union may intervene in their domestic affairs and, as a result, 'these states must be taken to have conceded a quantum of their legal and political sovereignty to the African Union'. They, however, continue to maintain that 'a consequent use of force by that Union cannot thereby derogate from the territorial integrity or political independence of that state.' The authors thus seem to submit that African states have consented to *intervention* in their domestic affairs by the African Union, but that this intervention must be by other means than the *use of force*, since the prohibition on the use of force is widely regarded as a principle of *jus cogens*.[103]

In contrast to the submissions by Abass and Baderin, De Wet[104] holds the opinion that in the absence of explicit Security Council authorisation, the regional intervention would be illegal, unless it concerns a situation of self-defence. According to her it cannot be argued that regional organisations would have a residual power to adopt military measures, or a so-called 'right

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100 In the *Nicaragua* case n 40 above at 534 Judge Jennings, in a dissenting opinion, remarked that '[t]here can be no doubt that the principle of non-intervention is an autonomous principle of customary international law … '.

101 T Murithi *The African Union*: *Pan-Africanism, peacebuilding and development* (2005) 97–98.

102 Abass & Baderin n 74 above at 18–19.

103 Kioko n 72 above at 820.

104 E de Wet 'The relationship between the Security Council and regional organisations during enforcement action under Chapter VII of the United Nations Charter' 2002 *Nordic Journal of International Law* 15.

of emergency' to act in situations of gross and systematic human rights violations as this would violate the notion of centralised use of force that is inherent in the Charter, and specifically be in violation of the second sentence of article 53(1) of the Charter which explicitly prohibits enforcement action by regional organisations without Security Council authorisation.[105] She finds the suggestion that the Security Council could prevent a regional organisation from intervening by adopting a resolution to such effect, unconvincing as this would require from the Security Council to justify its inaction (a so-called 'opt-out' procedure). The Security Council is only required to justify why it is engaging in military action (a so-called 'opt-in' procedure). In any event, a permanent member of the Security Council with an interest that coincides with that of the regional organisation could frustrate such a Chapter VII resolution, by using its veto power.[106] Should the Security Council adopt a practice of *ex post facto* retroactive authorisation, such authorisation will have to be given in unambiguous terms under Chapter VII of the Charter in order to render the intervention by the regional organisation legal.[107]

From the above discussion it is clear that there is currently a conflict between the peace and security provisions of the United Nations Charter and that of the Constitutive Act of the African Union. It is submitted that this conflict be addressed by employing the principle of complementarity in instances where intervention is contemplated. This would entail that the primary responsibility for intervention be left to the regional organisation, in this case the African Union, and that the United Nations Security Council should only intervene in instances where the regional organisation is unwilling or unable to undertake such action. If regional organisations are forced to obtain authorisation from the United Nations Security Council before it intervenes in a state, the regional peace and security institutions would be subordinated to the Security Council procedures and the veto power, and consequently be rendered ineffective. For example, during the recent crisis in Zimbabwe it was left to the African Union and SADC to deal with the situation and the attempt by the United States and Britain to involve the Security Council of the United Nations was vetoed by China and Russia who both argued that the crisis should be dealt with on a regional level.[108]

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105 *Id* at 15.
106 *Id* at 16.
107 *Id* at 17.
108 'Russia, China veto UN Zimbabwe sanctions' *Reuters*, 11 July 2008 (found on the internet at http://www reuters.com/article/latestCrisis/idUSN11364578 (accessed in July 2008)).

INTERVENTION WITHOUT SECURITY COUNCIL AUTHORISATION

Humanitarian intervention and the responsibility to protect

Because the protection of human rights is an increasing concern of the international community as a whole, the question arises whether a particular state may take military action against another state on humanitarian grounds.[109] Such a proposition not only challenges the basic foundations of international law, namely state sovereignty and the principle of non-intervention in the internal affairs of states,[110] but is also in contradiction with article 2(4) of the Charter of the United Nations which stipulates that all Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.[111] The Charter recognises the right to resort to force only in two instances: firstly, under the authority of the Security Council and secondly, when states exercise the right of individual or collective self-defence in terms of article 51.[112] The prohibition on the unauthorised use of force is widely regarded as a rule of customary international law and even *jus cogens*.[113] A possible conflict between the individual and the community interest seems inevitable: on the one hand, the customary law principles of non-intervention and the prohibition on the use of force safeguards the sovereignty of states, but, on the other hand, the recognition of a right to humanitarian intervention

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[109] Generally the term *humanitarian intervention* refers to the use or threat of force by a state, a group of states or an international organisation without approval by the Security Council in order to protect the internationally recognised human rights of the citizens of the target state. See D Kritsiotis 'Reappraising policy objections to humanitarian intervention' 1997–1998 *Michigan Journal of International Law* 1005–1006 fn 1.

[110] *Id* at 1005.

[111] According to B Fassbender 'Sovereignty and constitutionalism in international law' in N Walker (ed) *Sovereignty in transition* (2003) 129–130 the ban on the use of force by the Charter is today not so much understood as a limitation of sovereignty, but rather as a necessary prerequisite for a *de facto* enjoyment of sovereign equality by states. Therefore, a state's sovereign equality depends on a comprehensive prohibition on the use of force and an effective mechanism to implement and enforce this prohibition.

[112] Article 51 provides as follows: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right to self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' Also see Dugard n 7 above at 417–430 for a discussion of the arguments raised in support of the use of force without the authorisation of the United Nations.

[113] ID Seidermann *Hierarchy in international law: the human rights dimension* (2001) at 115.

may be an effective means of protecting human rights, a number of which have also attained the status of *jus cogens*, and preventing humanitarian crises.[114]

Proponents of a liberal view of sovereignty argues for the legality of humanitarian intervention by contending that governments which are unable or unwilling to protect human rights, resulting in gross violations of the rights of masses of people, forfeit their sovereignty in the sense of responsible government and the international community must consequently provide the needed protection and assistance.[115] Before 1945 states have on several occasions intervened in other states to protect non-nationals where their treatment was so outrageous that it constituted a shock to the conscience of mankind.[116] Unfortunately, these humanitarian interventions often disguised an ulterior political purpose.[117] Apart from the purity of states' motives when intervening on so-called humanitarian grounds, the objections against the inclusion of a right to humanitarian intervention in international law also include the possibility of the abuse of such a right, and the prospect that it would be selectively applied.[118]

As a result of the potential abuse of humanitarian interventions, some authors seem cautious to unconditionally describe humanitarian intervention as legal, but rather contend that humanitarian intervention is illegal, but might be morally justifiable in certain circumstances.[119] The moral justification of

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114 Kritsiotis n 109 above at 1043.

115 FM Deng *Protecting the disposed* (1993) 13–15 advances such a liberal view of sovereignty by stating that '[t]he concept of sovereignty … is becoming understood more in terms of conferring responsibilities on governments to assist and protect persons residing in their territories, so much so that if governments fail to meet their obligations, they risk undermining their legitimacy' (at 15). In a similar vein ZA Lomo 'The struggle for protection of the rights of refugees and IDPs in Africa: making the existing international legal regime work' 2000 *Berkeley Journal of International Law* 278 argues that '[f]rom a liberal perspective, traditional conceptions of sovereignty and how it defines obligations in international law are not just changing but are an anachronism all together, i.e., the "state is now widely understood to be the servant of the people and vice-versa"'.

116 Dugard n 7 above at 514.

117 Schreuer n 71 above at 422.

118 See Kritsiotis n 109 above at 1020–1039. According to Jamnejad & Wood n 39 above at 377 certain concepts such as the margin of appreciation and proportionality could be applied to the relationship between human rights and intervention to prevent states from using minor human rights breaches as a justification for major interventions.

119 JD van der Vyver '*Ius contra bellum* and American foreign policy' 2003 *South African Yearbook of International Law* 6–7 classifies these arguments into the following categories: the *literalist approach* represented by Julius Stone argues that art 2(4) of the United Nations Charter only prohibits the use of force for specific unlawful purposes

humanitarian intervention may be attributed to the international community's belief that it has a 'responsibility to protect'. Humanitarian intervention is justified by contending that people matter most and that states, as well as the international community, have a duty to protect them.[120]

The idea of 'sovereignty as responsibility' was articulated by one of its main proponents, Francis Deng, in 1996 in his book *Sovereignty as responsibility:*

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namely 'against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations'. Because humanitarian intervention does not seek to change the territorial borders of the state under attack, or to challenge the political independence of that state, it is not included in the scope of the United Nations Charter proscription. Stone furthermore contends that one cannot reconcile a blanket prohibition on the threat or use of force with the provisions of art 2(3) of the Charter which requires member states of the United Nations to settle international disputes by peaceful means and in such a manner that international peace and justice are not endangered. See J Stone *Aggression and world order* (1958) 95; 98–101. The *flexible and teleological approach* represented by Michael Reisman maintains that the prohibition on the use of force must be read in conjunction with the overarching human rights concerns of the United Nations, as reflected in the several provisions of the Charter and of which humanitarian intervention is a logical extension. See M Reisman 'Humanitarian intervention to protect the Ibos' in R Lillich (ed) *Humanitarian intervention and the United Nations* (1973) 177–178. The *emergency mechanism argument* represented by Richard Baxter and Richard Lillich justifies the need for humanitarian intervention by arguing that the Security Council has been immobilised by the veto power of the permanent members. This presupposes that humanitarian intervention should be 'deactivated' if the Security Council ever begins to function smoothly. See R Baxter in R Lillich (ed) *Humanitarian intervention and the United Nations* (1973) 53–54; RB Lillich 'Humanitarian intervention: a reply to Ian Brownlie and a plea for constructive alternatives' in JN Moore (ed) *Law and civil war in the modern world* (1974) 229–230; RB Lillich 'Forcible self-help by states to protect human rights' 1967 *Iowa Law Review* 335; 345–351; RB Lillich 'A United States policy of humanitarian intervention and intercession ' in DP Kommers & DG Loescher (eds) *Human rights and American foreign policy* (1979) 288–289. See further MR Fowler & JM Bunck *Law, power, and the sovereign state: the evolution and the application of the concept of sovereignty* (1996) 139–140.

120 I Simonovic 'Relative sovereignty in the twenty first century' 2002 *Hastings International and Comparative Law Review* 373 notes that some authors attribute this change in the object of protection from states to people to the evolution of state sovereignty into popular sovereignty. This theory suggests that in the contemporary world the principle of sovereignty can no longer be used as a shield against the actual suppression of popular sovereignty. A third-party state's intervention to restore the power of a democratically elected government, or to restore democracy and respect for basic human rights in another state, can be considered legitimate. However, there are also opposing views which label this tendency toward international intervention as remains of the colonial attitude, an attempt to create a world order based on values and interests particular to the most powerful states, or as simply dangerous.

conflict management in Africa.[121] Evans[122] points out that the conceptualisation of sovereignty as responsibility

> gained traction from all the post-Second World War institutional developments associated with the establishment of the United Nations, membership of the UN, and in particular, accession to its human rights instruments, which necessarily entails the voluntary acceptance of sovereignty-limiting obligations and responsibilities, both internally and externally.

The idea of sovereignty as responsibility was the stimulus for the establishment of the Independent International Commission on Intervention and State Sovereignty, in September 2000 by Canada, with the mandate to investigate the relation between intervention for human protection purposes and state sovereignty.[123] The Commission suggests that sovereignty should be seen as the responsibility to protect. According to the Commission in its *Report on the Responsibility to Protect* [124] this implies, firstly, that the state authorities are responsible for the functions of protecting the safety and the lives of citizens and the promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the United Nations. Thirdly, it means that the agents of the state are responsible for their actions and are thus accountable for their acts of commission and omission. In view of its approach to sovereignty as the responsibility to protect, the Commission supports intervention for human protection purposes when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.[125] The Report was subsequently partially adopted by the General Assembly in the 2005 World Summit Outcome Document.[126] In this document the General Assembly states that:

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121 F Deng *Sovereignty as responsibility: conflict management in Africa* (1996).

122 G Evans *The responsibility to protect: ending mass atrocity crimes once and for all* (2008) 37.

123 See Evans n 122 above at 38–43 for the background on the establishment and functioning of the Commission.

124 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (December 2001) 13 (found on the internet at http://www.iciss.ca/report2-en.asp (accessed in May 2010)).

125 *Id* at 16. Also see the discussion by H Strydom 'Peace and security under the African Union' 2003 *South African Yearbook of International Law* 74–76.

126 World Summit Outcome Document (2005) (GA Res 60/1, UN Doc A/RES/60/1 (25 Oct 2005)). See further Evans n 122 above at 43–50.

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.[127]

These principles were also reaffirmed by the Security Council.[128] The formal adoption of the principles formulated in the *Report on the Responsibility to Protect* signals a significant step towards the international community accepting a link between collective preventative action and intrastate conflict resulting in humanitarian crises.[129] However, it is clear from the above statement by the General Assembly that the right to humanitarian intervention must be considered on a case to case basis and will only be recognised when it occurs with the approval of the Security Council; a viewpoint also supported by the majority of international law scholars.[130]

The seriousness with which the responsibility to protect is regarded is evident from the court application brought by concerned South African citizens to stop the trans-shipment from China of 70 tons of arms from the Durban harbour to Zimbabwe. The legal action was brought in terms of the South African National Conventional Arms Control Act[131] which prohibits the issuing of a transport permit if it would contribute to internal repression

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127 Paragraph 139.

128 SC Res 1674 (2006), par 4 reads as follows: '*Reaffirms* the provisions of par 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.' SC Res 1706 (2006) states as follows in the second paragraph of its preamble: '*Recalling also* its previous resolutions … and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 World Summit outcome document….'

129 JJ Welling 'Non-governmental organizations, prevention, and intervention in internal conflict: through the lens of Darfur' 2007 *Indiana Journal of Global Legal Studies* 170.

130 Dugard n 7 above at 423.

131 41 of 2002.

or suppression of human rights and fundamental freedoms. The Act furthermore prohibits the transfer of conventional arms to governments that systematically violate or suppress human rights and freedoms,[132] which has clearly been the case with Zimbabwe for some time. The applicants therefore contended that there was a crisis in Zimbabwe after its controversial presidential elections, and expressed the concern that the weapons could possibly be used against Zimbabwean civilians, thereby further undermining human rights and democracy in the country. This would in turn affect the peace and security in the rest of the region. Since no arms embargo against Zimbabwe existed, the South African government said that it was not in a position to unilaterally stop the transaction between China and Zimbabwe. On 18 April 2008 the Durban High Court in South Africa granted an interim interdict preventing the movement of the arms through South Africa to Zimbabwe, pending the review of the relevant transport documents. However, shortly after the Court granted the interdict, the ship left South African waters. Although this application was brought by individuals and not an individual state, it is nevertheless an example of action taken on humanitarian grounds and a clear indication that the protection of human rights is no longer regarded as a matter within the exclusive jurisdiction of a particular state.[133] This inference is further strengthened by the subsequent refusal of both Mozambique and Tanzania to allow the ship access to their harbours, and the call by Zambia, as chair of the SADC grouping, urging African coastal states to bar the Chinese ship from entering their territorial waters.[134] Due to this unprecedented regional pressure, coupled with pressure form the rest of the international community, the ship was recalled to China.[135]

Murithi[136] even argues that the responsibility to protect has effectively been enshrined in the Constitutive Act of the African Union: In addition to article 4(h) which provides for a right of the Union to intervene in certain grave circumstances, article 4(j) declares that member states have the right to request intervention from the Union to restore peace and security. Moreover, article 7(e) of the Protocol of the Peace and Security Council determines that the council can recommend to the Assembly of Heads of State intervention on behalf of the Union in a member state in respect of grave circumstances,

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132 Section 15.
133 See *Legalbrief*, 18 April 2008; *Beeld*, 19 April 2008, at 1.
134 *Legalbrief* 23 April 2008.
135 *Id* 25 April 2008.
136 T Murithi 'The responsibility to protect, as enshrined in art 4 of the Constitutive Act of the African Union' 2007 *African Security Review* 16.

namely war crimes, genocide and crimes against humanity. He therefore holds the opinion that these provisions grant the African Union both the right and the responsibility to protect.[137] According to Murithi the active interventionist stance taken by the African Union with regard to the internal conflict situations in Burundi, Darfur and Somalia is indicative of the Union's commitment to the responsibility to protect.[138] The argument by Murithi suggests that the African Union does not only have a *right*, but also a *duty* to intervene in member states under certain circumstances. It is however debatable whether the selective interventions by the African Union provide sufficient evidence of such a duty. Furthermore, should it be argued that the Constitutive Act of the African Union confers a duty on the African Union to intervene in certain grave circumstances, the obligation on regional organisations in article 53(1) of the United Nations Charter to obtain prior authorisation from the United Nations Security Council before taking enforcement measures, will become obsolete.

Because, in principle, interventions should be carried out by the Security Council to be legal, interventions by *ad hoc* coalitions or individual states can, at the moment at least, be regarded as legitimate at the most.[139] This is also in conformity with the report by the Independent Commission on Kosovo that NATO's military action against Yugoslavia, although not strictly legal, was legitimate.[140] In a study on the issue of humanitarian intervention after 9/11, Molier[141] refers to the theory by Tesón[142] that state sovereignty should be exercised to protect the fundamental rights of the individuals who live in the territory of the state. A state that continuously violates the human rights of its citizens, forfeits internal and external legitimacy and can therefore no longer claim the protection offered by article 2(4) of the Charter.[143] In contrast to the approach by The Independent International Commission on Intervention and State Sovereignty[144] and that

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137 *Id* at 17.

138 *Id* at 23.

139 *Report of the International Commission on Intervention and State Sovereignty* n 124 above at 54–55.

140 *The Kosovo Report* (2000) 186 (available at: http://www.oxfordscholarship.com/oso/public/content/politicalscience/9780199243099/toc.html (accessed in May 2010)).

141 G Molier 'Humanitarian intervention and the responsibility to protect after 9/11' 2006 *Netherlands International Law Review* 49.

142 FR Tesón *Humanitarian intervention: an inquiry into law and morality* (1997).

143 *Id* at 98; 174. Also see FR Tesón 'The liberal case for humanitarian intervention' in JL Holtzgrefe & RO Keohane (eds) *Humanitarian intervention: ethical, legal and political dilemmas* (2003) 93–129.

144 *Report of the International Commission on Intervention and State Sovereignty* n 124 above.

of the Independent Commission on Kosovo,[145] Tesón thus regards humanitarian intervention as *legal* in circumstances where a state is unable or unwilling to end serious human rights violations.[146] Because in the situation referred to by Tesón, a sovereign state with an effective government still exists, the international community would probably be reluctant to forcefully intervene. On the other hand, in instances where no effective government exists, thus in the case of a failed state, it would theoretically be easier to intervene on humanitarian grounds, since the prohibitions on the use of force and intervention are only enforceable between states. It therefore seems peculiar that the African Union has not intervened in Somalia, which has had no effective government since 1991 and is widely regarded as a failed state.[147]

The debate regarding the legality versus the legitimacy of the unauthorised use of force thus centers on the following dilemma: In order to justify the unauthorised use of force, the damage to the rules-based international order, if the Security Council is bypassed by a concerned individual state or *ad hoc* coalition (as was the case with NATO's intervention in Kosovo in 1999), has to be weighed against the damage to the international order in the case of grave human rights violations while the Security Council fails to act in accordance with its responsibility.[148]

Molier concludes that, in theory, the concept of the responsibility to protect replaces the doctrine of humanitarian intervention.[149] However, from a legal

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145 *The Kosovo Report* n 140 above.

146 Molier n 141 above at 50.

147 G Kreijen *State failure, sovereignty and effectiveness: legal lessons from the decolonization of sub-Saharan Africa* (Doctoral dissertation, Leiden University, 2003) 34; 84–86.

148 Evans n 122 above at 146.

149 Molier n 141 above at 52. However, according to Evans n 122 above at 56 'the responsibility to protect' and 'humanitarian intervention' are two very different concepts. While humanitarian intervention has as its core coercive military action for humanitarian purposes, the responsibility to protect entails much more. The responsibility to protect is first and foremost about taking preventative action, at the earliest possible stage. Evans *id* at 39–40 points out that the Independent International Commission on Intervention and State Sovereignty attempted to invent a new way of talking about humanitarian intervention which has become irretrievably linked to *only* military force in order to respond to mass atrocities. The Commission 'sought to turn the whole weary – and increasingly ugly – debate about 'the right to intervene' on its head and re-characterise it not as an argument about the "right" of states to do anything but rather about their "responsibility" – in this case, to protect people at grave risk'. According to the *Report of the International Commission on Intervention and State Sovereignty* n 124 above at xi the responsibility to protect embraces the following three responsibilities: 'A. *The responsibility to prevent*: to address both the root causes and direct causes of internal

point of view, Security Council authorisation is still needed for humanitarian intervention to be legal. Similar to the call by the Independent Commission on Kosovo for the revision of international law to conform to 'an international moral consensus',[150] Molier proposes the formulation of a general principle of international law to justify the use of force to end human rights violations without Security Council authorisation.[151] Kindiki[152] puts it even stronger by stating that 'one may speak of an emerging norm of customary international law on humanitarian intervention'. He bases his viewpoint on the increasing significance of the international duty to promote and protect human rights, and argues that this forms the foundation of the further development of a customary law justification for humanitarian intervention without Security Council mandate.[153] It is, however, at present, uncertain whether recent examples of state intervention in response to humanitarian crises should be regarded as a new customary rule or principle of international law. It is nevertheless at least clear that the international community is, in the words of Kritsiotis,[154] experiencing a 'humanitarian awakening' resulting in states making the normative decision to regard humanitarian concerns, such as the prevention of genocide, above claims of state sovereignty and the principles prohibiting intervention and the unauthorised use of force. The fact that forcible intervention without Security Council approval, but which is regarded as morally justified, is generally accepted by the international community, is a confirmation of the humanitarian awakening referred to by Kritsiotis. It seems that international

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conflict and other man-made crises putting populations at risk. B. *The responsibility to react:* to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention. C. *The responsibility to rebuild:* to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.' It is submitted that when force (as a last resort) is used in execution of the responsibility to protect, the lines between humanitarian intervention and the responsibility to protect becomes blurred, making the difference between the two concepts purely academic.

150 *The Kosovo Report* n 140 above at 164.

151 Molier n 141 above at 52. Evans n 122 above at 147 points out that at present '[a]ny concession that as a matter of law (as distinct from morality or principle) there are some circumstances that justify the Security Council being bypassed is one that seriously undermines the whole concept of a rules-based international order. That order depends upon the Security Council, in the absence of a credible self-defense argument, being the *only* source of legal authority for nonconsensual military interventions'.

152 K Kindiki *Humanitarian intervention: the role of intergovernmental organisations* (LLD dissertation, University of Pretoria, 2002).

153 *Id* at 128. In order to reach this conclusion Kindiki analyses state practice (*usus*) since 1816 and addresses the question of *opinio iuris*.

154 Kritsiotis n 109 above at 1045.

law is gradually developing a 'penumbra of reasonableness' in order to mitigate the gap between legality (in the sense of strict legal positivism) and legitimacy (in the sense of moral justice).[155] This is evident form the fact that the international community has in the past responded to these technically illegal, but morally justifiable actions with tacit approval or with only minimal, if any, rebuke.[156]

CONCLUSION

At the onset of this contribution the question was posed whether a strict interpretation of article 2(7) is still appropriate to regulate the international relations between states. As a result of the increasing acceptance that the protection of human rights is a responsibility of the international community, states will find it increasingly difficult to use state sovereignty as a shield to ward off international interference in the case of wide-spread and gross human rights violations. In order to ensure the effective protection of human rights the enforcement powers of the Security Council should not be interpreted too strictly, especially with regard to the question whether a particular situation constitutes a threat to international (or regional) peace and security. It is therefore necessary to consider a reformulation of article 2(7) in line with contemporary international law notions regarding state sovereignty and the protection of international human rights. Although it would be premature to recognise a right to humanitarian intervention in current international law, such a norm seems to be emerging. Humanitarian intervention could be a necessary instrument to address conflict situations on the African continent, which often result in gross human rights violations and the displacement of millions of people. However, in order to prevent the misuse of humanitarian intervention in these circumstances, strict conditions need to apply on a case to case basis. There is furthermore in this regard a need for greater cooperation between the peace and security organs of the African Union and the United Nations as the situation in, for example, Darfur clearly illustrates. In situations like these the alleviation of human suffering due to wide-spread and gross human rights atrocities, should trump state sovereignty.

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155 Evans n 122 above at 147 refers in this regard to a so-called 'plea in mitigation' which would involve an acknowledgement by the intervening state of the illegality of the intervention, combined with a claim that the intervention took place in exceptional and defensible circumstances.

156 TM Franck *Recourse to force: state actions against threats and armed force* (2002) 180–184.