

# **The Questioned Legality of Foreign Military Intervention in Members' state in the Economic Community of West African States!**

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### **Introduction**

The military coup in Mali that herald a coup into the political domain of another West African States remains a major concern to ECOWAS Heads of States who summoned an extraordinary meeting to discuss the ugly development. ECOWAS condemned the coup and calls for immediate restoration of democracy and constitutional order in the French speaking West African nation. ECOWAS then appointed a team; lead by former Nigerian President Godluck Jonathan, to negotiation a transition that will immediately return Mali to civilian rule. Unlike Gambia and Sierra Leone, ECOWAS has not threatened physical military intervention, but has announced economic sanctions and blockade. If diplomacy fails, then there is likelihood for a military intervention to force the military to relinquish power and restore democracy, like it did in Gambia in 2017 and Sierra Leone in 1999.

In the Gambia, President Yahya Jammeh, following Presidential Elections held on the 1<sup>st</sup> December 2016, refused to step down and accept the result. The electoral commission in Gambia had announced that President Jammeh was voted out of office and the main contender, Adama Barrow, won the polls to become President-elect. This marked the end of the 22 years of dictatorship in the tiny West African state. Few days after, President Jammeh rejected the result claiming irregularities and called for fresh elections. ECOWAS could have none of it and asked that the defeated President Jammeh respects the electoral outcomes. Ex-President Jammeh refused to step down after twenty-two years in office, a period that has been regarded as a dictatorship.

ECOWAS concerned with the developed decided to enforce the will of the people of The Islamic Republic of Gambia. Jammeh refused to budge and threatened several actions, including a petition filed later with the court. An Emergency meeting of Heads of State of ECOWAS convened and was agreed that the "wishes of the people at the general elections must be respect."<sup>1</sup> Few days later, the African Union (AU) issued a statement<sup>2</sup> endorsing the ECOWAS heads of state decision; a support later re-echoed by the United Nations General Assembly (UNGA). An intervention force marshaled in Dakar, with Senegal and Nigeria eager to force the defeated President Jammeh out; and the troops actually crossed borders into Gambia after the ECOWAS deadline passed.

### **AU Constitutive Act<sup>3</sup> and Its Peace and Security Protocol on Non-Intervention and Non-Use of Force.**

In this part, I argue that legally speaking, any basis for the use of force could be founded in the AU Treaty.

In 2000, the Organization of African Unity<sup>4</sup> transformed itself into the African Union<sup>5</sup> with the coming into effect of its Constitutive Act.<sup>6</sup> The Constitutive Act marks the beginning of a tirade of reforms within the AU. Significantly, the AU with determination to reform and transform, declared from the onset that it was time for business by setting itself up with a very lofty goal; "to maintain the multifaceted challenges that confront" African countries and the people of Africa.<sup>7</sup> Several organs of the AU changed

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<sup>1</sup> See generally <https://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-gambian-december-1-presidential-election/> [accessed 29th, May 2020].

<sup>2</sup> See the African Union Press Release <https://au.int/ar/node/31696>.

<sup>3</sup> The African Union Constitutive Act, herein after referred to as the AU Treaty.

<sup>4</sup> The Organization of African Unity (OAU) came into effect in 1963 as a regional body.

<sup>5</sup> Hereinafter referred to as the AU.

<sup>6</sup> Constitutive Act Supra 2.

<sup>7</sup> Constitutive Act, Supra pmb1.

nomenclatures<sup>8</sup> and new institutions were established. The agency under the OAU Charter that was called the “Mechanism for Conflict Prevention, Management and Resolution,” was changed to the The Peace and Security Council (PSC) Protocol<sup>9</sup> made it “not merely an organ of the AU, but ... more significantly, the ‘standing decision-marking organ for the prevention, management and resolution of conflicts.’”<sup>10</sup> Perfunctorily, the PSC enjoins the Constitutive Act of the AU to empower the organization with “the right...to intervene in a Member State pursuant to a decision of “[t]he Assembly”<sup>11</sup> in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 14 (h) of the Constitutive Act”.<sup>12</sup> The AU further manifested its determination to stop wars by including in the PSC Protocol the power to intervene pursuant to the Constitutive Act, and also established a Standby Force, which “shall compose of standby multidisciplinary contingents, with civilians and military component in their countries and ready for rapid deployment at appropriate notice”.<sup>13</sup> “State parties to the Protocol are obliged to ‘take steps to establish standby contingents for participation in peace support mission,’ as and when the PSC might decide, or for intervention, as the AU Assembly might authorized.”<sup>14</sup> Among several functions of the Standby Force is to intervene in countries where there is a “grave circumstance”, *at the request of a member state*, to restore peace and security.<sup>15</sup> Additionally, the Standby Force is mandated to provide humanitarian assistance to civilians suffering in conflict situations and to “support efforts to address major natural disaster.”<sup>16</sup>

The above provision gives many of us, student as well as scholars of the Africa turbulent situation, hopes of a break from the past. A past where African leaders have colluded with each other to slaughter their kinsmen with impunity; for almost forty years after its creation, the OAU climbed down from the lofty peaks of its noble intentions, and degenerated into being merely “a trade union of the current Heads of States and Governments, with solidarity reflected in silence if not in open support for each other.”<sup>17</sup> Every temptation exist to believe, based on a moral standpoint, that The Constitutive Act of the AU ushered in a new dawn - a light at the end of tunnel.

The Constitutive Act and the PSC Protocol however, presents two fundamental problems. The Constitutive Act relied on the powers of “[t]he Assembly” to authorize an intervention into any “grave circumstances,” while the PSC relies on the Constitutive Act for mandate. Starkly, and surprisingly so, absent is any reference to the United Nations General Assembly (GA) or, more especially, the United Nations Security Council<sup>18</sup> (UNSC). The UNSC has the sole powers and responsibilities to mandate “collective security mechanism” in situations where it deems “international peace and security” are threatened. The powers stem from the customary law principle, now codified into convention law principles in Article 2 (4) of the UN Charter, which uphold the Westphalia customs of state sovereignty on “non use of force”, “threat to use force” or “act of aggression” in the international relationship between states.

The second problem has to do with the normative provision itself: where it empowers the Standby Force to intervene “at the request of a member state”<sup>19</sup> into the domestic affairs of another or preemptory norms. The use of the definite article “a” renders this provision vague and prong to multiple interpretations, making it problematic. One interpretation, I argue, is that ‘any’ “(m)ember States” can

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<sup>8</sup> Ibid .

<sup>9</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 9th July 200, (hereinafter referred to as the PSC Protocol), which came into effect in 2004 after its inauguration in May of that year. .

<sup>10</sup> Nsongurua J. Udombana, *When Neutrality is a Sin* The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan, 1151, (2005).

<sup>11</sup> The Assembly of Heads of States and Government of the African is called “The Assembly” and is the highest decision making body in the AU, which composed of heads of states or governments or representatives of governments. .

<sup>12</sup> PSC Protocol, Supra 7, art. 13 (1).

<sup>13</sup> Id.

<sup>14</sup> Udombana, Supra 8, quoting PSC Protocol 13 (2).

<sup>15</sup> PSC Protocol Supra 7, Article 13 (3) (c). .

<sup>16</sup> Id. Art. 13 (3) (f).

<sup>17</sup> Udombana Supra 8, quoting Julius Nyerere, former president of Tanzania, describing the OAU before launching a counter invasion into Uganda to ride Field Marshall, Elhaj Edi Amin of his job as president. .

<sup>18</sup> Created by Article of The Charter and empowered to use Chapter VII powers to restore peace or prevent threat to, or, collapse of international peace. .

<sup>19</sup> African Charter, Article 5.

call on the AU to intervene in the internal affairs of an other states. Another interpretation is that the “victim states” should make the call to the regional body for help, when it deems necessary, into its domestic affairs. This could have been the reason why President Elect of Gambia, Adama Barrow, as soon as he was sworn into office called on ECOWAS and AU to assist the people of Gambia in the restoration of democracy and peace. Mali seems to be different with the military insisting that the issue remains purely an internal matter to be decided by the Malian people and not by outsiders. From the two interpretations, the former stands more accepted than the latter, since the drafters were at liberty to categorically state that a victim state shall call on the AU to intervene’ without any fuse.

The international trend that flow in proscribing the non-use of force did not pass the Africa regional body- the AU, then the OAU- unnoticed. It was a time in history when African states were determined, ‘to keep the hard won independence’, and thought it was extremely imperative to avoid outside interference. The fear of re-colonization prompted the institution to recall, “the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation.”<sup>20</sup> Thus, every attempt was made to uphold the ‘territorial integrity’ and ‘political independence’ of its members.

Taking the cue from the Organization of Africa Unity instrument, the AU Constitutive Act and the Peace and Security Council Protocol promote the doctrine of state sovereignty. The Constitutive Act “enjoins peaceful settlement of disputes among its members<sup>21</sup>; prohibits the use of force or threat of force<sup>22</sup>; and proscribes noninterference into the domestic affairs of other states.”<sup>23</sup> The PSC protocol, similarly, enjoins “peaceful settlement of disputes and conflicts”<sup>24</sup> and proscribes “non-interference by any member states in the internal affairs of another.”<sup>25</sup>

A number of other instruments before and after the AU Constitutive Act and PSC Protocol also proclaim principles of “sovereignty, noninterference, and recourse to threats or use of force”<sup>26</sup>. One such instrument is the Declaration on a Code of Conduct for Inter-African Relations, adopted in 1994. This pact declares “the peaceful settlement of disputes constitutes an essential component of the duty developing on state to refrain from the use of force or the threat thereof or aggression.”<sup>27</sup> Similarly, the Algiers Declaration was adopted in 1999, in Algeria, which reaffirms the necessity “to promote the use of peaceful means in the resolution of conflict, in conformity with the principles of sovereign equality, noninterference, non-recourse to threats or use of force, and of the independence, sovereignty and territorial integrity of states”<sup>28</sup> Additionally, the AU General Assembly adopted the Non-Aggression and Common Defense Pact,<sup>29</sup> which aims “to promote cooperation among the Member States ...,”<sup>30</sup> all in light of protecting and promoting non-intervention and non-use of force.

The question that stems from the above is, first, how the AU could be inherently so contradictory in the same instruments that acclaim so much to sovereignty, and place a breach in others by allowing itself to intervene into the affairs of another states and establishing a Standby Force under the PSC Protocol? Secondly, does the AU Constitutive Act violate customary and conventional international law, with particular reference to Article 2 (4) of the UN Charter?

Like the exception of individual and collective self-defense and authorization from the UNSC in a time of breach of international peace, the AU has placed exceptions to the non-intervention and sovereignty protection in the region with article 4. This is done by recognizing the need to prevent genocide, crimes against humanity, and other serious crimes and places such emergency as an exception to the rule of

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<sup>20</sup> Id. Art. 4 (d).

<sup>21</sup> Id. Art. 4 (e).

<sup>22</sup> Id. Art. 4 (f).

<sup>23</sup> Id. Art. 4. (g).

<sup>24</sup> Peace and Security Protocol 2002, Art. 4 (a) .

<sup>25</sup> Id Art. 4 (f).

<sup>26</sup> Udombana, *Supra* Note 10., 1162.

<sup>27</sup> Nsongurua Udombana, *The Unfinished Business, Conflicts, The African Union and the New Partnership for African Development.* (2003).

<sup>28</sup> Algiers Declaration, Adopted 12-14 July 1999. .

<sup>29</sup> 31 January 2005, Not yet in force.

<sup>30</sup> *Ibid* 28.

non-intervention. There are both moral and political reasons: that even though the conflict of laws seem apparent, *prima facie*, but underneath this reason for this provision lie the determination of Africa leaders not to allow the reoccurrence of situations of gross violation of human rights like what happened in Rwanda, Sierra Leone, Liberia, Democratic Republic of Congo, Central African Republic, Darfur in Sudan and other egregious killings. Rather than view it as a contravention, argued Udombana, it should be more retrospective of recent history in Africa and to accept the provisions as an exception to the rule.

## Customary and Conventional International Law on Non-Intervention and the exceptions

### “Oh dear, Customs of Law!”

Customary International Law frowns at the ‘use of force’ in international relations, thus only permits two instances when a state can resort to force. This general practice of state(s) has become an undisputable set of *lex lata*, rather than *lex ferenda*.

Since the seventeenth century, customary international law has supported the doctrine of state sovereignty and *reserve domain* primarily because the world was littered with conflicts between and among states. And the world thought it was time to negotiate and create a world of mutual respect for states, no matter the size or population. At the Treaty of Westphalia of 1648, the equality and independence of states was maintained with a provision outlining the “duty on the part of states to refrain from intervention in the internal or external affairs of other states”<sup>31</sup> Therefore, every activity with the proclivity to intervene in the “political, socio-economic life of another states” was discouraged. As John Dugard puts it, “the weight of authority is against the recognition of [such rights]”<sup>32</sup> to meddle into the domestic affairs of another state. The International Court of Justice in the Nicaragua case<sup>33</sup> emphasized that “part and parcel of customary international law”<sup>34</sup> is for every state to conduct its business without outside interference.

Convention law also followed the trend of non-intervention; right from the inception of the United Nations (UN). The UN Charter reaffirms the position of customary international law by codifying and proclaiming “the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter.”<sup>35</sup> This duty is placed, importantly, on “every state”, rather than “certain members”, of the UN. Indicating that members or non-members of the UN should adhere to this customary law provisions, irrespective. Article 2 (4) of the UN Charter did not only outlaw the “use of forces” in the affairs of another states, but raised the bar higher to “...interdicts mere threats of force.”<sup>36</sup> With the purpose of UN, *inter alia*, to move international relations from the doctrine of ‘only the strong survive’ to “maintain[ing] international peace and security, and to that end: to take effective collective measure for the prevention of and removal of threats to peace, and for the suppression of acts of aggression and other breaches of peace”,<sup>37</sup> it was no mistake that article 2 (4) scopes was tightened to avoid loose cannon interpretations. In order to restrict big and powerful states from using their vantage position to dominate the smaller states, the post World War II idea was to protect ‘territorial integrity and political independence.’<sup>38</sup>

The Charter, however, provides two broad exceptions to the use of force or threat of force: first is the “inherent rights” to individual self-defense. While there has been a general agreement on this exemption, there is “fundamental disagreement on the scope of self-defense, especially in relation to

<sup>31</sup> Ian Brownie, *Principles of Public International Law* 293, (5<sup>th</sup> Ed., 2003).

<sup>32</sup> John Dugard, *International Law: A South African Perspective* 423 (2000).

<sup>33</sup> *Military and Paramilitary Activities in and Against Nicaragua (Merits)*, 1986 IVJ Rep. 14 (June 27) hereinafter referred to as *Nicaragua*.

<sup>34</sup> *Id.* 3.

<sup>35</sup> UN Charter, Article 2 (4).

<sup>36</sup> Y. Dinstein, *The Contemporary Prohibition of the Use of Inter-State Force*.

<sup>37</sup> UN Charter, *Supra* 23. Art. 1.

<sup>38</sup> UN Charter, *supra* 23. Art 1 (a).

the so-called anticipatory and 'preventive' self-defense...."<sup>39</sup> The second strand of exception is the "collective security" measure under the authorization of the UNSC, pursuant to the mandate to determine the existence of a "threat to peace", "breach of the peace", or "act of aggression" and to take measures to maintain or restore international peace and security, including the use of force.<sup>40</sup>

Yet, the prohibition of use of force and its exception has witnessed several violations. The United States, for instance, argued rightly so in the Nicaragua Case that, because it placed reservations on the UN Charter, it is not bound by the conventional law principles found in Article 2 (4) and that 'prohibition on the use of forces is conventional since it has been codified into the UN Charter reducing its customary nature.'<sup>41</sup> The International Court of Justice<sup>42</sup> held the impossibility for "two international laws to coincide exactly as regards the regulation of use of force...", but emphasis that there would be "variations between them in a number of points..."<sup>43</sup> The court established further that "(e)ven if customary and convention norms did overlap in every respect, customary law would retain its separate identity - and continue to exist side by side with conventional law..."<sup>44</sup> Therefore, Article 2 (4) is both customary law in nature and conventional law in practice, which makes it almost impossible to deviate from. Supportively, article 53 of the Vienna Convention on the Law of Treaties, which deals with the issue of 'jus cogens', establishes that "a treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general International Law."<sup>45</sup> Certainly, the UN Charter's intention was the reinforcement and enforcements, rather than contradiction of general international law, a genre which customary law bellows.

The United Nations Convention on the Law of the Sea<sup>46</sup> states that:

*In exercising their rights and performing their duties under this convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.*<sup>47</sup>

There is not much difference in the wording of this article and article 2 (4) of the UN Charter, which prohibits forces, just that "it uses the phrase 'the principles of the international law embodied in the Charter of the United Nations' in lieu of the original terminology ('the Purpose of the United Nations')".<sup>48</sup> Further, the UN adopted the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of United Nations.<sup>49</sup> It made reference to seven previous resolutions<sup>50</sup> and "(e)mphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States".<sup>51</sup> Its further reaffirms that;

*"(e)very State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of*

<sup>39</sup> Nsongurua J. Udombana, when Neutrality is a Sin" The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan, 1160, (2005).

<sup>40</sup> UN Charter, Chapter VII powers – use of force, which has been mandated sparsely over the last decades. .

<sup>41</sup> Nicaragua, Supre 21, 86.

<sup>42</sup> Established in 1921, hereinafter referred to as ICJ.

<sup>43</sup> Nicaragua Ch 7, B.

<sup>44</sup> Id. 96-7.

<sup>45</sup> Vienna Convention the Law of Treaties 196, hereinafter referred to as the "Vienna Convention".

<sup>46</sup> United Nations Convention on the Law of the Sea, 1982, 21 I.L.M 1261, 1326 91982).

<sup>47</sup> Id. Art. 301.

<sup>48</sup> Dinstein, Supra 24, 92.

<sup>49</sup> UN Resolution 2625 (XXV), unanimously passed in 1970, hereinafter referred to as "Friendly Resolution".

<sup>50</sup> "Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XVIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,".

<sup>51</sup> Friendly Resolution, Supra, par. 3.

*the United Nations and shall never be employed as a means of settling international issues.*<sup>52</sup>

Therefore, many other regional instruments followed this trend of prohibiting the threat or use of force. The Rio de Janeiro Inter-American Treaty of Reciprocal Assistance<sup>53</sup>; and the 1975 Helsinki final Act<sup>54</sup> are among the few examples.

The exceptions of collective self defense provided for in Article 51 of the UN Charter allows for states to use force in order to protect their territorial integrity. The two exceptions of individual and collective self-defense remain unchanged, though with many controversies. Irrespective of the hullabaloo around the principle, "a state has a right to use force to defend itself from external armed attacked."<sup>55</sup> Therefore, there should have been an 'armed attack' before the states can take up arms to defend itself. It has been argued that a state should use force in anticipation of an armed attacked on its territory. Anticipatory self-defense and or belated use of force to defend one's territory have all summed up to one thing: that there must be an attack or a threat of an imminent armed attack on its territory before a state can justifiably then use force as self-defense.

Article 4 of the AU Treaty defying all legitimacy is certainly not appropriate in this context. It provides for an attack and not a defense after an attack. Second, the article further authorized a right to intervene in domestic affairs of another state like civil wars, where heinous crimes are being committed. Which leads to another highly debated issue, international humanitarian intervention (HMI), and the only explanation for this provision could have been "third party intervention".

Where then does this leave Article 4? One school of thought beholds that Article 4 falls under the rubric of collective security. Others believe its does not meet the requirements needed.

When Article 51 of the UN Charter provides that 'every state has the inherent right of individual and collective self defense' to protect it territory, it required further a request from a victim state. According to the Nicaragua Case, for the excuse of collective self-defense to avail itself, there must be an armed attack from another state that precipitated the intervention of a more powerful states, who has a bilateral or multi lateral agreement with the 'victim state.' Secondly, it is clear that the victim state of the armed attack must declare it vulnerability. There is no rule under customary international law permitting another state to exercise the right of collective self-defense on the basis of its own assessment. Where collective self-defense is invoked, it is expected that the state for whose benefit it is used would have declared itself as a victim of an armed attack.<sup>56</sup>

On the 18<sup>th</sup> April 2006, the UNSC passed a resolution<sup>57</sup> on Sudan craving the "protection of civilians in armed conflicts' and "reaffirms the provisions of paragraphs 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."<sup>58</sup> Koffi Annan called on the UN to face a new approach in preventing the suffering of millions trap in conflict. In an address to the UN,<sup>59</sup> he stressed that the world body should "... also move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities."<sup>60</sup> He urged that "the time has come for Governments to be held to

<sup>52</sup> Id. Part I. proclamation principles.

<sup>53</sup> Rio De Janeiro Anti-War Treaty (Non-aggression and Conciliation), 1933, 163 L.N.T.S 393, 405.

<sup>54</sup> Helsinki Final Act, 1975, 14 I.L.M 1292, 1294 (1975).

<sup>55</sup> Ibid 45.

<sup>56</sup> Nicaragua case, para 194, "In state practice, there is no instance of anticipatory self defence being expressly invoked to justify the actual use of force, except perhaps in the Harib Fort incident, 1964 UNYB 181; this use of force by the UK was condemned by the Security Council as reprisal." Judge Schwebel, dissenting in para 172-3, argued that there is a right to anticipatory self defense, but came up with no support on state practice for collective self defence. .

<sup>57</sup> Resolution 1674 (2006) Adopted by the Security Council at its 5430th meeting, on 28 April 2006, referring to earlier resolutions, resolutions 1265 (1999) and 1296 (2000) on the protection of civilians in armed conflict....

<sup>58</sup> Ibid.

<sup>59</sup> In larger freedom: towards development, security and human rights for all United Nations conferences and summits in the economic, social and related fields.

<sup>60</sup> Ibid 54.

account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service.”<sup>61</sup>

On May 25<sup>th</sup> 1997, a military coup ousted the democratically elected government of Sierra Leone, President Ahmed Tejan Kabbah. The coup received international condemnation and prompted the then Organization and African Unity, now AU, for the first time, to give 16 –member Nigerian-led Economic Community of West Africa States the power to take the most effective measures to remove coup leader Maj. Johnny Koroma’s military junta. With a successful overthrow of the military junta, by ECOMOG,<sup>62</sup> total disorder was loose upon the country. Members of the military junta, who had colluded with the rebels, went into the bush and betrayed their constitutional responsibility of protecting the states. Sierra Leone was left with no standing national army, with only the West Africa Peacekeeping forces as the main sources of support, “a small UN force, UNOMSIL, was sent in to supplement an existing ECOMOG regional Force.”<sup>63</sup> A senseless and brutal war was waged for two years that saw the cataclysmic invasion of the capital city, Freetown, in 1999 and scores of innocent people lost their lives and host of other gross violations occurred. The Loma Peace Agreement was signed in July 1999, in Lome, Togo, which replaced a UN Observer Mission (UNOMSIL) with a peacekeeping mission (UNAMSIL).

The mission of the peacekeepers was to help the government implement the peace treaty and to “assist in the implementation of the disarmament, demobilization and reintegration plan.”<sup>64</sup> The UNSC adopted unanimously Resolution 1270 which gives Chapter VII powers to the new multi-national force and empowers them to “take the necessary action to ensure the security and freedom of movement of its personnel.” After a recommendation by the Secretary General that this was needed to protect the UN forces and civilians.<sup>65</sup> The resolution went further to manifest what is now called the “responsibility to protect”, by authorizing UNMASIL *‘within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence.*”<sup>66</sup> In a subsequent resolution, Resolution 1289, the SC invoked similar powers of using force to protect civilians when it authorized UNAMSIL to “provide security at key locations, important intersections, and major airports facilitates to allow the free flow of people, goods, and humanitarian assistance; and provide security in the disarmament process.”<sup>67</sup>

## **Justifications.... Is it the Time for ECOWAS and AU to Act?**

In the midst of the arguments, it is important to frankly state that the AU Constitutive Act was the first blow to a non-proactive UN system in intervening in grave situations in many “developing countries”; and Africa over the past twenty years, being about the epicenter of endemic brutal fratricidal warfare, has experienced more of nauseous wars that makes all of this pedantic arguments irrelevant. African leaders are registering their dissatisfaction over the manner in which the never-agreeing UNSC has treated Africa’s concerns over the past years and saying ‘time has come for us to take the destiny of our continent into our own hands.’ For decades the UNSC has failed to save the lives of Africans when needed, rather the UN intervened “too little too late” in Sierra Leone (1991 to 2000), Rwanda (1994), Liberia (1989 to 1993) and in Sudan – after thousands of men, women, and children had been butchered by beasts masquerading as liberation fighters.

In Sierra Leone the casualty figure from the country’s ten years of war is debatable, as it varies widely.<sup>68</sup> However, “[t]he Crimes of War Project”<sup>69</sup> estimated about 75,000 people died during the conflict and over a million were cramped in refugee camps in neighboring Guinea, Nigeria and Ghana. Rwanda is

<sup>61</sup> supra.

<sup>62</sup> Ibid (54).

<sup>63</sup> Ibid. .

<sup>64</sup> Id. Para 34.

<sup>65</sup> Seventh and Eight Report of the Secretary General on UNOMSIL, S/1999/836,S/1999/1003; first Report.of the Secretary General on UNAMSIL, S/1999/1223; UN Press Release SC/6742.

<sup>66</sup> Ibid.

<sup>67</sup> Gray, Supra 74, 181.

<sup>68</sup>Otaola Igor Hodson De, A Conflict Analysis of the Mano River Region: Guinea, Liberia and Sierra Leone, A Report for ActinAid, p. 4, 31st October 2005.

<sup>69</sup>See generally <http://www.crimesofwar.org/>.

perhaps the most notorious case of the spectacular failure of the UN and the international system in times of great need – with the world now goggling at films that strive to bring to light deaths equivalent to the Jewish Holocaust during the Second World War. Certainty in the number of deaths continues to be a challenge, estimate have it that between 800,000 to 1,000,000 human lives perished under the watchful eyes of the international community.<sup>70</sup> Despite the media reports, the Canadian led United Nations Assistance Mission to Rwanda failed to stop the massacre, instead Belgium and France were more resolved in pulling out the UN troops that provided a bit of a check against blatant bestiality.

In Liberia, the International Crisis Group<sup>71</sup> estimated that 250,000 thousand people died during the country's conflict. With millions of refugees burdening Sierra Leone, Ivory Coast, Guinea, Nigeria Ghana and the whole of the West Africa sub-region plagued with the effect of that war. Perhaps, ECOWAS thought Gambia could be another Liberia or Sierra Leone. Or would want to avoid the Malian situation from degenerating into a full-blown crisis. The UN in August 2007 authorized the “deployment of 26,000 peacekeeping troops to Sudan's war-torn Darfur Region.” The UN estimates the conflict has killed 200,000 people and displaced two million more over the last four years.<sup>72</sup> There are about 240,000 Darfur refugees living in neighboring Chad, and they live in dangerous and unprotected camps.

Every rule that hinders the protection of genocide, war crime and crimes against humanity should give way to humanity -a universal law that would speedily prevent such heinous crimes against human survival, and human dignity. In this vein, should sovereignty triumph over humanity? Michael Smith insists that “individual state sovereignty can be overridden whenever the behavior of the state even within its own territory threatens the existence of the elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside.”<sup>73</sup> Kofi Annan, former Secretary General of the UN, mourned at the nonintervention stance of the world body in a more graphic manner when he cautioned, “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica- to gross and systemic violation of human rights that affect every precept of our common humanity?”<sup>74</sup>

## **Jus Cogens: A Customary Law and a Justification for Deviation?**

This part examines the principles of *jus cogens*, the theoretical debate of its meaning and argues and takes a position on the relationship between customary law and *jus cogens*.

There is certainly an emerging conflict between the customs of law and the rule of *jus cogens*, that *jus cogens* is part of customary law, but has more force than ordinary customs of law. That the customary law provision of ‘prohibition of the use of force’ has reached *jus cogens* status which implied that two principles of *jus cogens* are at war here. Another school says *jus cogens* is different from customary law and has more binding force than customary law. Jus Cogens Upholds Humanity!

The doctrine of *jus cogens* is a component of international law that cannot be derogated from. It has been defined as “(p)inciples of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties. For example, genocide and participating in a slave trade are *jus cogens*.<sup>75</sup> Whatever the definition is, few commonalities present themselves: *jus cogens* is “compelling” and a “higher form” of law that cannot be deviated from by any states. Even though its forms and types are still a constant source of debate among legal scholars, certain crimes have however

<sup>70</sup> See, e.g., Rwanda: How The Genocide Happened, BBC, April, 2004 which estimated of 800,000, and OAU sets Inquiry into Rwanda Genocide, Africa Recovery, Vol. 12 1#1 (August 1998), page 4, which estimates the number at between 500,000 and 1,000,000.

<sup>71</sup> “The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organization, with some 145 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.” See generally: <http://www.crisisgroup.org/home/index.cfm?id=208&l=1> .

<sup>72</sup> CNN Femi Oke, anchor of the program Inside Africa, covering the report of Nic Robertson who “relives the dangers of covering a humanitarian crisis in Chad. See <http://edition.cnn.com/2007/WORLD/africa/12/28/inside.africa/>.

<sup>73</sup> Michael J. Smith, Humanitarian Intervention, An overview of the Ethical Issues (1998).

<sup>74</sup> International Commission on State Sovereignty, The Responsibility to Protect: Report on the International Commission on Intervention and State Sovereignty (2001).

<sup>75</sup> See <http://www.nolo.com/definition.cfm/Term/13FB4261-D05C-44FE-A8554A5F5134FC55/alpha/J/>.

been classed a *jus cogens*. Crimes like genocide, piracy, general slavery; slave trade, torture, territorial aggrandizement and wars of aggression have all been settled on as rules of *jus cogens*.<sup>76</sup>

The Vienna Convention established that a treaty cannot violate *jus cogens*; a treaty is void if it runs contrary to the principle of *jus cogens*. It states that:

*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*<sup>77</sup>

According to the International Criminal Tribunal for Yugoslavia (ICTY), in the case of *Prosecutor v. Furundzija*<sup>78</sup>, preemptory norm cannot be changed "through international treaties or local or special customs or even general customary rules not endowed with the same normative force".

The legal, political and moral problems that arise from this characterization are that the non-use of force is a convention and customary law, but has very often been argued to have attained preemptory norm status. Therefore the evils- genocide and crimes against humanity- that the AU provisions tend to prevent are *jus cogens*.

The theoretical debate aside, however, HMI, or "responsibility to protect" is not a new doctrine, but rather a routine feature that co-existed with the development of state sovereignty in the international legal system. Few treaties before the first and second World Wars explain the state practice doctrine of prioritizing humanity to sovereignty. The protection of Christian minority within the Ottoman Empire<sup>79</sup> and the francophone Roman Catholics in British North America are indicative. "The Treaty of Peace between the United States of America, British Empire, France, Italy and Japan and Poland, for example provides: '[p]oland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race, or religion'<sup>80</sup> Similarly, the multi-state intervention in Greece between 1827-1830 was more plausibly argued by Ellery Stowell to have a "motive of the intervention would seem to have been to protect the rights of (Greek) self-determination."<sup>81</sup> Stowell claimed that the intervention led Turkey to accept the London Treaty, which led to the independence of Greece in 1830.

Similarly, AU Treaty included in the intervention clause the need to protect "genocide, crimes against humanity and other serious crimes".<sup>82</sup> Genocide is a preemptory norm and can be protected by any action without authorization from UNSC. However, crimes against humanity did not fall into this category, nor are other serious crimes; and this category could spring a UN Charter violative argument. But, though not in all cases, crimes against humanity lead to genocide, so are other serious crimes. In order to prevent the deterioration of situation into genocide and scamper for reactive measure to cure it, the AU Treaty provision on intervening in member states appears to be pre-emptive in nature. Allowing for intervention when the ugly heads of crimes against humanity and other serious crimes arose up.

<sup>76</sup> Article 54 of the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951.

<sup>77</sup> Vienna Convention, *Supra*, U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969).

<sup>78</sup> *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213 (2002), 435.

<sup>79</sup> Treaty of Edirne (Adrianople) between Russian and Turkey, Signed 14 September 1829, BFSO XVI, 647, Arts. V and VII.

<sup>80</sup> Udombana, *Supra* 10.

<sup>81</sup> Ellery Stowell, *Intervention in International Law*, 126 (1921).

<sup>82</sup> AU Treaty *supra* 23.

## Conclusion

It is a hard contest, but prima facie the AU Charter allows for military intervention in member states, which appears to contravene Article 2 (4) of the UN Charter. Article 2 (4) forms part of both customary and conventional law. With Article 53 of the Vienna Convention being evidential in support of this position: it states that any treaty that runs contrary to *jus cogens* should be automatically declared void. I will argue, on this basis, that prima facie the AU Charter is legally a nullity and cannot stand the test above. However, *jus cogens* contain a particular aspect called preemptory norm, which are non-derogable. Preemptory norm includes crimes like 'genocide', slavery and slave trade, piracy, torture and aggression. The AU Charter, authorizing interventions like what happened in the Gambia, and a pending one in Mali, is geared towards protecting violation of *jus cogens* norms such as crimes against humanity, torture, genocide et al. This ushered in a complex matter of compromising preemptory norm against customary prohibition of force. If the doctrine of *jus cogens* is, arguable, part of customary international law and a state or any other regional body can attempt to stop genocide and without any authorization, then, why would the AU not intervene to stop carnages in a turbulent continent before recourse to unnecessary legalities that have over the years not helped? The imperativeness of scrutinizing some aspect of international law to suit the changing world of the 21<sup>st</sup> century is now apparent. It is time for an "instant paradigm shift" since the world is "...constantly faced with new situations, due to dynamics of progress. 'Therefore there is clear need for a reasonably speedy method of responding to such changes by a system of prompt rule formulation'"<sup>83</sup>

Obviously, "the AU Charter was certainly overdue for review"<sup>84</sup> and many scholars have pointed out that gone are the days when "feeble compromises of the late 1950s and 1960" which makes the regional instruments "a dated instrument bearing very little likeness to today's reality."<sup>85</sup> Whatever those compromises were, they were no longer desirable in a changing continent. The departure from business as usual was swift and brave and has sent a message to the UN bodies to follow suit, or else, modernity would prevail over tradition in international law and politics. The AU has manifested the need to "take right seriously", align with emerging norm of 'humanity first' and "replac[ing] the culture of impunity with the culture of accountability..."<sup>86</sup> It has sent a strong message that no more would African leaders be allowed to rely on "within borders" argument to oppress their people and escape unscathed.

In this same vein, the international community is gradually accepting and passing resolutions on the dire 'need to protect civilians in times of grave breeches'. It is only a matter of prudence for such giant steps to be taken in order to uphold and protect the stance by institution like the AU to prevent crimes against humanity. The international community should be preemptive, rather than reactive, in their responsibility to protect. The ECOWAS action in Gambia was rocked on the principle emerging approach to uphold and protect humanity. Protecting humanity could justify any further regional action into Mali that will result into physical confrontation through military action to remove the coup leaders and send the soldiers back to the barracks.

Over the years, African countries and their regional organs have come under severe criticism to move away from their non-intervention shell to a more robust outlook. As if ECOWAS heard the clarion call, it has decided to intervene and make scourge of brutality prohibited as dictated by the rules of *jus cogens*. For decades Africans have been slaughtered by their "kith and kin" on the pretext of *reserve domain* and the international community has failed to move swiftly like it did to halt the pogrom in Iraq. Simply because the big players had no interests in protecting the lives of Africans. Civil wars and oppression of all sorts have resulted in the destruction, at will, of vulnerable groups must stop. That is

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<sup>83</sup> Nsongurua Udombana, "Can the Leopard Change its Spots? The African Union Treaty and Human Rights", p. 1202 (2000).

<sup>84</sup> Id. 1182.

<sup>85</sup> Udombana, *Supra* 110, quoting an editorial *Sirte and the Rest of Us*, AFR. Topics (Nov-Dec 1999) at 3.

<sup>86</sup> *Supra* 110, at 1259.

the underlying message of the AU Charter, and a clear show of solidarity has emerged with little regard to rules of procedure of an ever divided and undecided UNSC over Africa issues.

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