



Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union

On 6 and 7 December 2012, at a conference convened by the Centre for Human Rights in collaboration with the Department of Political Sciences, University of Pretoria, a group of interdisciplinary academics, policymakers and practitioners in the areas of international peace and security with a special focus on Africa, considered and affirmed the Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union, set out below. These Principles are intended to provide greater clarity and inform action by the African Union, sub-regional actors, governments and practitioners on how to enhance their respective roles in ending mass atrocities in Africa pursuant to Article 4(h), which provides 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’.

The right of the African Union to intervene in Member States

1. Every State has the primary responsibility to protect the fundamental rights of its citizens in accordance with domestic constitutional law, international human rights law, international humanitarian law and international criminal law. Under Article 4(h), the African Union (AU) is accorded the right to intervene in a Member State pursuant to a decision of the AU Assembly of Heads of State and Government (‘AU Assembly’) in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (mass atrocities). Article 4(h) proceeds from the basis that there is a duty on Member States of the AU to protect their own populations from mass atrocities. This responsibility entails the prevention of mass atrocities through appropriate means such as the establishment and effective functioning of human rights protection mechanisms at the domestic level, and the acceptance of international human rights supervision.

2. Article 4(h) has two dimensions. The first dimension concerns intervention in the event of grave circumstances (intervention to protect populations from mass atrocities). The second dimension, foreseen under the Protocol on the Amendments to the Constitutive Act of the AU, which is not yet in force, relates to intervention to restore peace and stability (intervention to restore legitimate order). These guidelines only focus on the first dimension, namely intervention to protect populations from mass atrocities.

3. Article 4(h) empowers the AU to intervene in a Member State under a limited set of stipulated ‘grave circumstances’. By consenting to Article 4(h), Member States of the AU have accepted that sovereignty is not a shield but rather a responsibility, particularly when populations are at risk of war crimes, genocide and crimes against humanity. Article 4(h) complements Article 4(g) of the AU Constitutive Act, which prohibits interference in the

internal affairs of other States, in that mass atrocities are identified as legitimate concerns for the AU as a whole and may trigger intervention by the AU.

4. Article 4(h) allows the AU to protect populations at risk of war crimes, genocide and crimes against humanity if the target State is unable or unwilling to discharge its primary responsibility to protect the fundamental rights of its citizens. According to the wording of Article 4(h), intervention on the basis of Article 4(h) requires a decision of the AU Assembly. Where diplomacy and other peaceful means have failed, the AU may use force to protect populations at risk of mass atrocities. Therefore, it is coercive measures, in particular military force, that require the decision of the AU Assembly under Article 4(h).

The responsibility to protect

5. The AU Constitutive Act codifies the right of intervention to protect populations against mass atrocities. The notion of ‘responsibility to protect’, as set out in the 2005 World Summit Outcome Document, has the same objective as the right of intervention in Article 4(h). However, there are also important differences. Article 4(h) intervention relates, in particular, to the third of the three foundational pillars of the ‘responsibility to protect’, namely the use of military intervention as a last resort. The wording of Article 4(h) suggests that intervention on the basis of Article 4(h) is an exceptional measure in the face of grave circumstances that are beyond non-coercive measures and so require military option as a last resort.

6. The ‘right’ in Article 4(h) implies a legal entitlement or prerogative which is compatible with the notion of sovereignty as responsibility. This ‘right’ should as far as feasible be interpreted to imply a duty to intervene to prevent or halt mass atrocities in the form of war crimes, genocide and crimes against humanity.

Modalities of intervention

7. Noting that Article 23(2) of the AU Constitutive Act provides for political and economic sanctions and denial of transport and communication against errant States, Article 4(h) recognises that there are limits to non-violent means in stopping mass atrocities, and the only realistic means can be military intervention.

8. The threshold for intervention pursuant to Article 4(h) is ‘grave circumstances’ that constitute serious violations of human rights and humanitarian law in the form of genocide, war crimes and crimes against humanity. These serious violations of human rights and humanitarian law are crimes under international law. Therefore, accountability through criminal prosecution to deter potential perpetrators, for example by arresting perpetrators, may also be part of an Article 4 (h) intervention.

Threshold for intervention: mass atrocities

9. In deciding on intervention under Article 4(h), the AU Assembly should consider the inability or unwillingness of the national government to protect its population from mass atrocities. It follows that one of the determining factors is the inability or culpability of the government concerned in causing, tolerating or failing to stop such atrocities. Therefore, where a State violates the fundamental rights of its own citizens, or tolerates or fails to stop

mass atrocities within its territory, the AU is authorised by Article 4(h) to intervene to prevent or halt mass atrocities in order to protect populations and save lives.

10. Considering the speed with which mass atrocities occur and that the threshold for Article 4(h) intervention is high, difficult to prove and amenable to political discretion, in deciding on Article 4(h) intervention, the AU must prioritise the imperative to save lives over technical or overly legalistic ascertainment of the commission of war crimes, genocide and crimes against humanity.

Authorisation of the Security Council

11. As a matter of legal requirement, the AU requires the authorisation of the UN Security Council for Article 4(h) intervention. The UN Security Council has the responsibility to authorise the use of force in the implementation of Article 4(h) intervention. Where the UN Security Council is unwilling or indecisive in authorising intervention, the conferment of the right to intervene on the AU by Member States of the AU provides greater space for the AU to act in the face of war crimes, genocide and crimes against humanity on the continent.

Preventing mass atrocities

12. The aim of Article 4(h) must be to prevent mass atrocities from occurring or to halt mass atrocities when they occur, and should not serve as a punitive measure or political tool.

The role of the African Union stakeholders in preventing mass atrocities

13. The AU should encourage States and sub-regional organisations in establishing prevention, early warning and early reaction capabilities to mass atrocities.

14. To prevent mass atrocities, at the minimum, the AU should fill the protection gap and enhance the protection of civilians in armed conflicts by strengthening the mechanism to oversee the compliance with international humanitarian law (IHL) on the continent, detect violations and put pressure on the recalcitrant parties in armed conflict to comply with IHL in order to prevent war crimes.

15. The AU's Continental Early Warning System should develop capacity to rapidly detect and react to any genocidal intent on the continent and there should be an effective interface between early warning systems at the continental and sub-regional levels in order to take concrete measures to eradicate the root causes of genocide. The AU should also ensure that Member States respect their legal obligations to bring perpetrators of genocide to justice.

16. The AU should exert peer pressure on AU Member States to end violations where systematic patterns of human rights and humanitarian law violations are revealed, and encourage Member States to enact laws to prevent mass atrocity crimes and punish the perpetrators of these crimes in the domestic courts.

17. In the spirit of popular participation, the AU should develop strong links with civil society organisations at the national, sub-regional and continental levels to ensure that implementation of Article 4(h) intervention allows for meaningful contributions from the

citizenry at the grass root level. Civil society organisations, States, regional economic communities (RECs), the AU Peace and Security Architecture including the African Commission of Human and Peoples' Rights ('the African Commission'), the African Court of Human and Peoples' Rights ('the African Court'), and other relevant international institutions all have a role to play in the implementation of Article 4(h).

18. Under Article 58 of the African Charter on Human and Peoples' Rights, the African Commission should provide authoritative reports on the existence of a series of serious or massive violation that may trigger Article 4(h) intervention, not only to the AU Assembly but also to the Peace and Security Council (PSC), which can serve as the basis for deciding whether or not to intervene.

19. The African Commission should also, as a matter of principle, bring cases against a State Party of situations constituting mass atrocities to the African Court pursuant to Rule 118(3) of its Rules of Procedure, and should articulate criteria for doing so.

20. The PSC should coordinate with the African Commission and the UN Special Procedures to prevent mass atrocities by detecting looming atrocities and intervening before atrocities are committed.

21. The African Court should exercise its jurisdiction actively to prevent war crimes, genocide and crimes against humanity, including the use of provisional measures to compel repressive States to respect and protect the fundamental rights of their citizens.

22. The Continental Early Warning System must be actively involved in human rights and IHL monitoring and reporting. There should be strategic partnerships and collaboration among sub-regional early warning capacities, human rights and humanitarian law monitoring bodies with the Continental Early Warning System.

23. The Panel of the Wise should serve as an impartial mechanism for advising on a decision to intervene pursuant to Article 4(h).

24. The Pan-African Parliament should fully engage with other AU organs within the sphere of its responsibility to promote peace and security, human rights, democracy, good governance and accountability in order to eradicate the causes of mass atrocities on the continent.

25. The Economic Social and Cultural Council has unquestionable *locus standi* before the African Court that can be utilised for the enforcement of human rights in order to prevent mass atrocities.

26. As one of the systems for monitoring adherence to the rule of law in African States, the African Peer Review Mechanism should provide political pressure on governments that ignore or challenge the findings of relevant human rights institutions or special procedures.

27. The African Standby Force should have a capability to protect populations at risk of mass atrocities and to deter potential perpetrators of mass atrocities.

The role of sub-regional organisations in preventing mass atrocities

28. The proximity to the conflict provides sub-regional organisations with a better understanding of its dynamics, key players, context-specific management and resolution options and makes them better placed to initiate rapid and less expensive responses to conflict than the AU and the UN. Regional organisations should further enhance regional cooperation among judicial authorities to support international justice mechanisms.

The role of African States in preventing mass atrocities

29. AU Member States should adopt legislative, administrative and other measures that will ensure that their national courts can exercise universal jurisdiction over war crimes, genocide and crimes against humanity. States should also make the declaration allowing for individual petitions pursuant to Article 34(6) of the Protocol on the Establishment of the African Court. AU Member States should address the root causes of mass atrocities within their jurisdiction. When implementing Article 4(h) intervention, the humanitarian motive to save lives and protect human dignity should override national or strategic interests. Furthermore, States should commit resources towards prevention of mass atrocities and should implement Article 4(h) where prevention fails.

The role of the international community in preventing mass atrocities

30. The international community, including the United Nations, regional and sub-regional organisations, and non-governmental organisations should help States to build capacity to protect their populations from mass atrocities and to assisting those which are under stress before crises and conflicts break out. Should peaceful means be inadequate and national authorities manifestly fail to protect their populations from mass atrocities, the international community should help the AU to intervene to stop the mass atrocities.

The role of civil society in preventing mass atrocities

31. Given their influence and presence on the ground, civil society should contribute to the monitoring of implementation of human rights and humanitarian norms and build awareness of mass atrocity prevention. Where mass atrocities occur, the civil society should collect evidence of atrocities and identify perpetrators and also help the citizens to hold governments accountable.