CHAPTER 9

SOFT LAW AND LEGITIMACY IN THE AFRICAN UNION: THE CASE OF THE PRETORIA PRINCIPLES ON ENDING MASS ATROCITIES PURSUANT TO ARTICLE 4(H) OF THE AU CONSTITUTIVE ACT[IV]

Busingye Kabumba

Abstract

The phenomenon of soft law has generated significant debate, and controversy, in international legal scholarship. Nevertheless, soft law instruments remain an increasingly important feature of norm generation in international society. This chapter suggests that the resilience of soft international law can only be properly understood by having regard to another contemporary idea in international law – the concept of legitimacy. To this end, the chapter proposes a general theory for understanding the interaction between soft law and legitimacy in international law. This theory is then applied as a lens for analysing the nature, role and impact of soft law in the African Union system, using the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union as a case study. The chapter demonstrates that soft law can be a powerful tool in the hands of non-traditional actors in international law, one which should be applied conscientiously and deliberately to democratise and humanise international law, rather than to entrench its more hegemonic aspects.

1 Introduction

Soft law norms have been as important a feature of the normative framework of the African Union (AU) as they were of its forerunner, the Organisation of African Unity (OAU). Whether in their own right, or as forerunners of 'hard law' instruments, these instruments and documents have had, and continue to have, important effects in shaping and constraining the behaviour of organs and members of the AU. At the same time, insufficient scholarly attention has been paid to the nature, role and impact of these instruments.

This chapter seeks to address the dearth of scholarship in this important area, and further seeks to enquire into the legitimacy of these instruments as a feature of contemporary norm generation in the AU. The

enquiry is located within a legitimacy paradigm precisely because of the grey area which such legal instruments occupy – in so far as, while they are not quite recognisable under the framework of traditional legal instruments, at the same time they duly attract attention in terms of their impact and effects. In particular, the chapter seeks to conceptualise and categorise 'soft law' instruments in the AU framework; assess their nature, role and impact in the AU; and, finally, interrogate their legitimacy as a form of norm generation in the AU – both in terms of input legitimacy (using participation and other criteria) and output legitimacy (in terms of the efficacy and substantive quality of the norms thereby generated).

To this end, the chapter begins by proposing a general theory for understanding the relationship between the phenomenon of 'soft law' and the concept of 'legitimacy' in international law. This theory then is applied as a basis for analysing the role of soft law in the AU system, using the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union (Pretoria Principles) as a case study.

2 A general theory of the interaction between soft law and legitimacy

The idea of 'soft law' is one of the more controversial issues in contemporary international legal discourse,[1] and a respectable body of scholarship exists that challenges the validity and utility of this concept.[2] In addition, there is limited agreement, even among authors who accept a potential role for soft law in the international legal system, as to the precise meaning of the term. According to one approach, the term 'soft law' is more appropriately used in relation to weak norms expressed in traditional or 'hard' international legal instruments, as opposed to stipulations in instruments that are *stricto sensu* non-binding.[3] On the other hand, a number of scholars conceive of a wider catchment for 'soft law' which would include both weak norms in traditionally-binding instruments as well as norms contained in non-traditional instruments. According to Abbott and Snidal, for instance, 'the realm of "soft law" begins once legal arrangements are weakened along one or more of the dimensions of

1 B Kabumba 'Soft law and legitimacy in international law: A case study of the Doha Declaration on the TRIPS Agreement and Public Health' unpublished LLD thesis, University of Pretoria, 2014 1 4.

2 See, eg, J Klabbers 'The redundancy of soft law' (1996) 65 *Nordic Journal of International Law* 167; L Blutman 'In the trap of a legal metaphor: International soft law' (2010) 59 *International and Comparative Law Quarterly* 605; J d'Aspremont 'Softness in international law: A self-serving quest for new legal materials' (2008) 19 *European Journal of International Law* 1075; P Weil 'Towards relative normativity in international law?' (1983) 77 *American Journal of International Law* 413.

3 See, eg, D Shelton 'Soft law' George Washington University Law School, Public Law Research Paper 322 (2008) 3.

obligation, precision and delegation'.[4] In the author's view, the latter approach is preferable in terms of taking proper account of the phenomenon of soft law as a feature of obligation and norm generation in contemporary international law.

That said, it may be possible to identify three broad categories of soft law instruments, depending on their source or authorship: (i) state-generated soft law; (ii) non-state generated soft law; and (iii) quasi-state generated soft law.[5] The first category relates to instruments generated by states; the second to those issued by non-state actors (such as academics, non-governmental organisations (NGOs), private think tanks and similar groups); and the third to those developed by state-created bodies, such as treaty bodies. These distinctions might be useful in appreciating the disparate fortunes of certain soft law instruments as opposed to others. However, as will be demonstrated later in the chapter, these distinctions as to authorship, in themselves, are neither dispositive nor conclusive.

For its part, the concept of legitimacy is as current, if not as controversial, as that of soft law in international legal scholarship. Although it has a much longer tradition in the field of political science,[6] reflection upon the significance of legitimacy in international law is gaining currency.[7] Perhaps the most important work in this regard has been that by Franck, who conceptualised legitimacy in terms of the ability

4 KW Abbott & D Snidal 'Hard and soft law in international governance' (2000) 54 *International Organisation* 421-422.

5 Kabumba (n 1 above) 21-22.

6 For early work in the field, see C Schmitt *Legality and legitimacy* (1932).

7 See, eg, TM Franck 'Why a quest for legitimacy' (1987) 21 *UC Davis Law Review* 535; TM Franck *The power of legitimacy among nations* (1990); Kabumba (n 1 above); M Kumm 'The legitimacy of international law: A constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 907; R Wolfrum & V Röben *Legitimacy in international law* (2008); A Buchanan 'The concept of legitimacy as applied to international law and institutions' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 79; J Tasioulas 'Legitimacy as "the right to rule"' in Besson & Tasioulas (above) 97 *et seq*; J Brunnée & SJ Toope *Legitimacy and legality in international law: An interactional account* (2010); S Wheatley *The democratic legitimacy of international law* (2010); NA Molinero 'Legality and legitimacy in the use of force' (2008) http://www.fride.org/download/COM_Legalidad_legitimidad_ENG_jul08.pdf (accessed 4 December 2015); PH Brietzke 'Law, legitimacy and coercion: One view from law and economics' (1991) 25 *Valparaiso University Law Review* 343; TL Meares 'Norms, legitimacy and law enforcement' (2000) 79 *Oregon Law Review* 391; J Jackson et al 'Why do people comply with the law? Legitimacy and the influence of legal institutions' (2011) 52 *British Journal of Criminology* 1051; D Luban 'Fairness to rightness: Jurisdiction, legality and the legitimacy of international criminal law' Georgetown University Law Centre, Georgetown Public Law Research Paper 1154117 (2008); SW Schill 'Enhancing international investment law's legitimacy: Conceptual and methodological foundations of a new public law approach' (2011) 52 *Virginia Journal of International Law* 57; D Bodansky 'The legitimacy of international governance: A coming challenge for international environmental law?' (1999) 93 *American Journal of International Law* 599; DM Bodansky 'The concept of legitimacy in international law' University of Georgia, School of Law, Research Paper Series 07-013 (2007); R Wolfrum 'Legitimacy of international law and the exercise of administrative functions: The example of the International Seabed Authority, the International

of a rule to attract consensual compliance on the part of those to whom it is addressed.[8]

2.1 Soft law as a framework for legitimatisation and delegitimisation

The intersection between the concepts of legitimacy and soft law may be understood as being located in the central question of *compliance.* A legitimacy-based enquiry seeks to understand why certain legal rules are complied with as opposed to others, even where the rules thus violated or ignored attract significantly high actual or potential sanctions.[9] The concept of 'soft law', with the paradox it necessarily carries, similarly represents an attempt to grapple with the challenge of situating norms which, while not manifesting within the rigid and traditionally-acceptable forms of 'law', nevertheless appear to enjoy a certain normative weight and significance, especially in terms of their appearing to attract voluntary compliance.

There thus appears to be a reflexive and natural relationship between the concept of soft law, on the one hand, and that of legitimacy, on the other, in so far as they both provide lenses for understanding the reality of norm generation, reception and compliance in contemporary international relations.[10]

Soft law may serve as a framework through which various actors in the international community may make claims and counterclaims as to the (il)legitimacy of certain norms manifested in 'hard' international law.[11] On the one hand, through the generation of soft law, actors in the international legal system can collectively legitimise a particular normative position.[12] On the other hand, soft law may be used to collectively delegitimise a normative position.[13] Often, these processes – of legitimisation and delegitimisation – occur contemporaneously, insofar as the legitimisation of a particular norm might involve the delegitimisation of an alternative normative position, and *vice versa*.[14]

Maritime Organization (IMO) and International Fisheries Organizations' (2008) 9 *German Law Journal* 2039; JL Cohen *Globalisation and sovereignty: Rethinking legality, legitimacy and constitutionalism* (2012)*;* DD Caron 'The legitimacy of the collective authority of the Security Council' (1993) 87 *American Journal of International Law* 552; I Clark *Legitimacy in international society* (2005)*;* EU Petersmann (ed) *Reforming the world trading system: Legitimacy, efficiency and democratic governance* (2005).

8 Franck (1987) (n 7 above); Franck (1990) (n 7 above).

9 Kabumba (n 1 above) 11-12.

10 For a fuller account of this reflexive relationship, see, generally, Kabumba (n 1 above).

11 Kabumba 117-147.

12 Kabumba 117-118.

13 Kabumba 119-120.

14 Kabumba 119-120 145-146.

That said, for soft law to have this power – to legitimise or delegitimise contending normative positions – it is important that the soft law instrument in question itself enjoys a high degree of legitimacy.[15] This brings to the fore the question as to the criteria for the determination of (il)legitimacy – whether this is of soft law or of the normative positions it seeks to challenge or establish. Two limbs of legitimacy may be broadly identified in this regard, namely, (i) input or process legitimacy; and (ii) output or substantive legitimacy.[16]

Process legitimacy has been conceived as being predicated upon the following: (i) systemic validation; (ii) democratic participation; and (iii) jurisdiction.[17] Systemic validation refers to the proximity of the norm-generation process to traditional modes of rule making in the system.[18] Democratic participation refers to the 'nature and quality of participation' that attends the generation of the norm.[19] Finally, jurisdiction refers to the extent to which the norm relates to a subject matter more amenable to action by the international community rather than individual states.[20]

For its part, output or substantive legitimacy is informed by the following aspects: (i) determinacy; (ii) coherence; (iii) effectiveness; and (iv) justice. Determinacy refers to the extent to which a rule is able to communicate a clear message as to the obligation entailed.[21] Coherence relates to the degree to which the rule is rationally linked to both its own sub-rules as well as to other norms in the field of its operation.[22] Effectiveness or 'functional legitimacy' relates to the ability of the rule to meet the purposes for which it was developed.[23] Justice refers to the extent to which the application of the rule would result in a reasonable outcome.[24]

2.2 Assessing the legitimacy of soft law

Having outlined the criteria for legitimacy in section 2.1 above, we can attempt an assessment of the legitimacy of soft law, on the basis of the

15 Kabumba 120-121.
16 Kabumba 39-40.
17 Kabumba 40-47.
18 Kabumba 40-42. According to Franck, two separate elements are hereby implicated, namely, (i) symbolic validation (which may take the form of ritual or pedigree or both); and (ii) adherence (the vertical link between a 'primary rule of obligation' and secondary rules identifying the sources of rules of obligation); Franck (1990) (n 7 above) 91-97. According to Kabumba, however, these are better understood as one broad element – 'systemic validation' – denoting the degree to which the process of norm generation can be located within, or approximated to, traditional or recognised forms of rule making in the particular community; Kabumba (n 1 above) 40-42.
19 Kabumba 42.
20 Kabumba 46-47, citing Kumm (n 7 above) 920-922.
21 Kabumba 48, citing Franck (1990) (n 7 above) 50-54.
22 Kabumba 50, citing Franck (1990) (n 7 above) 144-152 180.
23 Kabumba 51-52.
24 Kabumba 54.

notion that the (de)legitimating power of soft law is directly linked to the degree of legitimacy of the soft law instrument in question.[25]

From the outset, it is worth noting that the very concept of soft law faces a legitimacy-based challenge,[26] although much of this critique manifests in the nature of challenges to the *legal* validity of soft law as a source of obligation in the international legal order.[27] An enquiry into the legitimacy of soft law itself, therefore, is not only important but, in many ways, inescapable. It is to this examination that we now turn, based on the broad criteria outlined in section 2.1 above.

2.2.1 Input or process legitimacy

Systemic validation

To the extent that a number of soft law instruments are either not formulated by states or, if they are, emerge through processes that do not follow the formal or traditional modes for the creation of what are traditionally understood to be 'binding' legal obligations, it may be said that most soft law instruments lack a degree of systemic validation.[28] In particular, non-state and quasi-state-generated soft law instruments suffer a deficit of systemic validation insofar as they do not have the imprimatur of direct state consent.[29]

The case of state-generated soft law is somewhat more complex in this regard since, in certain circumstances, such instruments may be deemed to provide evidence of state practice or *opinio juris* – the two elements required for the emergence of customary international law norms.[30] That said, even though state-generated soft law instruments enjoy a degree of consent, it might be argued that the choice to enshrine a norm in a 'declaration' as opposed to a 'treaty'[31] is an indication, at least in the short term, of an intention by states not to be bound by the norm in question, as a treaty-based obligation, in the strict or traditional legal sense.

25 See sec 2.1 above.
26 M Goldmann 'We need to cut off the head of the king: Past, present, and future approaches to international soft law' (2012) 25 *Leiden Journal of International Law* 336 338.
27 See, eg, Klabbers (n 2 above) 167; Blutman (n 2 above) 605; D'Aspremont (n 2 above) 1075; Weil (n 2 above) 423; H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.
28 Kabumba (n 1 above) 125-130.
29 For a classic statement of the primacy of state consent in international law, see *The Case of the SS 'Lotus' (France v Turkey)* PCIJ Rep Series A No 10.
30 See Blutman (n 2 above) 617-618, especially at fn 55, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 99-100, paras 188-189 and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 254-255 paras 70-73.
31 It is acknowledged that a treaty does not have to be expressly so called to be deemed one under international law, the important quality being the intention of the parties to be bound; see art 2(1)(a) of the Vienna Convention on the Law of Treaties 1969.

On the whole, therefore, it may be said that many soft law instruments generally lack a degree of systemic validation, with this deficit being particularly suffered by non-state and quasi-state-generated soft law.

Democratic participation

The higher the degree and quality of participation in the process of its development, the higher the degree of legitimacy that a particular soft law instrument will enjoy.

Soft law instruments differ greatly in this respect. Some are generated by small groups of experts,[32] while others are generated through widely-consultative processes involving a wide range of participants – both state and non-state.[33]

The greater the participation of a wide variety of state and non-state actors in the generation of a soft law instrument, the higher the degree of legitimacy it will enjoy.

Jurisdiction

In this respect also, soft law instruments differ greatly. Where, as is usually the case, the instruments deal with subjects that are more appropriately dealt with through international action and co-operation than by individual state action, the soft law instruments enjoy a high degree of jurisdictional legitimacy. These would include soft law instruments in fields such as human rights, the environment, trafficking in persons, and so forth. Instruments touching on more 'domestic' leaning fields – such as taxation and administrative matters – are more suspect in this regard.

2.2.2 Output or substantive legitimacy

Determinacy

It is worth noting that some 'soft law' norms are precisely so called because of their low degree of determinacy, their expression in 'binding'

32 See, eg, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), developed by a 'distinguished group of international human rights experts' at a meeting in Yogyakarta, Indonesia, http://www.yogyakartaprinciples.org/ (accessed 7 December 2015).

33 A good example in this regard is the process leading up to the development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which included both states and indigenous persons themselves. See M Barelli 'The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 960 970.

instruments notwithstanding. Frequently cited examples in this regard include certain provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.[34]

Apart from the above, the question as to the determinacy of soft law depends on the particular instrument. A good example in this regard is provided by a comparison between the 2007 Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), on the one hand; and the 2006 Montreal Declaration of the International Conference on LGBT Human Rights (Montreal Declaration), on the other. These are both non-state-generated soft law instruments. However, while the Yogyakarta Principles are expressed in clear and precise terms as to legal obligation, the Montreal Declaration is couched in more oblique and equivocal language.[35] As such, the Yogyakarta Principles have a higher degree of determinacy than the Montreal Declaration.

Coherence

A number of soft law instruments meet this criterion of legitimacy. Indeed, soft law instruments are sometimes generated primarily to ameliorate deficiencies – including in respect to coherence – of 'hard' law positions.

The coherence of soft law instruments may be enhanced by their reference to existing 'hard' law, and in addition by the reference, in 'hard' law to them. Either of these, and particularly where both occur, helps to demonstrate that the soft law instrument in question fits logically within the framework of legal obligation applicable in a particular field or with respect to a particular matter.

Effectiveness

In this regard, a number of soft law instruments fair reasonably well. Indeed, as acknowledged in the scholarship (on all sides of the soft law question), there is no gainsaying the fact that soft law instruments are complied with, with increasing frequency, in a wide range of contexts and fields.[36]

34 See, eg, art 2(1) of the ICESCR, which enjoins each state party to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

35 Kabumba (n 1 above) 137-138.

36 See, eg, D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2000); C Koutalakis & A Buzogany 'When soft law hits hard: On the effectiveness of new regulatory approaches in pollution prevention and control in the EU' http://regulation.upf.edu/dublin-10-papers/4C1.pdf (accessed 5 December

Moreover, in some instances, soft law appears to have emerged as a direct response to the ineffectiveness of existing 'hard' law normative frameworks.[37] A good example in this regard is the Responsibility to Protect (R2P) doctrine, which developed as a result of the apparent absence of an effective response, under traditional or 'hard' law, to situations of mass atrocities.[38]

Justice

This 'reasonableness' criterion arguably is met by the great majority of soft law instruments, especially where these norms are deliberately developed to mitigate any harsh effects that might flow from the application of 'hard' law.

A good example in this respect is the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration). As its full title suggests, the Doha Declaration – a state-generated soft law instrument – was formulated in 2001 as a direct response to concerns over the negative impact of the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) on the life and health of large numbers of people, particularly in developing countries.[39]

In sum, as the analysis in this section demonstrates, soft law instruments may enjoy a high degree of legitimacy. Although they are usually weak in terms of systemic validation, a large number of them score well in terms of other criteria of legitimacy. In principle, therefore, particular soft law instruments can enjoy the high degree of legitimacy required for them to have the power to legitimise or delegitimise normative positions in the international legal system.

2015); A Schaefer 'Resolving deadlock: Why international organizations introduce soft law' paper presented at the EUSA Ninth Biennial International Conference, University of Austin, Texas, 31 March-2 April 2005; A Power & O Tobin 'Soft law for the internet, lessons from international law' (2011) 8 *SCRIPTed* 31; M Koppel 'The effectiveness of soft law: First insights from comparing legally binding agreements with flexible action programs' (2009) 21 *Georgetown International Law Review* 821; A Flückiger 'Why do we obey soft law' in S Nahrath & F Varone *Rediscovering public law and public administration in comparative policy analysis: A tribute to Peter Knoepfel* (2009), cited in Kabumba (n 1 above) 142 fn 58.

37 Kabumba (n 1 above) 143.

38 Kabumba 143, citing B Halt 'The legal character of R2P and the UN Charter' (2012) 1 2, http://www.eir.info/2012/08/08/the-legal-basis-of-the-responsibility-to-protect/ (accessed 5 December 2015). This is further explained in sec 3.1 below.

39 For a more detailed analysis in this regard, see Kabumba (n 1 above) 148-279.

3 Soft law and legitimacy in the African Union system: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union

The preceding section suggests a theory for understanding the interaction between soft law and legitimacy in international law. In this section, the framework of analysis developed in section 2 above is applied with regard to the phenomenon of soft law in the AU system, using the Pretoria Principles as a case study.[40]

In order to properly analyse the status and potential effect of soft law in the AU, in general, and the Pretoria Principles, in particular, it is critical to begin with an enquiry into the traditional or formal structure for norm generation under the AU framework. In this regard, it may be noted that in 2002 the AU emerged out of the OAU, which itself had been created in 1963.[41] Under the new AU structure, the Assembly of Heads of State and Government is the supreme decision-making body of the Union.[42] Although there exists a Pan-African Parliament (PAP), which is intended 'to ensure the full participation of the African peoples in the development

40 Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the African Charter, http://www.chr.up.ac.za/index.php/pretoria-principles.html (accessed 1 September 2017).

41 African Union Commission and New Zealand Crown *African Union handbook* (2014) (AU handbook) 10 http://www.un.org/en/africa/osaa/pdf/au/au-handbook-2014.pdf (accessed 6 December 2015). The OAU was created by 32 independent African states. An additional 21 states joined the OAU with the result that by 2002, when the AU was created, the OAU had a total of 53 members. The membership of the AU later grew to 54 states with the admission of South Sudan; AU handbook 10. After decades of dialogue regarding the reform of the OAU, a concrete step in this regard was taken in 1999 when the OAU Heads of State and Government concluded the Sirte Declaration, and committed to 'a speedy process for the creation of the African Union'; PR Seka 'The road to African integration: A historical perspective' (2009) 1 (8) *Journal of Public Administration and Policy Research* 159. Following upon the 1999 Sirte Declaration, further concrete steps were soon adopted by the OAU Heads of State and Government, namely, the 2000 Lomé Summit, at which the AU Constitutive Act was adopted; the 2001 Lusaka Summit, at which a clear roadmap for the actualisation of the AU was agreed; and the 2002 Durban Summit, at which the AU was launched and wherein the first Assembly of Heads of State and Government was conducted. See, generally, J Cilliers 'Hopes and challenges for the peace and security architecture of the African Union' in H Besada (ed) *Crafting an African security architecture* (2016) 42; O Babarinde 'The African Union: Finally in the path of the EU?' in J Roy & R Domínguez (eds) *Regional integration fifty years after the Treaty of Rome: The EU, Asia, Africa and the Americas* (2008) 53-71.

42 Art 6(2) African Union Constitutive Act, https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf (accessed 30 August 2017) (AU Constitutive Act). The AU Assembly of Heads of State and Government succeeded the Assembly of Heads of State and Government which had formerly been established under arts VII-XI of the Charter of the Organization of African Unity, https://au.int/web/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf (accessed 30 August 2017) (OAU Charter).

and economic integration of the continent',[43] and although the 'long-term aim' of the AU is for this Parliament to 'exercise full legislative powers', at the moment this body is only empowered to 'exercise advisory and consultative powers'.[44]

Other mechanisms to note are the African Commission on Human and Peoples' Rights (African Commission), which was established under the African Charter on Human and Peoples' Rights (African Charter), 'to promote human and peoples' rights and ensure their protection in Africa';[45] and the African Court on Human and Peoples' Rights (African Court), established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).[46] In terms of article 45 of the African Charter, the African Commission is empowered to, among other things, (i) collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and 'should the case arise, give its views or make recommendations to governments';[47] (ii) formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation;[48] (iii) ensure the protection of human and peoples' rights under conditions laid down by the African Charter, including through the consideration of individual and inter-state communications;[49] and

43 Art 17(1) AU Constitutive Act.

44 AU Handbook (n 41 above) 68. Under the 2001 Protocol to the Abuja Treaty relating to the Pan-African Parliament, the duties of the Parliament include (i) to facilitate the effective implementation of the OAU/African Economic Community's (AEC's) policies and objectives 'and, ultimately, the AU'; and (ii) to familiarise the peoples of Africa with the objectives and policies aimed at integrating the African continent within the framework of the AU's establishment. To this end, it is intended in the long run to have members of the Parliament elected by universal suffrage; AU Handbook (n 40 above) 68. See also, generally, BR Dinokopila 'The role of the Pan-African Parliament in the promotion of human rights in Africa' unpublished LLD thesis, University of Pretoria, 2013 http://repository.up.ac.za/bitstream/handle/2263/53215/Dinokopila_Role_2014.pdf?sequence=1&isAllowed=y (accessed 30 August 2017). It should be noted that the African Union General Assembly, in its 23rd session, held in Malabo, Equatorial Guinea, 26-27 June 2014, approved a new Protocol, aimed at vesting the Pan-African Parliament with a significant legislative mandate under the AU structure. See Decisions by the African Union General Assembly, 26-27 June 2014, Malabo, Equatorial Guinea, Doc.Assembly/AU/Dec.517-545(XXIII). The Protocol, however, is yet to enter into force.

45 Art 30 African Charter, https://au.int/sites/default/files/treaties/7770-file-banjul_charter.pdf (accessed 30 August 2017). The African Charter was adopted in Nairobi on 27 June 1981 and entered into force on 21 October 1986.

46 Art 1 African Court Protocol, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (accessed 1 September 2017). The Court Protocol was adopted by member states of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.

47 Art 45(1)(a) African Charter.

48 Art 45(1)(b) African Charter.

49 Art 45(2) & 47-59 African Charter.

(iv) interpret all the provisions of the African Charter at the request of a state party, an institution of the [African Union] or an African organisation recognised by the [African Union].[50] For its part, the African Court is mandated to render judgments in respect of all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.[51] The African Court is also entitled to issue advisory opinions on any legal matters relating to the African Charter or any other relevant human rights instruments, at the request of any member state of the [African Union], the [African Union] itself, any of its organs, or any African organisation recognised by the [African Union].[52]

That said, to the extent that from their mandates neither the African Commission nor the African Court is vested with an affirmative *legislative* role under the AU framework, the competence of the Assembly of Heads of State and Government, in the traditional sense, strictly speaking remains exclusive in this regard. To this extent, norms generated other than by the Assembly of Heads of State and Government may be placed in the 'soft law' category for purposes of the determination of AU law. These would include Recommendations, General Comments[53] and Resolutions[54] of the African Commission; judgments and advisory opinions of the African Court; and other instruments such as Declarations, Model Laws and Principles developed either by organs of the AU or by individual states or groups of states, NGOs, individual experts and policy makers and other actors.[55]

Thus far, it does not appear that the development of soft law in the AU system has been the source of much controversy. Indeed, soft law, especially state-generated soft law, was a prominent feature in the institutional life of the AU's predecessor, the OAU, being the forerunner of many 'hard law' instruments adopted under the aegis of the Organisation. Moreover, as noted above, the AU itself was initially

50 Art 45(3) African Charter.
51 Art 3(1) African Court Protocol.
52 Art 4 African Court Protocol.
53 See, eg, the African Commission General Comment 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, http://www.achpr.org/instruments/general-comment-two-rights-women/ (accessed 7 December 2015).
54 See, eg, the African Commission Resolution on Access to Health and Needed Medicines in Africa, http://www.achpr.org/sessions/44th/resolutions/141/ (accessed 7 December 2015).
55 For analyses of the phenomenon of 'resolutions' and 'General Comments' issued by the African Commission, which appear to claim a kind of legislative or quasi-legislative competence, see, respectively, JP Biegon 'The impact of resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016 (on file with author); E Durojaye 'The General Comments on HIV adopted by the African Commission on Human and Peoples' Rights as a tool to advance the sexual and reproductive rights of women in Africa' (2014) 127 *International Journal of Gynaecology and Obstetrics* 305.

conceived in a soft law instrument – the 1999 Sirte Declaration. Nevertheless, as soft law instruments become more ubiquitous in the AU framework, it is to be expected that they, especially non-state and quasi-state-generated soft law, will come under increasing scrutiny by individual member states and groups of member states of the AU, the Assembly of Heads of State and Government, the African Court as well as, perhaps, by the Pan-African Parliament, especially if the Parliament eventually is cloaked with law-making power.[56]

An enquiry into the legitimacy of soft law as a feature of norm generation within the AU framework, therefore, is critical, and it is to this that we now turn, using the Pretoria Principles as a case study. The Pretoria Principles address themselves to article 4(h) of the AU Constitutive Act, which itself drew closely upon the Responsibility to Protect (R2P) doctrine that had emerged in the international legal system.[57] It is, therefore, necessary to start with a consideration of the R2P doctrine, as a foundation for an examination of article 4(h) and, eventually, the Pretoria Principles.

3.1 Evolution of the Responsibility to Protect doctrine in the international legal system

The modern articulation of the R2P doctrine may be traced to a 1999 report of the UN Secretary-General to the General Assembly, in which he outlined, in broad strokes, the competing imperatives facing the international community.[58] In his report, after referring to the situations in Afghanistan, Angola, the Balkans, Cambodia, East Timor, Kosovo, Rwanda, Sierra Leone and Sudan; the Secretary-General noted that while the world had learnt that it could not be passive in the face of gross and systematic violations of human rights, at the same time it had also learnt that any intervention had to be based on 'legitimate and universal

56 An indication of the turf wars to come in this regard might be provided by an examination of the experiences with soft law in the European Union, and especially the approaches to the concept adopted by the European Court of Justice (see, eg, Case C-322/88 *Grimaldi* [1989] ECR 4407 and Case C-57/95 *France v Commission* [1997] ECR I-1627); and the European Parliament (see, generally, European Parliament, Resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)) C 187 E/77, A6-0259/2007 / P6-TA PROV (2007)0366 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0366+0+DOC+XML+V0//EN (accessed 7 December 2015)).

57 See, eg, R Goldstone 'Foreword' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) xvi ('the right of intervention under art 4(h) of the AU Constitutive Act is mirrored in the doctrine of the "responsibility to protect" (R2P), which was unanimously adopted at the United Nations (UN) World Summit in 2005').

58 Press Release, Secretary-General presents his annual report to General Assembly UN Doc SG/SM/7136/GA/9596 (20 September 1999) http://www.un.org/press/en/1999/19990920.sgsm7136.html (accessed 6 December 2015).

principles' if it were to be supported by the international community.[59] To this end, the Secretary-General observed that although the 'developing international norm' in support of intervention to protect civilians from large-scale slaughter might be met by 'distrust, skepticism, even hostility', the norm and an evolved understanding of state sovereignty that was incidental to it ought to be welcomed.[60]

In response to the challenge posed by the Secretary-General, the then Canadian Prime Minister, Jean Chrétien, at the UN Millennium Assembly in September 2000, announced an intention to establish an independent International Commission on Intervention and State Sovereignty (ICISS).[61] The Commission was launched on 14 September 2000 by the then Canadian Foreign Minister, Lloyd Axworthy, who identified its mandate as being to foster dialogue and promote global consensus as to how the international system might act in the face of massive violations of human rights.[62] Although it had been hoped that the Commission would be able to complete its work within one year,[63] the report of the Commission was finally issued in December 2001. The ICISS Report took a cautious approach, one emphasising UN Security Council approval for interventions to protect civilians facing mass atrocities.[64] Where such approval was not forthcoming, the Report recommended action by the UN General Assembly under the Uniting for Peace Resolution.[65]

Following a series of reports which additionally considered the R2P doctrine, such as the December 2004 report of the United Nations High-

59 As above.

60 As above. See also S Gumedze 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Law Journal* 135 138. The Secretary-General's thoughts would be even more clearly and affirmatively laid out in his 2000 report on the role of the United Nations in the 21st century. See in this regard Secretary-General, *Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century* UN Doc A/54/2000 (27 March 2000) http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf (accessed 6 December 2015), cited in M Payandeh 'With great power comes great responsibility? The concept of the responsibility to protect within the process of international lawmaking' (2010) 35 *Yale Journal of International Law* 469 472.

61 See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS Report) December 2001 81, http://responsibility toprotect.org/ICISS%20Report.pdf (accessed 6 December 2015). The Commission was co-chaired by Gareth Evans (Australia) and Mohamed Sahnoun (Algeria). Other members of the Commission were Gisèle Côté-Harper (Canada), Lee Hamilton (United States), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel V Ramos (Philippines), Cornelio Sommaruga (Switzerland), Eduardo Stein Barillas (Guatemala) and Ramesh Thakur (India).

62 ICISS Report (n 61 above) 81.

63 Payandeh (n 60 above) 472-473. This would allow the Canadian government to present the Commission's findings and recommendations to the 56th session of the United Nations General Assembly; Payandeh (n 60 above) 472-473.

64 Payandeh 473.

65 Payandeh 473-474, citing Uniting for Peace, GA Res 377 (V), UN Doc A/1775 (3 November 1950).

Level Panel on Threats, Challenges and Change[66] and the March 2005 report by the UN Secretary-General,[67] the doctrine was further elaborated by the World Summit held in October 2005, of which the outcome document contained specific recommendations for its conceptualisation.[68] It was after the World Summit, in particular, that 'the concept of the responsibility to protect entered into discussions and statements of organs of the United Nations, regional organisations, and representatives of states'.[69]

Since that time, the R2P doctrine has been supported by the UN Security Council,[70] the UN Secretary-General[71] and the UN General Assembly.[72]

3.2 Article 4(h) of the African Union Constitutive Act and the Responsibility to Protect doctrine

It is a matter of some coincidence that the transition from the OAU to the AU occurred at a time when the R2P doctrine was first being conceived in the international legal system. In the event, the framers of the AU foundational document – the Constitutive Act of the African Union

66 The High-Level Panel on Threats, Challenges and Change was established by the UN Secretary-General in 2004, with a mandate to 'evaluate the adequacy of existing policies and institutions with regard to current threats to international peace and security'; Payandeh (n 60 above) 474. The Panel delivered its report in December 2004. See Report of the High-Level Panel on Threats, Challenges and Change: A more secure world: Our shared responsibility UN Doc A/59/565 (2 December 2004) cited in Payandeh (n 60 above) 474.

67 Secretary-General *Report of the Secretary-General, In larger freedom: Toward development, security and human rights for all* UN Doc A/59/2005 (21 March 2005) cited in Payandeh (n 60 above) 475.

68 2005 World Summit Outcome, GA Res.60/1, UN Doc A/Res/60/1 (24 October 2005) cited in Payandeh (n 60 above) 475-476. According to para 138 of the World Summit Outcome Document, '[e]ach individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means'.

69 Payandeh (n 60 above) 476.

70 See Goldstone (n 57 above) xvii, citing UN Security Council Resolution 1674 of April 2006.

71 See Secretary-General *Report of the Secretary-General, Implementing the Responsibility to Protect* UN Doc A/63/677 (12 January 2009) cited in Payandeh (n 60 above) 478 and Goldstone (n 57 above) xvii.

72 According to Payandeh, further discussion was conducted during the 63rd session of the UN General Assembly, held in October 2009, resulting in a Resolution that further clarified the international consensus at the time; GA Res 63/308, UN Doc A/RES/63/308 (7 October 2009) cited in Payandeh (n 60 above) 479. Similarly, Goldstone notes that the Secretary-General's report of January 2009 generated debate in the UN General Assembly, during which it appeared that there was a divergence of views regarding the scope and application of the doctrine. While most states were in favour of the doctrine, some raised a number of critical issues regarding its implementation, including as to its consistency with the UN Charter rules relating to the use of force. There was also some discussion around the role of regional organisations, such as the AU, in the enforcement of the doctrine; Goldstone (n 57 above) xvii.

(Constitutive Act)[73] – established in article 4(h) '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'.[74]

The articulation of article 4(h) of the Constitutive Act has been said to have been the AU's response to Kofi Annan's 1999 challenge to the international community.[75] As such, in a very real sense, through article 4(h) of its Constitutive Act, the AU appears to have deliberately chosen to adopt, as a 'hard law' norm under the AU legal framework, a concept which at the time could at best be said to be 'soft law' in the international legal system.

The AU position was in part also informed by the continent's unique experiences of mass atrocities, on the one hand, and the absence of effective international intervention, on the other, with the 1994 Rwandan genocide serving as perhaps the most egregious example in this regard.[76] This is a critical point, especially if it is recalled that, as the large majority of African states were under colonial domination at the time of the adoption of the UN Charter in 1945, there was very limited African involvement in the formulation of the contemporary international legal framework for the regulation of the use of force.

This view of article 4(h), as a deliberate and considered African response to a problematic international legal framework, is supported by a review of the AU's subsequent practice. For instance, in March 2005, in the course of the 7th extraordinary session of the Executive Council of the AU, the AU developed a consensus regarding proposed reforms to the UN system, which was articulated in a document entitled the Common African Position on the Proposed Reform of the United Nations (also known as the Ezulwini Consensus).[77] In this document, the AU re-affirmed its stance regarding the R2P doctrine, noting in particular that the UN General Assembly and Security Council, in part due to their geographical distance from the theatre of many African conflicts, were not

73 Adopted 11 July 2000 and entered into force 26 May 2001.

74 The intervention has to be sanctioned by the Assembly, whose decisions are taken by consensus or, where this cannot be obtained, by a decision of a two-thirds majority of the member states of the AU; Gumedze (n 60 above) 149-150 citing Article 7 (1) of the Constitutive Act.

75 See Gumeze (n 60 above) 139 ('[p]arallel to the work of the ICISS, the AU took the lead in entrenching the responsibility of protecting in its founding document, the Constitutive Act').

76 See Gumedze (n 60 above) 139 ('[i]t could be argued that the Rwandan genocide (which could have been avoided had the UN intervened) was one of the most important considerations for entrenching the responsibility to protect in the Constitutive Act as this affected African states directly'); Goldstone (n 57 above) xvii ('[t]he horrendous genocide in Rwanda in 1994 could have been prevented or at least minimised with the kind of intervention contemplated by art 4(h)').

77 Gumedze (n 60 above) 141.

always well suited to properly evaluate such situations.[78] In terms of the Ezulwini Consensus, therefore, the AU felt that it was more prudent for regional organisations, which were situated closer to the sites of such conflicts, to be authorised to quickly intervene, on the understanding that UN Security Council approval could be sought and obtained after the fact.[79] In addition, the R2P doctrine was further enshrined in article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSCAU Protocol).[80]

It does bear noting that the AU is yet to invoke article 4(h) as a basis for the use of force.[81] At the same time, however, article 4(h) is yet to be legally challenged, 'supporting the notion that the international community tacitly consents to the newly emerging regional norm',[82] which might be with good reason.[83]

In sum, the history of article 4(h), which is inevitably intertwined with that of the R2P doctrine, reveals the radical, but deliberate, nature of this provision of the AU Constitutive Act. Essentially, through article 4(h), the AU established as a regional 'hard law' norm a principle which until that point had, in the international system, only been a political commitment at least, or a 'soft law' obligation, at most.[84]

3.3 Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union

The Pretoria Principles were formulated and adopted at a conference held on 6 and 7 December 2012 at the University of Pretoria, organised by the

78 As above.

79 AU Executive Council 'The Common African position on the proposed reform of the United Nations: The Ezulwini Consensus' http://www.africa-union.org/News_Events/Calender_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc (accessed 5 December 2015) cited in Gumedze (n 60 above) 141.

80 Entered into force 26 December 2003, cited in Gumedze (n 60 above) 148. Art 4(j) of the PSCAU Protocol provides that the Council shall be guided by '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, in accordance with article 4(h) of the Constitutive Act'. The PSCAU replaced the Declaration on the Establishment within the OAU of the Mechanisms for Conflict Prevention, Management and Resolution (Cairo Declaration); Gumedze (n 60 above) 148 fn 57.

81 M Kunschak 'The role of the United Nations Security Council in the implementation of article 4(h)' in Kuwali & Viljoen (n 57 above) 66.

82 Kunschak (n 81 above) 67.

83 As Kunschak notes: 'Ambiguity does not necessarily constitute only a problem of legal insecurity, but also offers the opportunity of a more flexible reaction to critical situations. Article 4(h) provides the AU with a legal tool to act without having to wait for the international community and its political considerations in the face of imminent danger'; Kunschak (n 81 above) 67.

84 In terms of the relationship between art 4(h) and the R2P doctrine, Goldstone observes that '[w]hile the doctrine of R2P is a political commitment of the UN member states, art 4(h) is a legal obligation on AU member states'; Goldstone (n 57 above) xvii.

University's Centre for Human Rights and the Department of Political Science.[85] Participants at the conference comprised 'interdisciplinary academics, policy makers and practitioners in the areas of international peace and security with a special focus on Africa'.[86] The Pretoria Principles, therefore, fall within the category of non-state-generated soft law. According to what appears to be the official website of the Principles, they were 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)'.[87]

In the first place, as with most non-state-generated soft law instruments, the Pretoria Principles begin with a legitimacy deficit, especially in terms of input or process legitimacy. As noted in section 2 above, input legitimacy may be analysed with reference to three indicators, namely, (i) systemic validation; (ii) democratic participation; and (iii) jurisdiction. In so far as the Pretoria Principles were formulated by a relatively small group of experts, acting in their individual capacities, the process of formulating the Principles had a low degree of democratic participation, and little, if any, systemic validation. The one measure of input legitimacy of which the Principles do reflect a high degree relates to jurisdictional legitimacy. This is because the Principles relate to an issue – the prevention of mass atrocities – which is clearly of concern to the international community as a whole, rather than a matter within the exclusive domain of any individual state or states.

This being the case, it is even more critical that the Principles reflect a substantial degree of output or substantive legitimacy, to offset or perhaps even overcome the input legitimacy deficit they suffer. Indeed, to the extent that the Principles are said to be aimed at providing 'greater clarity' and guiding 'action' by the AU and other relevant actors, it would appear that the Principles themselves invite precisely this kind of enquiry. It will again be recalled, from the discussion in section 2 above, that output legitimacy may be assessed in terms of four considerations: (i) determinacy; (ii) coherence; (iii) effectiveness; and (iv) justice. We now turn to an assessment of the substantive legitimacy of the Pretoria Principles, based on these indicators. In this section, determinacy and coherence are treated separately, while effectiveness and justice are jointly considered.

85 See http://www.chr.up.ac.za/index.php/pretoria-principles.html (accessed 1 September 2017).
86 As above.
87 As above.

3.3.1 Determinacy

It may be said that the Pretoria Principles cover some ground in terms of elaborating and clarifying the meaning of article 4(h) – that is to say, enhancing the *determinacy* of that provision as an aspect of its substantive legitimacy. According to the Principles, while every state has the primary responsibility to protect its citizens,[88] in terms of article 4(h), the AU is clothed with the right to intervene in a member state pursuant to a decision of the AU Assembly of Heads of State and Government, in respect of grave circumstances, that is to say, war crimes, genocide and crimes against humanity.[89] Therefore, such intervention by the AU is triggered only where it is clear that the target state is 'unable or unwilling to discharge its primary responsibility' to protect its citizens.[90]

The Pretoria Principles also make the important acknowledgment that article 4(h) is a manifestation, in 'hard' international law, of the R2P doctrine which hitherto had mainly found expression in 'soft' international instruments. According to the Principles, by the terms of article 4(h), the AU Constitutive Act 'codifies' the R2P doctrine expressed in the 2005 World Summit Outcome Document.[91] To this end, according to the Principles, the 'right' under article 4(h) 'implies a legal entitlement or prerogative' which should 'as far as feasible be interpreted to imply a duty to intervene to prevent or halt mass atrocities'.[92] Although this appears to be a significant stretch of the language of article 4(h), in my view this approach is consistent with the spirit of that provision.[93]

The Pretoria Principles thus appear to enhance, to some degree, the determinacy – and therefore substantive legitimacy – of article 4(h). However, I return to an assessment of this criterion in section 3.3.3 below.

88 Principle 1 Pretoria Principles.

89 Principles 1 & 3 Pretoria Principles. Principle 3 provides in part that '[b]y 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'.

90 Principle 4 Pretoria Principles. See also Principle 9 Pretoria Principles.

91 Principle 5 Pretoria Principles. Principle 5 notes, however, that art 4 h) relates, in particular, to the third of the three foundational pillars of the R2P doctrine, that is to say, the use of military intervention as a last resort.

92 Principle 6 Pretoria Principles.

93 A similarly broad, and likewise contextually appropriate, reading of art 4(h) is represented by the terms of Principles 8 (which is to the effect that 'accountability through criminal prosecution to deter potential perpetrators, for example by arresting perpetrators, may also be part of an article 4(h) intervention') and 10 (under which it is provided that '[c]onsidering 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').

3.3.2 Coherence

One of the major assertions contained in the Pretoria Principles is reflected in Principle 11, which is to the effect that '*as a matter of legal requirement*, the AU requires the authorisation of the UN Security Council for article 4(h) intervention' and that 'the UN Security Council has the responsibility to authorise the use of force in the implementation of article 4(h) intervention'.[94] It is not difficult to understand the motivation for this assertion, which seems to have been founded on a concern to remain within the bounds of the UN Charter framework for the maintenance of international peace and security,[95] especially having regard to the claim, under article 103 of the Charter, of normative superiority of obligations under that document over competing arrangements and obligations.[96] To this extent, therefore, it could be said that the Pretoria Principles enjoy a great degree of coherence – as an aspect of substantive legitimacy – in so far as they provide a reading of article 4(h) which is more closely aligned with the broader international legal framework for the maintenance of peace and security.

In addition, the Pretoria Principles could be said to reflect an additional measure of coherence – in institutional terms – especially with regard to the articulation of the roles of various AU stakeholders in preventing mass atrocities in Africa,[97] including through the use of the AU's Continental Early Warning System.[98] The stakeholders identified in this regard include AU member states;[99] civil society organisations (CSOs);[100] regional economic communities (RECs);[101] regional and sub-regional organisations;[102] the African Commission;[103] the African Court;[104] the AU Assembly;[105] the AU Peace and Security Council;[106] the

94 My emphasis.
95 In particular, the prohibition of the use or threat to use force under art 2(4) of the UN Charter, which has been recognised to be a norm of *jus cogens; Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States),* 1986 ICJ Reports 14 para 190.
96 According to art 103 of the UN Charter: 'In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. On this question, see, generally, E de Wet & J Vidmar (eds) *Hierarchy in international law: The place of human rights* (2012) and R Bernhard 'Article 103' in B Simma et al (eds) *The Charter of the United Nations: A commentary* (2002) 1293.
97 Principles 13-31 Pretoria Principles.
98 Principles 15 and 22 Pretoria Principles.
99 Principles 13, 16 & 29 Pretoria Principles.
100 Principles 17 & 31 Pretoria Principles.
101 Principle 17 Pretoria Principles.
102 Principle 28 Pretoria Principles.
103 Principles 17-20 Pretoria Principles.
104 Principles 17 & 21 Pretoria Principles.
105 Principle 18 Pretoria Principles.
106 As above.

Panel of the Wise;[107] the Pan-African Parliament;[108] the Economic, Social and Cultural Council;[109] the African Peer Review Mechanism (APRM);[110] the African Standby Force;[111] the UN Special Procedures;[112] and the international community as a whole.[113] In this way, the Pretoria Principles outline a vision for article 4(h) which includes a proactive role for the AU, working in concert with other stakeholders, in preventing mass atrocities in Africa.

The Pretoria Principles, therefore, seem to improve upon the coherence, and thus substantive legitimacy, of article 4(h). Nonetheless, as with the case of the criterion of determinacy above, we shall return to an assessment of the element of coherence in section 3.3.3 below.

3.3.3 Effectiveness and justice

It should be recalled that the major significance of article 4(h) was the decisive stance it represented with regard to action by the AU in the face of mass atrocities on the continent. As noted in section 3.2 above, through this provision the AU deliberately and thoughtfully chose to *claim* for itself, on the African continent, authority granted, in the international legal system, primarily[114] to the UN Security Council under article 24 of the UN Charter. This position was partly in response to the UN Secretary-General's 1999 challenge to the international community, and was further informed by the continent's own painful experiences of mass atrocities in the face of international indifference and inaction. The lack of reference in article 4(h) to UN Security Council authorisation, therefore, was neither an omission nor an oversight, but rather a deliberate affirmation, in a 'hard law' instrument of what at the time had been a 'soft' obligation under consideration by the international community. In article 4(h), the softness of the R2P doctrine had found some solidification, and the provision could serve as a useful reference point in the continuing conversation, in the international legal system, towards the further advancement of the doctrine.

In asserting UN Security Council authorisation as a requirement for the implementation of article 4(h), the Pretoria Principles effectively diminish the significance of the provision, as a radical challenge, from the African continent, to an international legal framework for the use of force

107 Principle 23 Pretoria Principles.
108 Principle 24 Pretoria Principles.
109 Principle 25 Pretoria Principles.
110 Principle 26 Pretoria Principles.
111 Principle 27 Pretoria Principles.
112 Principle 20 Pretoria Principles.
113 Principle 30 Pretoria Principles.
114 For judicial clarification that 'primary' responsibility does not mean 'exclusive' responsibility, see *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility)* 1984 ICJ Reports para 95.

which has been proven to suffer from a high degree of ineffectiveness and injustice (as elements of output legitimacy). Put differently, article 4(h) was aimed at enhancing the *effectiveness* and *justice* – as aspects of substantive legitimacy – of the international legal framework for the use of force, in terms of its ability to allow for decisive regional action to prevent mass atrocities. As such, by re-emphasising and re-centring the need for UN Security Council authorisation as a prerequisite for decisive AU intervention, the Pretoria Principles arguably undermine the effort and thought reflected in article 4(h).

Moreover, the Pretoria Principles do not offer definitive guidance with regard to what the AU can, or should, do should such authorisation not be forthcoming. In this respect, the Principles only note that '[w]here 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'.[115] With respect, it is difficult to understand what 'greater space' means as used in this context. In this regard, therefore, aside from the concerns over effectiveness and justice, the Pretoria Principles further suffer from deficits with regard to *determinacy* and *coherence* – as elements of substantive or output legitimacy.

The approach adopted by the Pretoria Principles with respect to the requirement for Security Council authorisation as a condition for intervention under article 4(h) is even more difficult to understand given the recognition, in the Principles themselves, that '[t]he 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'.[116] If sub-regional organisations have a better understanding of 'context-specific management and resolution options' with respect to conflicts, then it would follow that, as envisaged in article 4(h), the AU similarly has a better understanding than the UN Security Council with respect to conflicts on the continent, and should be accorded a measure of deference especially with regard to the prevention of mass atrocities. Indeed, as noted earlier, a major consideration that informed the framing of article 4(h) was the strong feeling on the part of AU member states that, given their greater proximity to and interest in conflicts on the continent, they were better placed than the UN Security Council to evaluate the need to intervene, including militarily, in such situations. The language of Principle 11 does not demonstrate sufficient consideration of, and respect for, this important concern, which is a major failing of that Principle. Thus, unfortunately, through a rigid, and arguably insufficiently context-sensitive approach,

115 Principle 11 Pretoria Principles.
116 Principle 28 Pretoria Principles.

Principle 11 of the Pretoria Principles unduly 'softens' an important normative 'hard law' advancement, in the AU framework, of what had prior to article 4(h) only been articulated as 'soft law' in the international legal system.

3.3.4 General legitimacy-based assessment of the Pretoria Principles

In sum, it bears reiterating that article 4(h) of the AU Constitutive Act was a deeply-considered response to a number of critical failures of the UN Charter framework for collective security, particularly as experienced in Africa. In this sense, the Charter framework could be said to have manifested a degree of output illegitimacy, especially in relation to its capacity to effectively protect persons at risk of mass atrocities. It is precisely this legitimacy deficit that article 4(h) sought to mitigate. To address this, article 4(h) effectively 'hardened', at the regional level, a soft law norm which was beginning to be articulated at the international level, with regard to the importance of preventing mass atrocities through decisive action when necessary.

Through asserting a requirement for UN Security Council authorisation for such action, which article 4(h) had deliberately omitted, the Pretoria Principles arguably undermine the potential of that provision in terms of enabling the AU to quickly intervene to prevent mass atrocities and, by extension, perpetuate the prevailing output illegitimacy of the international legal framework for the use of force.

This is made even more problematic by the fact that the Principles themselves do not provide any definitive guidance as to the position where the UN is either unwilling or unable to act, and further by the contradiction between Principle 11 (which emphasises the need for UN Security Council authorisation) and Principle 28 (which emphasises geographical proximity to conflict as an important consideration for determining the best-placed intervener).

As such, in my view, the Pretoria Principles suffer legitimacy deficits in terms of both input or process legitimacy and output or substantive legitimacy. Unfortunately, in so far as they specifically address themselves to article 4(h) of the AU Constitutive Act, they share the normative space occupied by that provision, and operate, in that space, to somewhat undermine the radical challenge it represents.

4 Conclusion

This chapter has sought to demonstrate the challenges and opportunities presented by soft law in the AU, through an analysis of the interaction between the R2P doctrine (a 'soft law' doctrine in the international legal system), article 4(h) of the AU Constitutive Act (a 'hard law' instrument)

and the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union (a 'soft law' instrument).

In my view, the case of the Pretoria Principles at once demonstrates the potential role as well as pitfalls of soft law, particularly non-state and quasi-state-generated soft law. On the one hand, soft law instruments can be powerful tools for advancing normative claims and building systemic consent in the direction of important positions. At the same time, they can serve to diminish and undermine nascent forms of resistance and bold action attempted by weaker actors in the international community. There is real and 'hard' power – economic, ideational,[117] reputational, institutional and otherwise – often at play in the formulation of 'soft' law; and, like all power, this power should be wielded with great introspection.

Although as a union of states the AU has the capacity to generate 'hard' international law, its economic and other limitations, as compared to a number of other actors – state and non-state – in the international community continue to undermine the AU's capacity to be relevant to the lived realities of many of the peoples of the continent.[118] The AU thus is 'weak' or 'soft' in this sense. This weakness notwithstanding, the AU identified the need to intervene decisively to prevent mass atrocities on the continent, and sought, through article 4(h), to create a legal mechanism to support this position, incorporating in its stride the R2P 'soft law' doctrine, which at the time was only just being articulated in the international legal system. In my view, the AU's position deserved support and validation, as a regional, bottom-up, effort to enhance the outcome legitimacy of the international legal framework for the use of force.

It might be the case that the position adopted by the Pretoria Principles better reflects traditional legal doctrine and, especially, the UN Charter framework. However, the Pretoria Principles might have better served the context-specific concerns of the African continent if they supported, and validated, the regional legal position the AU had asserted for itself; one which arguably had, and continues to have, the potential for the realisation of more just outcomes with regard to the prevention of mass atrocities in

117 For reflections on the concept of 'ideational power', see C Deere *The implementation game: The TRIPS Agreement and the global politics of intellectual property reform in developing countries* (2009)*;* M Elsig *Different facets of power in decision-making in the EU* NCCR Trade Regulation, Working Paper 2006/23 (2006) http://phase1.nccr-trade.org/images/stories/publications/IP2/WP_ELSIG_FACETSOFPOWER.pdf (accessed 7 December 2015); R Falk, M Juergensmeyer & V Popovski (eds) *Legality and legitimacy in global affairs* (2012); H Baumgärtner *Patents, power and rhetoric* Working Paper 4, Faculty of Humanities and Social Science, Universität Luzern (2011).

118 As Kuwali & Viljoen observe: 'The failings of art 4(h) intervention are ultimately not due to legal lacuna or the lack of legal arguments, but arise from the lack of political commitment … political will is inextricably linked to enforcement capacity, which includes military means. The African Standby Force, therefore, needs to become fully operational, and should be provided with resources to make it less reliant on the contribution of external donors'. D Kuwali & F Viljoen 'Conclusion' in Kuwali & Viljoen (n 57 above) 346.

Africa. In my view, from a politico-legal perspective, activists engaged in the creation of 'international law from below',[119] including through the articulation of non-state and quasi-state-generated soft law, should be more deliberate in employing the undeniable power of 'soft law' in the advancement of more substantively legitimate outcomes. Put simply, in my view, the power of 'soft law' should as far as possible be employed to further democratise and humanise international law, rather than to entrench and validate its more hegemonic or manifestly illegitimate features and outcomes.

119 For a detailed analysis of this phenomenon, see, generally, B Rajagopal *International law from below* (2003).