

The African Union and the responsibility to protect

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Summary

This article discusses how the African Union, as a major contributor to peace and security, has embraced and further entrenched the concept of the responsibility to protect. It traces the concept from the time when the former Secretary-General of the United Nations, Kofi Annan, challenged the international community to agree on the basic principles and processes of when intervention should occur in order to protect humanity against gross violations of human rights. It further discusses how the government of Canada responded to this challenge through the establishment of the International Commission on Intervention and State Sovereignty, which undertook extensive work in an attempt to unpack the meaning of the concept. The article makes reference to the 2005 World Summit where the Heads of State and Government of the United Nations unanimously affirmed the concept of the responsibility to protect, as well as to the 2005 Common African Position on the Proposed Reform of the United Nations (Ezulwini Consensus) wherein the Executive Council of the African Union affirmed this concept. The article further makes linkages between the concept of the responsibility to protect and the notions of human rights, human security and international security. Focusing on the African Union, the article discusses how the concept has over the years evolved in the African context. Devoting particular attention to article 4(h) of the Constitutive Act of the African Union, the article gives an understanding on how this article gives effect to the responsibility to protect. It elaborates on the notions of collective intervention and universal jurisdiction, among other things. The article also considers the processes to be undertaken by the

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African Union, as a means of giving effect to the responsibility to protect, following requests for intervention by its member states and occurrences of undesirable unconstitutional changes of government.

[T]here are moments when I feel that we are trapped in a mammoth factory known as the African continent, where all the machinery appears to have gone out of control all at once. No sooner do you fix the levers than the pistons turn hyperactive in another part of the factory, then the conveyor belt snaps and knocks out the foreman, the boiler erupts and next the whirling blades of the cooling fans lose one of their members which flies off and decapitates the leader of the team of would-be investors — the last hope of resuscitating the works. That, alas, is the story of our human factory on this continent.¹

1 Introduction

Upholding human rights is one of the most effective ways of contributing to international security. A respect for human rights arguably prevents conflicts, both intra-state and interstate. Where conflicts take place, the application of human rights principles best addresses violations of human rights and fundamental freedoms. Achieving international security requires states to fulfil their responsibility to protect their citizens against human rights violations. Within the African context, the responsibility to protect is articulated in article 4(h) of the Constitutive Act of the African Union (Constitutive Act),² which provides for ‘the right of the [African] 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’.³

The responsibility to protect ensures that human rights are respected, protected, promoted and fulfilled.⁴ The responsibility to protect goes beyond these so-called grave circumstances, as human rights must be respected, protected, promoted and fulfilled at all times. In post-conflict situations, for instance, human rights take centre stage in addressing post-conflict challenges such as development or the lack thereof. Thus,

¹ W Soyinka ‘Constitution and continuity’ *Tempo* 16 March 2000 <http://www.nigerianlaws.com/> as quoted in NJ Udombana ‘The unfinished business: Conflicts, the African Union and the New Partnership for Africa’s Development’ (2003) 35 *George Washington International Law Review* 55.

² Adopted on 11 July 2000 and entered into force on 26 May 2001.

³ See generally AA Girmachew ‘A study of the African Union’s rights of intervention against genocide, crimes against humanity and war crimes’ unpublished PhD thesis, University of Oslo, 2008.

⁴ On the levels of state obligation to respect, protect, promote and fulfil human rights, see *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC case*). In particular, see paras 44-47 of the *SERAC case*.

in post-conflict reconstruction and development,⁵ the consideration of human rights is one of the most important indicative elements for addressing past experiences and thereby informing a peaceful future and stable environment. Essentially, human rights as an indicative element encompasses the promotion, protection and respect for human rights and human dignity. International security, therefore, cannot be achieved without respect for human rights. Hence, one cannot talk about international security without addressing human rights, the so-called 'idea of our time'.⁶

That Africa faces multi-faceted challenges is not in dispute. Violations of human rights and general insecurity have now become the norm in Africa. One of the most profound challenges on the continent is the responsibility of African states to protect their citizens and to ensure their right to peace, security and stability within the continent. Amongst other things, this results from the fact that Africa generally remains a continent wracked by armed conflicts and what Furley and May refer to as "hopeless cases" where peace, if it does break out, can be tenuous, full of unresolved rivalries and tension, liable to be temporary and viewed as unsatisfactory by many of the participants'.⁷ The International Commission on Intervention and State Sovereignty (ICISS) could not have put it better when stating that '[m]illions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse'.⁸

The African continent presents interesting case studies due to a wide array of challenges: undemocratic governments; *coups d'état*; mercenarism; blood/conflict diamonds; bad governance and poor leadership, unfree and unfair elections; corruption and money laundering; underdevelopment; abuse of human rights; genocide; poverty; drought and famine; human trafficking; and HIV/AIDS.⁹ These problem areas have a bearing on the responsibility to protect and speak to the need for African states to ensure human security on the continent.

⁵ Post-Conflict Reconstruction and Development (PCRD) is one of the tools of the AU designed to curb the severity and repeated nature of conflicts in Africa as well as to bring about sustained development. See eg Decision on Post-Conflict Reconstruction and Development (EXCL/Dec 302 (IX) 25 June – 2 July 2006, Banjul, The Gambia) and Report on Post Conflict Reconstruction and Development (DOC EX CL/274 (IX) 25 June – 2 July 2006, Banjul, The Gambia) <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/Main%20Folder/documents.html> (accessed 23 January 2010).

⁶ See C Heyns & F Viljoen 'The regional protection of human rights in Africa: An overview and evaluation' in PT Zeleza & PJ McConnaughay *Human rights, the rule of law, and development in Africa* (2004) 129.

⁷ O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 1.

⁸ Report of the International Commission on Intervention and State Sovereignty *The responsibility to protect* (2001) 11.

⁹ See S Gumede 'Meaning of human security revisited' *ISS Today* 29 June 2007 http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2436&slink_id=4660&slink_type=12&link_id=21 (accessed 29 February 2010).

Africa as such cannot be said to be a continent where human rights and security flourish.

As a result of the many problem areas enumerated above, the responsibility of ensuring that African states protect their citizens becomes even more profound. My understanding of the notion of the responsibility to protect is nothing but the duty entrusted upon states to ensure that the fundamental human rights of their citizens are zealously guarded and protected against violations of any kind. Within the African context, the responsibility to protect is unfortunately challenged by various factors, one of which is African states' poor overall human rights record. This is despite the fact that individual African states are parties to a plethora of human rights treaties at the international and regional levels. Notwithstanding these challenges, as it shall become clear, positive prospects exist for ensuring that African states fulfil their responsibility to protect their citizens against human rights abuses, especially in view of article 4(h) of the Constitutive Act.

The article discusses the African Union (AU) and the responsibility to protect, which is entrenched in article 4(h) of the Constitutive Act. First, the paper discusses the responsibility to protect and how it has evolved within the African context. Second, it considers the responsibility to protect under the AU with specific focus on collective intervention by the AU, the principle of universal jurisdiction, the request for intervention by AU member states, and unconstitutional changes of government. Finally, conclusions are drawn.

2 The responsibility to protect

The responsibility to protect is a very broad concept which covers a variety of issues. As stated above, the article seeks to confine the concept to states' obligation to ensure the respect for human rights within the African context. It cannot be denied that the concept finds greater emphasis in the case where there is a serious violation of human rights. In his report to the 1999 General Assembly, the former Secretary-General of the United Nations (UN), Kofi Annan, challenged the international community to agree on the basic principles and processes involved in respect of when an intervention should occur, under whose authority and how this was to be achieved.¹⁰ As a result of this challenge, the government of Canada responded by establishing the independent International Commission on Intervention and State Sov-

¹⁰ See the Annual Report of the Secretary-General to the 54th session of the UN General Assembly in September 1999 http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=28 (accessed 11 April 2010).

ereignty (ICISS) in September 2000.¹¹ The ICISS published a report titled 'The Responsibility to Protect' in December 2001.¹²

Parallel to the work of the ICISS, the AU took the lead in entrenching the responsibility of protecting in its founding legal document, the Constitutive Act. As already mentioned, the responsibility to protect is found in article 4(h) of the Constitutive Act. This became one of the core principles in accordance to which the AU was to function.¹³ It could be argued that the Rwanda 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. After all, the AU remains Africa's premier institution and principal organisation for the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments.¹⁴

As a concept the responsibility to protect is a fluid one. This presupposes that the concept is one that can be employed at various levels in order to ensure the protection of citizens. The responsibility to protect is a notion which seeks to challenge the traditional understanding of state sovereignty by allowing regional organisations to intervene in cases where serious human rights violations are taking place. Thus, the concept is viewed as the legal and ethical commitment of the international community, acting through organisations such as the UN and Africa's regional organisations, to protect citizens from genocide, war crimes, crimes against humanity, or ethnic cleansing.¹⁵ In a recent report on the Wilton Park Conference 922,¹⁶ it was stated that the concept of responsibility to protect rests on three pillars, namely, the obligation of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and from incitement; a commitment to assist states to meet these obligations; and a responsibility to protect populations from these crimes and violations.

The international community deems the crime of genocide, crimes against humanity and war crimes to be the most serious crimes of international concern and elaborated upon in the Rome Statute of

¹¹ See the website of the International Commission on Intervention and State Sovereignty <http://www.iciss.ca> (accessed 10 January 2010).

¹² The *Report of the International Commission on Intervention and State Sovereignty* is available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (accessed 10 January 2010).

¹³ On the other core principles, see generally art 4 of the Constitutive Act.

¹⁴ Art 3(h) Constitutive Act.

¹⁵ Centre for Conflict Resolution *Africa's responsibility to protect* Policy Advisory Group Seminar Report (2007) 6.

¹⁶ See *Report on Wilton Park Conference 922: Implementing the responsibility to protect: The role of regional and sub-regional partners* (Friday 11 – Sunday 13 July 2008) <http://www.wiltonpark.org.uk/documents/conferences/WP922/pdfs/WP922.pdf> (accessed 12 February 2010).

the International Criminal Court (Rome Statute).¹⁷ The Rome Statute has proved to be an invaluable tool in the struggle against impunity, especially in conflict-ridden places. Worth noting is the fact that those individuals who are alleged to have committed serious crimes are predominantly from the African continent,¹⁸ namely, Darfur, Sudan,¹⁹ the Democratic Republic of the Congo,²⁰ Central African Republic²¹ and Uganda.²²

The above-mentioned serious crimes of international concern involve grave violations of human rights. Over and above the entrenchment of the responsibility to protect in article 4(h) of the Constitutive Act, African leaders have acknowledged the concept as an essential tool in preventing and halting war crimes, ethnic crimes, crimes against humanity and genocide. Africa's classic example of the expression of the responsibility to protect is found in an address by the Rwandan President, Paul Kagame, during a 2005 World Summit.²³

Never again should the international community's response be left wanting. Let us resolve to take collective action in a timely and decisive manner. Let us also commit to put in place early warning mechanisms and ensure that preventive interventions are the rule rather than the exception.

After the 1994 Rwanda genocide, African states grappled with the question of whether the UN was still the body of choice to bring about peace and security on the continent. In the most general sense, as Evans puts it, the international community has conspicuously failed to maintain the peace since the end of the Cold War.²⁴ Evans and Sah-

¹⁷ The text of the Rome Statute was circulated as document A/CONF 183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. On the international crimes, see arts 5-8 of the Rome Statute. Although the crime of aggression is listed in art 5(1)(d), art 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with arts 121 and 123, defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. The article further provides that such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

¹⁸ See situations and cases at <http://www.icc-cpi.int/cases.html> (accessed 22 February 2010).

¹⁹ *The Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* ICC-02/05-01/07.

²⁰ *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07.

²¹ *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

²² *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

²³ See 'The responsibility to protect: Towards a collective African response to genocide, war crimes and crimes against humanity' <http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=421> (accessed 10 January 2010).

²⁴ See generally G Evans *Co-operative security and interstate conflict* (1994) 1-8.

noun have clearly pointed out that '[i]n this new century, there must be no more Rwandas'.²⁵ This statement highlights the AU's approach in addressing human rights and international security within the African continent.

In March 2005, during the 7th extraordinary session of the AU's Executive Council, the AU affirmed the acceptance of the responsibility to protect in a document titled 'The Common African Position on the Proposed Reform of the United Nations', otherwise known as the Ezulwini Consensus. According to the Ezulwini Consensus, it was noted that the General Assembly and the Security Council of the UN are situated far away from the reality of the African conflict scenes, and may not be in a position to undertake effectively a proper appreciation of the nature and development of African conflict situations. In addressing this challenge, it was critical for regional organisations in areas of proximity to conflicts to be empowered to intervene with the approval of the UN Security Council. What also came out of the Ezulwini Consensus was the realisation that in certain circumstances, which require urgent attention, the approval of the UN Security Council could be granted *ex-post facto*.²⁶

In January 2009, the Heads of State and Government unanimously affirmed at the 2005 UN World Summit that 'each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.²⁷ The Heads of State and Government at the Summit outlined a three-pillar strategy in implementing the responsibility to protect: pillar one, the protection of the state, comprising of the enduring responsibility of the state to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement; pillar two, international assistance and capacity building, comprising of the commitment of the international community to assist states in meeting those obligations; and pillar three, timely and decisive response, comprising of the responsibility of member states to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.²⁸

It must be noted that this three-pillar strategy complements the ICISS-proposed three-dimensional definition of the responsibility as follows:²⁹

²⁵ G Evans & M Sahnoun 'The responsibility to protect' (2002) 81 *Foreign Affairs* 6.

²⁶ 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/Calendar_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc (accessed 29 March 2010).

²⁷ See the Report of the UN Secretary-General on implementing the responsibility to protect, 12 January 2009, A/63/677.

²⁸ As above.

²⁹ Report of the International Commission on Intervention and State Sovereignty (n 8 above) 17.

First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. This preferred terminology refocuses the international searchlight back where it should always be, that is, on the duty to protect communities from mass killing, women from systematic rape and children from starvation.

Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thus the 'responsibility to protect' is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the 'right or duty to intervene' is intrinsically more confrontational.

Thirdly, the responsibility to protect means not just the 'responsibility to react,' but the 'responsibility to prevent' and the 'responsibility to rebuild' as well. It directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction.

The definition of the first proposed dimension is very important in the sense that those seeking or needing support, that is, human beings, are the focal point for human security. The responsibility to protect should be most concentrated on the human needs of those seeking protection and support.³⁰ After all, the Universal Declaration of Human Rights (Universal Declaration) provides that '[a]ll human beings are born free and equal in dignity and rights'.³¹ By virtue of this fact, anything that threatens such freedom, equal dignity and fundamental rights should be guarded against. Hence the need for states' responsibility to protect human beings, regardless of any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³² This proposed dimension also points to the more serious forms of threats to human security, namely, mass killings, the systematic rape of women and the starvation of children. The responsibility for states to intervene in these situations cannot be gainsaid. It is also for this reason that specific international treaties have been adopted both at the international and regional levels with the main objective of addressing such challenges, which are rife within the African continent.

The definition of the second dimension proposed gives an indication that the primary responsibility to protect rests with none other than the state concerned. The international community, therefore, assumes the secondary responsibility, in the event that the state concerned fails or is unwilling to protect its citizens. The principle of sovereignty in this

³⁰ n 8 above, 15.

³¹ Art 1 Universal Declaration.

³² Art 2 Universal Declaration.

situation cannot inhibit the operationalisation of the responsibility to protect at the international level. According to the ICISS, the UN is an organisation dedicated to the maintenance of international peace and security on the basis of protecting the territorial integrity, political independence and national sovereignty of its member states.³³ The ICISS further states that the fact that the overwhelming majority of today's armed conflicts are internal has, among other things, presented the UN with the major difficulty of reconciling the principle of sovereignty and its mandate to maintain international peace and security, coupled with its compelling mission to promote the interests and welfare of people within those states experiencing armed conflicts.³⁴

This dilemma is equally true with the AU, whose objective is, among others, to defend the sovereignty, territorial integrity and independence of its member states.³⁵ Yet, it is also entrusted with the responsibility of promoting peace, security and stability on the continent,³⁶ which may arguably entail a violation of the principle of sovereignty. Since member states of international organisations such as the UN and AU voluntarily accept international obligations as responsible members of the community of states upon signing treaties, they accept the responsibilities of memberships flowing from their membership of such organizations. This is because treaties of international organisations are binding once ratified, accepted, approved or acceded to. The Vienna Convention on the Law of Treaties of 1969 provides that the terms 'ratification', 'acceptance', 'approval' and 'accession' mean the international act so named, whereby a state establishes on the international plane its consent to be bound by a treaty.³⁷ According to the ICISS Report, '[t]here is no transfer or dilution of state sovereignty. But there is a necessary re-characterisation involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.'³⁸

In dissecting the notion of sovereignty as responsibility, the ICISS Report states that it has a threefold significance,³⁹ namely, one, that it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and the promotion of their welfare; two, that it suggests that national political authorities are responsible to the citizens internally and to the international community through the UN; and three, that it means that the agents of the state are responsible for their actions, that is, they are accountable for their acts of commissions and omissions. It is through this way of thinking that international human rights norms are strengthened. The principle

³³ ICISS Report 13.

³⁴ As above.

³⁵ Art 3(b) Constitutive Act.

³⁶ Art 3(f) Constitutive Act.

³⁷ Art 2(1)(b) Vienna Convention on the Law of Treaties of 1969.

³⁸ ICISS Report 13.

³⁹ As above.

of accountability, especially on the part of state agents, is important as any acts of commission or omission, which seriously violate human rights, automatically attract international criminal responsibility. In this way, sovereignty cannot be a justification for non-observance of human rights norms and standards.

The third and last proposed dimension of the responsibility to protect emphasises the 'responsibility to prevent' and the 'responsibility to rebuild' over and above the 'responsibility to react'. One of the most important aspects of the responsibility to protect is that of undertaking measures to prevent the occurrence of serious violations of human rights. In the event that such violations occur, it is also critical that once the protection aspect of the responsibility is undertaken, the state has the responsibility to rebuild in collaboration with other states and through international organisations. It is for this reason that the AU designed a policy on Post-Conflict Reconstruction and Development (PCRD) as one of its tools intended to curb the severity and repeated nature of conflicts in Africa as well as to bring about sustained development.⁴⁰ The policy on PCRD comprises six indicative elements, namely, security, humanitarian/emergency assistance, political governance and transition, socio-economic reconstruction and development, human rights, justice and reconciliation, and women and gender.

The responsibility to protect finds fertile ground within the concept of human security, as understood in contemporary times, human security being a concept that focuses on the security of the individual – his or her physical safety, economic and social well-being, respect for his or her dignity and worth as a human being, and the protection of human rights and fundamental freedoms.⁴¹ In bringing a new dimension to the concept of human security, Kofi Annan, the former Secretary-General of the UN, stated that⁴²

[h]uman security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human, and therefore national, security.

⁴⁰ See Policy on Post-Conflict Reconstruction and Development <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/index.html> (accessed 30 January 2010).

⁴¹ Report of the International Commission on Intervention and State Sovereignty (n 8 above) 15.

⁴² K Annan 'Secretary-General salutes international workshop on human security in Mongolia' Press Release SG/SM/7382 <http://www.un.org/News/Press/docs/2000/20000508.sgsm7382.doc.html> (accessed 29 March 2010).

The responsibility to protect, therefore, is also a concept that seeks to ensure the continuity of human security. That is to say that there is no way that human rights, good governance, access to education and health care, for instance, can be enjoyed without a state protecting human rights. It is for this reason, therefore, that in the event that human security is threatened, the responsibility to protect takes precedence in the sense that the international community has to step in, in order to protect those seeking protection or assistance. Thus, the ICISS notes that⁴³

[t]he emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.

According to the African Union Non-Aggression and Common Defence Pact (not yet in force), 'human security' means⁴⁴

the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development.

From this definition, it is very clear that human security goes beyond the state-centric approach to security. Human security, therefore, centres on the human being. Human security can only be achieved once the basic needs of a human being are satisfied. Again, this requires states to ensure that human rights and fundamental freedoms are respected and protected for the benefit of the human being. The definition also underscores the importance of enabling the creation of social, economic, political, environmental and cultural conditions that are essential for the survival and dignity of the human being.

Human security guarantees that each individual is afforded opportunities and choices for their full development. To this end states, being the primary duty-bearers, have an enormous responsibility of ensuring that human security is achieved. In terms of the AU Non-Aggression and Common Defence Pact:⁴⁵

State parties undertake to promote such sustainable development policies as are appropriate to enhance the well-being of the African people, including the dignity and fundamental rights of every human being in the context of a democratic society.

⁴³ Report of the International Commission on Intervention and State Sovereignty (n 8 above) 16.

⁴⁴ Adopted by the 4th ordinary session of the Assembly held in Abuja, Nigeria, on 31 January 2005.

⁴⁵ Art 3(c) of the AU Non-Aggression and Common Defence Pact.

This provision underscores the importance of the promotion of sustainable development, pursued by the AU on the African continent. This ties in well with Africa's contemporary development blueprint, the New Partnership for Africa's Development (NEPAD).⁴⁶ NEPAD's main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the escalating marginalisation of the continent.⁴⁷ Thus, NEPAD's role in the promotion of human rights in Africa cannot be overemphasised as it addresses the issue of development, which is essential for the survival and well-being of the individual.⁴⁸

3 Responsibility to protect under the African Union

That the maintenance of international security is the primary responsibility of the UN, particularly the UN Security Council, is now settled.⁴⁹ Within the African context, it may be argued that the maintenance of security, which is regional in nature, is the primary responsibility of the AU, particularly the Peace and Security Council of the AU (PSCAU). Thus, the AU's work on peace and security contributes towards international security. According to Sutterlin:⁵⁰

Now, as the definition of international security has broadened to encompass not only peace between states but also the security of populations within states, economic and social progress are increasingly seen as essential to international security and peace.

The AU has in principle become the vanguard of an emerging regional African government aimed at fostering mechanisms for co-operation among African states and has as its main objective to promote peace, security and stability on the continent, thus contributing to international security.⁵¹

According to Evans:⁵²

⁴⁶ NEPAD was launched at a special summit in Abuja, Nigeria, on 23 October 2001. See NEPAD http://www.nepad.org/documents/nepad_english_version.pdf (accessed 12 January 2010). On the progress on NEPAD, see a report by Prof Wiseman L Nkuhlu *The New Partnership for Africa's Development: The journey so far* (June 2005) <http://www.nepad.org/2005/files/documents/journey.pdf> (accessed 12 January 2010). The NEPAD document is available at <http://www.nepad.org/AA0010101.pdf> (accessed 12 January 2010).

⁴⁷ Para 67 of the NEPAD document.

⁴⁸ See generally S Gumedze 'The New Partnership for Africa's Development (NEPAD) and human rights' (2006) 22 *South African Journal on Human Rights* 144.

⁴⁹ See art 24 of the UN Charter.

⁵⁰ JS Sutterlin *The United Nations and the maintenance of international security: A challenge to be met* (1995) 4.

⁵¹ See generally art 4 of the Constitutive Act of the AU.

⁵² G Evans *Co-operative security and interstate conflict* (1994) 1-8.

It is a central characteristic of the responsibility to protect norm, properly understood, that it should only involve the use of coercive military force as a last resort: when no other options are available, this is the right thing to do morally and practically, and it is lawful under the UN Charter.

In the event that governments are unable or unwilling to protect their citizens from genocide, war crimes, crimes against humanity and ethnic cleansing, the international community has a responsibility to protect those vulnerable populations. When the UN fails in its responsibility to protect, it is incumbent upon regional organisations, such as the AU, to fill in the gaps that the UN leaves as a result of its bureaucratic challenges in its attempt to protect citizens from serious violations of human rights. It is also for this reason that the AU has developed its own security architecture, which will ensure that the responsibility to protect, as we understand it, is effected at the regional level in order to complement this responsibility at the UN level. Below the paper focuses on the responsibility to protect as provided for in the Constitutive Act.

3.1 Article 4(h) of the Constitutive Act: Collective intervention by the African Union

In establishing the AU, its member states were, among other things, determined to promote and protect human rights on the continent, thus operationalising the responsibility to protect at the regional level.⁵³ This responsibility is solidified and elaborated upon through the express objective of the AU of promoting and protecting human and peoples' rights.⁵⁴ This objective gives a clear and unambiguous directive that it shall be undertaken 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. Among other things, the AU is also supposed to function in accordance with a respect for human rights.⁵⁵ This principle, therefore, informs the responsibility to protect at the AU level. The ICISS Report argues that, while sovereign states have the primary 'responsibility to protect' their own citizens, if they prove unwilling or unable to do this, then the international community must act regardless of political sensitivities.

The Constitutive Act recognises the contested principle of non-interference by any member state in the internal affairs of another.⁵⁶ This, however, does not preclude the AU (as opposed to the member states) to interfere in the internal affairs of its member states. Article 4(h) of the Constitutive Act provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly with respect to grave circumstances, namely, war crimes, genocide and crimes against

⁵³ See para 9 of the Preamble to the Constitutive Act.

⁵⁴ Art 3(h) Constitutive Act.

⁵⁵ Art 4(m) Constitutive Act.

⁵⁶ Art 4(g) Constitutive Act.

humanity. This principle, therefore, formalises and operationalises the responsibility to protect at the AU level. The Constitutive Act recognises war crimes, genocide and crimes against humanity as serious violations of human rights, which it describes as 'grave circumstances'. This principle, however, limits the responsibility to protect. It is argued here that Constitutive Act should have gone beyond so-called 'grave circumstances'.

Confirming the intervention principle, article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSCAU Protocol)⁵⁷ provides that the PSCAU shall, in particular, 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.

Article 4(h) of the Constitutive Act is yet to be amended so as to include in the listed international crimes a grave circumstance known as a 'serious threat to legitimate order'.⁵⁸ However, this crime is not defined. According to Baimu and Sturman,⁵⁹ this proposed amendment clause is inconsistent with the other grounds for intervention, which aim to protect African peoples from grave violations of human rights when their governments are unable or unwilling to do so. They argue that, rather than upholding human security, the amendment is aimed at upholding state security.⁶⁰

Save for the proposed amendment, article 4(j) of the PSCAU Protocol is identical to article 4(h) of the Constitutive Act. The omission of the proposed amendment from the PSCAU Protocol does not seem to have any effect as article 4(j) of that Protocol makes reference to article 4(h) of the Constitutive Act, which in turn will include the proposed amendment. The confirmation of the principle of intervention in the PSCAU Protocol further gives the responsibility to protect the prominence it deserves.

⁵⁷ The PSCAU Protocol entered into force on 26 December 2003 and replaced the Declaration on the Establishment within the OAU of the Mechanisms for Conflict Prevention, Management and Resolution (Cairo Declaration), while superseding the resolutions and decisions of the OAU relating to the Mechanisms for Conflict Prevention, Management and Resolution in Africa, which are in conflict with the PSCAU Protocol. See art 22 of the PSCAU Protocol.

⁵⁸ See art 4(h) of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st extraordinary session of the Assembly of the AU in Addis Ababa, Ethiopia, on 3 February 2003 and by the 2nd ordinary session of the Assembly of the AU in Maputo, Mozambique, on 11 July 2003. As of 3 February 2010, only 25 member states had ratified this Protocol.

⁵⁹ See E Baimu & K Sturman 'Amendment to the African Union's right to intervene: A shift from human security to regime security?' (2003) 12 *African Security Review* 37.

⁶⁰ As above.

According to article 4(h) of the Constitutive Act, circumstances warranting the AU's right to intervene in a member state should be considered to be 'grave'. The question of what constitutes 'grave circumstances' is likely to present a challenge, as the term 'grave' is relative. While the Constitutive Act does not precisely define what is to be considered 'grave circumstances', it nevertheless lists international crimes that qualify under such meaning, namely, war crimes, genocide and crimes against humanity. This is arguably a very simplistic approach in that confining 'grave circumstances' to only a few crimes narrows the scope of application of article 4(h) of the Constitutive Act.

The above-mentioned crimes, which constitute 'grave circumstances', have been defined in the 1998 Rome Statute of the International Criminal Court.⁶¹ Over and above these, a somewhat ambiguous 'grave circumstance', namely, 'a serious threat to legitimate order' is to be added to the list through a proposed amendment, which is not yet in force. While this may be viewed as a classical example of international law in the making,⁶² it remains to be seen what the meaning of 'a serious threat to legitimate order' will be interpreted to mean, especially given the somewhat rouse systems of governance in a number of African states which may use this proposed 'grave circumstance' as a justification for suppressing opposition within their territories. In fact, these autocratic systems of government may themselves be characterised as serious threats to legitimate order and the question then would be whether the AU should be bold enough to intervene in such circumstances.

In so far as the right to intervene is concerned, the AU will most definitely face a dilemma in making a decision of intervening in a member state. Be that as it may, before such decision is taken, a strong case has to be made to bring article 4(h) of the Constitutive Act into operation. Maluwa draws an analogy with terms such as 'threat to peace', 'breach of the peace' and 'acts of aggression', which are not defined in the UN Charter, but which the General Assembly and the Security Council of the UN have been able to determine precisely.⁶³ Based on this reasoning, Maluwa notes that the establishment of the PSCAU provides a clearly-defined mechanism which will be useful in determining which situations represent serious threats to legitimate order.⁶⁴

The right to intervene in member states must be sanctioned by the Assembly, which takes its decisions by consensus or, failing which, by

⁶¹ See <http://www.icc-cpi.int/> (accessed 19 March 2010). The Rome Statute entered into force on 1 July 2002. The definitions are found in art 8, for war crimes; art 6, for genocide; and art 7, for crimes against humanity.

⁶² See generally T Maluwa 'The OAU/African Union and international law: Mapping new boundaries or revising old terrain?' (2004) 98 *American Society of International Law Proceedings* 232.

⁶³ Maluwa (n 62 above) 236-7.

⁶⁴ As above.

a two-thirds majority of the member states of the AU.⁶⁵ Regarding the decision-making powers of the AU in respect of this right to intervene in a member state, Packer and Rukare raise a critical point. They argue that the fact that the Assembly is the only organ responsible to decide to intervene raises the risk of inaction.⁶⁶ This scepticism is based upon the Organisation of African Unity (OAU)'s practice of inaction in conflict situations in Africa, which also had the effect of impairing the credibility of the organisation dearly, particularly during the 1994 Rwanda genocide.

On the question of article 4(h) of the Constitutive Act, Kindiki argues that, since the provision is couched in terms of a 'right', meaning that the Assembly has the discretion to decide whether or not to intervene, then the consent of the target state will not be required.⁶⁷ He further suggests that it would have been much better had the provision been couched as a 'duty' which in his opinion would have created a sense of obligation to intervene, which in turn is more likely to move the AU into action.⁶⁸ Whether the 'intervention' is couched as a 'right' or a 'duty', there seems to be no way in which the AU may be held accountable for not exercising such a 'right' or undertaking such a 'duty'. One way of making the AU accountable is to enable it to accede to the African Charter in the same way that Protocol 14 of the European Convention on Human Rights makes a provision for the European Union to accede to the European Convention.⁶⁹

Acceding to a human rights instrument by the AU will also create a binding mechanism and give essence to the AU's functional principle of respect for democratic principles, human rights, the rule of law and good governance as provided for in the Constitutive Act. It is also in this way that the responsibility to protect by the AU can be enforceable through a judicial or quasi-judicial process. Of course, unless and until the African Commission and the African Court on Human and Peoples' Rights (which both provide for an implementation mechanism for the African Charter) are made organs of the AU, this recommendation would be futile. By transforming these organs to be part of the AU will ensure that there is an internal system of checks and balances. These organs will be given the authority to challenge the very institution, that is, the AU, which establishes them. Even though this may create tension between the AU and these mechanisms, the responsibility to protect,

⁶⁵ Art 7(1) Constitutive Act.

⁶⁶ CAA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 373.

⁶⁷ K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 107.

⁶⁸ As above.

⁶⁹ See art 17 of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004.

however, requires effective mechanisms that will ensure that the AU is kept in constant check in order to ensure its effectiveness in protecting citizens of its member states from serious violation of human rights.

The question of the AU's right to intervene is simply left to the 'whims' of the Assembly. While the Rwanda genocide remains an indictment, it is hoped that history will not repeat itself during a time when the AU has an arguably forward-looking peace and security regime in place. If a situation necessitates the AU to exercise its right to intervene in a member state, then such a right must, without any delay, come into operation for the sake of restoring peace and security. The trend within the AU is, however, not positive and the AU is either very slow to intervene in cases requiring its intervention as a result of a violation of human rights by its own member states (as in the case of Zimbabwe), or unable to effectively address gross violations of human rights within the context of grave circumstances (as in the case of Darfur, Sudan).

In the case of the Darfur crisis in the Sudan, the AU applied the responsibility to protect, based on the principle of intervention under article 4(h) of the Constitutive Act, but not invoking the provision explicitly, by establishing the African Union Mission in Sudan (AMIS).⁷⁰ Originally founded in 2004, with a force of 150 troops, AMIS was a peacekeeping force operating primarily in Darfur. By mid-2005, its numbers were increased to about 7 000. Despite the AU's intervention in Darfur, the peacekeeping mission was not able to contain the violence in Darfur. The AU's intervention in Darfur is very significant in understanding the practical application of the responsibility to protect within the African context as championed by the AU. No doubt, many lessons were learned through the AU's experience in Darfur. One of the lessons is the need for a strong peace and security architecture in Africa that will be able to deal with grave circumstances such those in Darfur.

The responsibility to protect in Darfur by the AU was also complemented by the UN. For instance, through the UN Security Council Resolution 1706, the UN Security Council requested the Secretary-General 'to take the necessary steps to strengthen AMIS through the use of existing and additional United Nations operations in Darfur'.⁷¹ Through the UN Security Council Resolution 1769, on 31 July 2007, the Security Council authorised and mandated 'the establishment, for an initial period of 12 months, of an AU/UN hybrid operation in Darfur (UNAMID)'. According to the UN Security Council Resolution 1769, the UNAMID⁷²

shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS, and shall consist of up to 19 555 military personnel,

⁷⁰ See website on the situation in the Darfur region of the Sudan <http://www.africa-union.org/DARFUR/homedar.htm> (accessed 30 March 2010).

⁷¹ UN Security Council Resolution 1706 (2006) S/RES/1706 (2006) 31 August 2006.

⁷² UN Security Council Resolution 1769 (2007) S/RES/1769 (2007) 31 July 2007.

including 360 military observers and liaison officers, and an appropriate civilian component including up to 3 772 police personnel and 19 formed police units comprising of up to 140 personnel each.

The mandate of UNAMID was subsequently extended for a further 12 months to 31 July 2009 through UN Security Council Resolution 1828 (2008),⁷³ and for a further 12 months to 31 July 2010, through UN Security Council Resolution 1881 (2009).⁷⁴

3.2 The principle of universal jurisdiction

From article 4(h) of the Constitutive Act flows the principle of universal jurisdiction, which is defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.⁷⁵ This principle has been resisted fiercely by the AU, which argues that it is being abused and misused when non-African courts indict African leaders for allegedly having committed international crimes. During its 11th ordinary session which was held between 30 June and 1 July 2008 in Sharm El-Sheikh, Egypt, the Assembly of the AU (Assembly) adopted a Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.⁷⁶ This decision, *inter alia*, vociferously argues that the abuse of⁷⁷

the political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, [was] a clear violation of the sovereignty and territorial integrity of these states.

The Assembly also stated that the abuse of the principle of universal jurisdiction was a development that could endanger international law, order and security.⁷⁸ What is intriguing is the fact that the Assembly had within the same decision expressly recognised that⁷⁹

universal jurisdiction is a principle of international law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with article 4(h) of the Constitutive Act of the African Union.

⁷³ UN Security Council Resolution 1828 (2008) S/RES/1828 (2008) 31 July 2008.

⁷⁴ UN Security Council Resolution 1881 (2009) S/RES/1881 (2009) 6 August 2009.

⁷⁵ See eg KC Randall 'Universal jurisdiction under international law' (1988) 66 *Texas Law Review* 785-788. See also International Law Association Committee on International Human Rights Law and Practice 'Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences' (2000) 2.

⁷⁶ Assembly/AU/Dec.199 (XI).

⁷⁷ See para 5(ii) of the Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.

⁷⁸ n 77 above, para 5(i).

⁷⁹ n 77 above, para 3.

What could be observed from the Assembly's standpoint in this instance is the fact that there is a move within the AU to resist at all costs the testing of the responsibility to protect in courts of law. International human rights law and international criminal law, however, protect the right of an accused to be presumed innocent until proven otherwise by a competent court or tribunal. The fact that there are several indictments against African leaders does not necessarily mean that they are guilty, as they are still presumed innocent.

In fact, the decision by the Assembly does not challenge the question of whether or not such 'judges from some non-African states' are competent to hear matters against African leaders. Instead, the justification given includes the fact that the abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security⁸⁰ and more specifically that⁸¹

[t]he abuse and misuse of indictments against African leaders have a destabilising effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations.

In reality, however, it is only a competent court that can pronounce on the question of whether or not an indictment against an individual (notwithstanding his or her social standing) has been abused and/or misused. My view is that the AU is not a competent organ to make such a ruling without laying a legal basis for it. More over, the AU's reaction borders on an abuse of power, which seriously impedes the AU's responsibility to protect. The AU's mandate is not to shield African leaders from prosecution but to ensure that human rights are promoted and protected.

Not only has the AU been protective of the Rwandan President, Paul Kagame, against prosecution by a non-African court, but such protection has also been extended to President Omar Hassan al-Bashir of Sudan. Following an application on 14 July 2008 by the prosecutor of the International Criminal Court (ICC) for a warrant of arrest under article 58 of the Rome Statute against the Sudanese President, the AU called on the UN Security Council to suspend the ICC's indictment of the Sudanese President for Darfur war crimes.⁸² The AU contended that the indictment would not only destabilise the country, but also undermine efforts to resolve the ongoing humanitarian crisis in Darfur. Again, the AU's reaction to the prosecutor's application for a warrant of arrest is seen as going against the principle of universal jurisdiction and the responsibility to protect. This is despite the fact that the AU, while condemning the application, reiterated the⁸³

⁸⁰ n above, para 5(i).

⁸¹ n above, para 5(iii).

⁸² See para 11(i) of the Communiqué of the Peace and Security Council of the AU, 142nd meeting, 21 July 2008, Addis Ababa, Ethiopia.

⁸³ n 82 above, para 2.

AU's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act, and in this respect, condemns once again the gross violations of human rights in Darfur.

Without arguing on the merits of the intended proceedings against the Sudanese President, it is critical that the ICC be allowed to exercise its independence and not be subject to any interference whatsoever from the AU in particular. The AU's interference in this matter is in violation of article 26 of the African Charter which provides that state parties to the Charter shall have the duty to guarantee the independence of the courts. The ICC is a competent court that is entrusted by the international community to dispense justice, whether or not the accused person is an African leader. Indeed, one of the principles of the AU is the respect for the rule of law and it may be argued that the AU's reaction to the Prosecutor's application is a sign of a discrepancy between what the AU believes on paper and what it practises. In such a situation, the responsibility to protect cannot thrive, at least not at the AU level.

3.3 Art 4(j) of the Constitutive Act: Request for intervention

The responsibility to protect can also be effected by an AU member state requesting the AU to intervene in order to restore peace and security in accordance with article 4(j) of the Constitutive Act. In such a case, the importance of the decision by the AU to intervene cannot be overemphasised. The advice of the PSCAU is also important in this regard, since it seeks to enable the Assembly to make informed decisions on whether or not to intervene in a particular member state. From the above, it can be observed that not only does the AU exercise its responsibility to protect on its own volition, but it is also prompted to act by member states. It is, however, not clear if the AU can be compelled to fulfil its responsibility to protect by the citizens in their individual capacity or through representations by civil society. Having observed that the AU is not in support of its own member states' leadership being subjected to international court proceedings, it is doubtful whether such intervention can be undertaken in the case where an African leader is perpetrating violations of human rights, including the right to peace and security.

In an attempt to clarify the need to transform the 'right to intervene' into a 'responsibility to protect', Evans and Sahnoun state the following:⁸⁴

If the international community is to respond to this challenge, the whole debate must be turned on its head. The issue must be reframed as an argument not about the 'right to intervene' but about the 'responsibility to protect.' And it has to be accepted that although this responsibility is owed by all sovereign states to their own citizens in the first instance, it must be

⁸⁴ Evans & Sahnoun (n 25 above).

picked up by the international community if that first-tier responsibility is abdicated, or if it cannot be exercised.

An important point, which Evans and Sahnoun raise, is that if we were to use this alternative language, then the change in terminology (from 'intervention' to 'protection') avoids the language of 'humanitarian intervention'.⁸⁵

According to Evans and Sahnoun, the application of 'the responsibility to protect' rather than 'the right to intervene' has three big spin-offs, namely, that it implies an evaluation of the issues from the point of view of those needing support as opposed to those who may be considering intervention; that it implies that the state concerned bears the primary responsibility to protect its citizens from violations of human rights; and that as an umbrella concept (ie the 'responsibility to protect') it embraces other responsibilities of 'reacting', 'preventing' and 'rebuilding'.⁸⁶ What is of paramount importance is the fact that the responsibility to protect at the international level is triggered by a state's inability or unwillingness to fulfil its primary responsibility to protect or is itself the perpetrator.

Evans and Sahnoun argue that 'even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people'.⁸⁷ They argue that it is now commonly acknowledged that sovereignty represents a two-pronged responsibility, namely, external responsibility, wherein states are responsible for respecting the sovereignty of other states, and internal responsibility, wherein states are responsible for respecting the dignity and basic rights of all the peoples within its territory.⁸⁸

The dual responsibility which sovereignty implies is now understood within the contemporary human rights discourse. The culture of impunity and indifference is an antithesis of sovereignty. It is the absence of this dual responsibility that has brought about untold suffering to African people with certain African states constantly turning a blind eye to gross human rights violations within their territories.

At face value, the right of the AU to intervene in a member state seems to be in conflict with the principle of non-interference under article 4(g) of the Constitutive Act and article 4(f) of the PSCAU Protocol, thus possibly frustrating the responsibility to protect at the AU level. Article 4(f) of the PSCAU Protocol provides for the principle of non-interference by any member state (and not the AU) in the internal affairs of another, and the Constitutive Act provides for the same principle of guiding the workings of the PSCAU. What is worth noting is that neither the Constitutive Act nor the PSCAU Protocol precludes the

⁸⁵ As above.

⁸⁶ As above.

⁸⁷ Evans & Sahnoun (n 25 above) 3.

⁸⁸ As above.

AU from exercising the right to intervene as a continental body responsible for peace and security in Africa. A reading of these instruments suggests that no AU member state may interfere in the internal affairs of another member state but may intervene through the AU which has a right to do so in terms of the Constitutive Act. It is unfortunate, however, that these instruments do not define the terms 'interfere' and 'intervene' which, while generally having the same meaning, they may in fact mean different things, conceptually speaking.

Over and above the responsibility to protect, the AU's right to intervene in a member state also operationalises the right of all peoples to peace and security under article 23(1) of the African Charter and the right of member states to live in peace and security under article 4(1) of the Constitutive Act. What remains a problem with this right is its content and ambit. As rightly pointed out by Packer and Rukare, the Constitutive Act is not clear on whether the definition of intervention is to be limited to the use of force or viewed broadly as including mediation, peacekeeping missions, sanctions and any other non-forcible measures.⁸⁹ Based on the fact that article 13(2) of the PSCAU Protocol envisages the establishment of an African Standby Force, Baimu and Sturman prefer to confine such intervention to one by means of military force.⁹⁰ In support of this assertion, Kindiki is of the view that, considering the fact that the intervention under article 4(h) of the Constitutive Act will entail responding to 'grave circumstances', which include war crimes, genocide and crimes against humanity, the presumption is that the intervention will be by the use of armed force because only proportional use of armed force is likely to address these 'grave circumstances'.⁹¹

Packer and Rukare,⁹² however, do concede that this right to intervene may also involve non-forcible measures such as mediation, peacekeeping missions, sanctions or any other measures. This viewpoint is informed by the AU's principles of peaceful resolution of conflicts between member states,⁹³ the prohibition of the use or threat of force among member states,⁹⁴ peaceful coexistence of member states and the right to live in peace and security,⁹⁵ and respect for the sanctity of human life and condemnation and rejection of impunity, political assassination, acts of terrorism, and subversive activities.⁹⁶ I therefore support the view that the right of the AU to 'intervene' in a member state encompasses both forcible and non-forcible measures, depending

⁸⁹ Packer & Rukare (n 66 above) 372.

⁹⁰ Baimu & Sturman (n 59 above).

⁹¹ Kindiki (n 67 above) 107.

⁹² Packer & Rukare (n 66 above) 372.

⁹³ Art 4(e) Constitutive Act.

⁹⁴ Art 4(f) Constitutive Act.

⁹⁵ Art 4(i) Constitutive Act.

⁹⁶ Art 4(o) Constitutive Act.

on the nature of the threat to peace and security. The question is about what is deemed to be ‘the best cause of action’ in the circumstances as recommended by the Chairperson of the AU under article 12(5) of the PSCAU Protocol. The circumstances prevailing in the member state would therefore inform the nature of the intervention strategy, whether forcible or otherwise. The main objective of such intervention, in whatever way it is shaped, is to ensure that the responsibility to protect is achieved in order to afford protection, especially to the most vulnerable groups who suffer in the hands of the AU’s member states.

Another point, which is closely linked to the risk of inaction by the AU, is that a difference of opinion between the Assembly and the PSCAU is bound to occur, especially when a decision arises on whether or not the AU should intervene in a particular member state. However, the Assembly will have the final word on the matter. Assume the PSCAU determines a situation to be representing a ‘threat to legitimate order’ and duly reports to the Assembly with the backing of the institutions closely working with it, such as the African Commission. If the Assembly assesses such a situation differently, tension would be inevitable between these organs, resulting in the peace and security framework being jeopardised, and the responsibility to protect being compromised.

3.4 Unconstitutional changes of government

Unconstitutional changes of governments remain a threat to Africa’s peace and security. Unconstitutional governments also breed violations of human rights. During its 164th and 165th meetings, the PSCAU condemned the *coup d’état* in the Republic of Guinea which took place on 24 December 2008.⁹⁷ The PSCAU stated in no uncertain terms that the *coup* was a flagrant violation of the Constitution of Guinea and other relevant AU instruments, as well as its demand to constitutional order. As a result of the *coup*, the PSCAU decided to suspend the participation of Guinea in the activities of the AU until the return to constitutional order in accordance with the relevant provisions of the AU Constitutive Act and the Lomé Declaration of July 2000 on unconstitutional changes of government.⁹⁸

Despite receiving the negative reports of SADC, the AU and the Pan-African Parliament observers on the Zimbabwean President run-off elections held on 27 June 2008,⁹⁹ the AU recognised Mr Robert Mugabe as the President of Zimbabwe in contravention of the principle under article 4(p) of the Constitutive Act on the condemnation and

⁹⁷ See Communiqué, Peace and Security Council 165th meeting, 29 December 2008, Addis Ababa, Ethiopia, PSC/PR/Comm(CLV).

⁹⁸ As above.

⁹⁹ See, eg, the *Report of the Pan-African Parliament Election Observer Mission PAP/S/RPT/76/08* <http://www.pan-africanparliament.org/Controls/Documents.aspx?DID=1029> (accessed 12 April 2010).

rejection of unconstitutional changes of governments. The AU, instead, supported the call for the creation of a government of national unity, by implication legitimising Mr Mugabe's illegal presidency.¹⁰⁰ The AU further issued a stern warning while appealing to states and parties concerned to refrain from any action that may negatively impact on the climate of dialogue. As regards states' 'interference' in Zimbabwean affairs, the AU's message was loud and clear: No AU member states had the right to interfere in the internal affairs of another member state. This approach is, with respect, counter-productive in effecting the responsibility to protect by the AU.

Article 4(p) of the Constitutive Act clearly condemns and rejects unconstitutional changes of governments. A punitive measure found in the Constitutive Act against unconstitutional governments is that they shall not be allowed to participate in the activities of the AU.¹⁰¹ In terms of article 5(2)(g) of the PSCAU Protocol, one criterion used in electing members of the PSCAU is a respect for constitutional governance in accordance with the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). Among other things, the PSCAU is empowered, under article 7(g) of the PSCAU Protocol, to institute sanctions whenever an unconstitutional change of government takes place in a member state, as provided for in the Lomé Declaration. The problem with sanctions (no matter what form they take) is that they tend to impact negatively upon civilian populations. Article 7(g) of the PSCAU Protocol empowers the PSCAU to institute sanctions and Rule 36(c) of the Rules of Procedure of the Executive Council of the AU empowers the Executive Council to apply sanctions imposed by the AU Assembly in respect of unconstitutional changes of government, as specified in Rules 35, 36 and 37 of the Rules of Procedure of the AU Assembly.

Unconstitutional changes of government remain a challenging issue facing the AU. Following the unconstitutional change of government that occurred in Madagascar on 17 March 2009, the PSCAU held several meetings,¹⁰² wherein it strongly condemned the situation and decided to suspend the country from participating in the activities of the AU, in conformity with the Lomé Declaration of July 2000 and the AU Constitutive Act.¹⁰³ During its 216th meeting held on 19 February

¹⁰⁰ See Resolution on Zimbabwe (Assembly/AU/Res 1 (XI)).

¹⁰¹ Art 30 Constitutive Act.

¹⁰² The meetings took place as follows: 16 March 2009 (179th meeting); 17 March 2009 (180th meeting); 20 March 2009 (181st meeting); 21 August 2009 (200th meeting); 10 September 2009 (202nd meeting); 9 November 2009 (208th meeting); and 7 December 2009 (211th meeting).

¹⁰³ See the Report of the Chairperson of the Commission on the Situation in Madagascar, Peace and Security 216th Meeting of the Peace and Security Council, 19 February 2010, Addis Ababa, Ethiopia, PSC/PR/2(CCXVI).

2010, the PSCAU issued a Communiqué¹⁰⁴ condemning the seizure of power by force that took place in Niger on 18 February 2010. Among other things, the PSCAU decided to suspend the participation of Niger in all activities of the AU until the effective restoration of constitutional order in the country, as it existed before the referendum of 4 August 2009.

The question posed here is whether the AU has a right to intervene in the circumstances under article 4(h) of the Constitutive Act read together with article 4(j) of the PSCAU Protocol. The underlying principle behind the AU's right to intervene is to restore peace and security. Although the meaning of what is to constitute a 'serious threat to legitimate order', the term that is likely to feature in article 4(h) of the Constitutive Act remains a problem. As discussed above, it would generally seem that unconstitutional changes of governments are classical cases of serious threats to legitimate order. It must be noted, however, that not all unconstitutional changes of government present serious threats to legitimate order. Assuming a democratically-elected government becomes autocratic during its tenure and one way of remedying the situation is to stage a *coup d'état*, the question is whether the AU would be justified in intervening. The answer to this question would be that if such an unconstitutional change of government threatens peace and security, then the AU would be justified in intervening in the member state concerned.

While the Constitutive Act is concerned with unconstitutional changes of government, it is silent on the unconstitutional continuation of governments. The latter has unfortunately become a disturbing trend where African leaders have generally remained in power though elections that are deemed not free and fair.

4 Conclusion

The article has discussed the AU as a contributor to peace and security through exercising its responsibility to protect human rights on the African continent. The question is whether 'the sad story of our human factory' on the continent can be reversed through the various structural arrangements within the AU. While the principle of the responsibility to protect remains controversial, the AU has taken the lead by embedding it within article 4(h) of the Constitutive Act. This is very significant in addressing peace and security on the African continent, a continent that has been described as 'the most threatened of all the other continents'.¹⁰⁵

¹⁰⁴ Communiqué of the 216th Meeting of the Peace and Security Council, 19 February 2010, Addis Ababa, Ethiopia, PSC/PR/COMM.2(CCXVI).

¹⁰⁵ AP Mutharika 'The role of the United Nations Security Council in African peace management: Some proposals' (1996) 17 *Michigan Journal of International Law* 561.

The new faces of international security in the twenty-first century require a greater emphasis on the notion of the responsibility to protect, especially in Africa. The already discussed three-dimensional definition of the responsibility to protect introduces a powerful tool for the AU in addressing the continent's challenges. The responsibility to protect builds a solid bridge between human rights, on the one hand, and international security on the other. This highlighted that the responsibility to protect also comprises the responsibility to prevent, the responsibility to rebuild and the responsibility to react. Whether this is practically feasible in Africa remains an open question. It would seem that in practice the AU has not as yet achieved enough considering the serious human rights violations and insecurity that generally engulf the continent. Conflicts and unconstitutional changes in government require that the responsibility to protect be enforced by the AU. The fact that article 4(h) of the Constitutive Act has already been applied in a number of African states points to the fact that the AU is at least embracing the responsibility to protect. Of course a more robust debate on the responsibility to protect *vis-à-vis* the principle of intervention is still required in Africa.

Summarising the African story, Jones sees the continent as having many challenges and much hope.¹⁰⁶ While the AU offers some hope in addressing some of Africa's many challenges, it is also faced with structural challenges, which include member states that are not prepared to ensure that human rights are respected, protected, promoted and fulfilled. This is a major challenge that not only frustrates sustainable development, but also undermines human security in Africa. Article 4(h) of the Constitutive Act offers some hope which AU member states should take advantage of.

That Africa generally remains a continent of perpetual suffering resulting from African states' inability to promote, protect and respect human rights is not in dispute. It was almost a decade ago that, in his most defining moment as the former British Prime Minister, Mr Tony Blair, declared that '[t]he state of Africa is a scar on the conscience of the world'.¹⁰⁷ Unfortunately, this remains a reality even today, especially in so far as implementing the responsibility to protect. Is there any hope that the scar on the conscience of Africa itself can begin to heal? The AU has what it takes to ensure that the principle of intervention is effectively implemented in grave circumstances, such as war crimes, genocide and crimes against humanity.

¹⁰⁶ See T Jones 'Africa: Many challenges, much hope' (1995) 89 *American Society of International Law Proceedings* 484.

¹⁰⁷ The speech was given to the Labour Party conference in October 2001.