15 The African Union and the Responsibility to Protect
Principles and Limitations

Ademola Abass

1 Introduction

There is nothing inherently new, or redoubtably extraordinary, in the proposition that States should shoulder the responsibility to protect their own people. Nor is it indeed a groundbreaking discovery that other States choose not to stand idly by while a State decimates its own citizens. If we exclude the travestied interpretation of sovereignty – which, for some States, seems to imply that a State is at liberty to wreak havoc on its own people – the very notion of sovereignty implies that a State bears an almost sacrosanct responsibility to protect its people against all forms of evils, including those that may originate from within the State itself, even if inadvertently.

It is when a State fails to discharge this responsibility, and the United Nations Security Council's (SC's) administered collective security under Chapter VII of the Charter fails to rescue the situation, that another State, or a group of States, acting as a *deus ex machina*, intervene to halt or prevent the wanton destruction of lives and property occurring in the State concerned. 'States playing God' (an inexact approximation of the Greek aphorism *deus ex machina* – 'god out of machine') is one way of looking at humanitarian intervention, especially since it is up to those States to decide for themselves that the human suffering in the target State has reached a level deemed unacceptable by any civilisation to warrant their intervention.

Humanitarian intervention has never been free from controversy, and for good reasons too. While some incidents of what were arguably humanitarian intervention – such as Tanzania's disposal of the murderous Idi Amin's regime in Uganda in 1979 – present isolated instances of persuasiveness, the vast majority of humanitarian interventions can be readily passed off as a shield for meddlesomeness, and are

In recent times – precisely since the raucous, blatant aerial invasion of Yugoslav forces by the North Atlantic Treaty Organisation (NATO) in Kosovo – the controversy about the legality of humanitarian intervention had somewhat abated. The hope for a revival of that debate, following Serbia's case against 10 NATO States before the International Court of Justice (ICJ), was dashed by the fact that the Alliance did not to plead humanitarian intervention as a justification for the 1999 action.[1] Only Belgium raised the plea in its memorial, but then, the fact that the case did not survive the provisional measures stage meant that the ICJ was spared pronouncing on the legality of humanitarian intervention.

In 2005, the General Assembly (GA) convened an unprecedented summit of world leaders as a follow-up to the 2000 Millennium Summit. The World Summit Outcome Document (WSO Document) embodied the principle of Responsibility to Protect (RtoP).[2] In two core paragraphs (138 and 139), States and the international community accept their different responsibilities to protect. Whilst States accept the responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing, the international community, through the United Nations (UN), commits to 'the responsibility to use appropriate diplomatic, humanitarian and other peaceful means ... to help to protect populations from' the same crimes States commit to prevent. The difference is that whereas a State's responsibility to protect its people is primary, the international community can only act as a secondary actor, and only when a State has failed in its own responsibility and is also unable to utilise assistance provided by the international community towards meeting that obligation.

Since the euphoric reception of RtoP in 2005 as a new international norm, a huge controversy has ensued about what the notion actually entails and how it is to be implemented. So far, critical points of discourse have included whether, in theory, RtoP is different from humanitarian intervention, when force can be used against a State that has failed to fulfil its RtoP obligation towards its people, and how the various elements of RtoP are to be implemented in practice. The most important issue of all remains how to reconcile RtoP with sovereignty, the fundamental basis for the existence of a State.

For a start, the international community sought to nip any potential controversy about RtoP in the bud by conceptually distinguishing the concept from its analogous counterpart, humanitarian intervention. Whether this early effort to elevate RtoP beyond the cryptogenic doctrinal debates about RtoP remains to be seen. However, several questions remain. Principal among these is whether, in lieu of the Security Council, other actors can take forcible measures to protect human lives. The WSO Document, as with other allied instruments, confers on the Security Council the ultimate authority to take forcible action towards vindicating RtoP. But considerable doubts linger as to whether this conferral precludes such actors as regional organi-

This chapter responds to this query by examining how the African Union (AU), the organisation credited with pioneering international efforts at legislating on RtoP, understands its responsibility to protect. In particular, it considers the various provisions of the Constitutive Act of the AU (AU Act), related to the Union's principles of 'non-indifference' and 'non-interference', as well as its right to intervene in its Member States, and their impact on RtoP. The chapter also discusses whether, in the contemplation of the AU's Ezulwini Consensus and several allied instruments, there is room for regional organisations to act in the stead of the Security Council whenever a dire RtoP situation arises. With reference to the AU 'intervention' in Kenya and Darfur, the chapter discusses the progress and pitfalls of implementing RtoP in Africa.

2 RtoP: Origin and Principles

It is not possible to calibrate RtoP, and there can be no last word on the concept's exact origin. Theories and views differ, depending on who is seeking and for what purposes. Commentators have traced the origin of RtoP to such rudimentary developments in nineteenth-century international law as the Martens Clause, contained in the 1899 and 1907 Hague Conventions.[3] Others have argued that the notion of RtoP emerged only recently. What is certain, though, is that from the late 1990s onwards, the notion that States bear a responsibility to protect their people began to appear rather ubiquitously in academic and policy discourses, although the doctrinal scope of such early conceptions did not exactly coincide with what is today regarded as RtoP.[4]

If one cares deeply about the concept's historical development, it is plausible to assert that as the notion that is used today, RtoP owes its popularity to the pioneering exposure of the concept by the International Commission on Intervention and State Sovereignty (ICISS) in 2001, [5] which was itself inspired by the fall-out from NATO's action against Serbia and Montenegro in Kosovo. The deep division caused the world over by the unauthorised NATO invasion of the Former Republic of Yugoslavia, particularly among the permanent members of the Security Council (the P5), created a high degree of solid perplexity in the international legal order. The vexed question was whether States should or should not act whenever the Security Council fails to act to stop the violent repression or destruction of people by their own governments or other elements, as with Rwanda. Those who believe States *should* act asserted humanitarian intervention in support of NATO, although, as already noted, NATO itself did not make this an official justification of its action in Kosovo. However, those opposed contend that humanitarian interventions, even if morally sensible, are antithetical to the established international legal order which confers sovereignty on States and regulates the instances permissible under

legal imperfections, against the legal superiority of sovereignty, often underwritten by a great moral perfidy.

In 1999 and 2000, reflecting on the perplexity warranted by the diametrical contest between the legal and deontological positions embodied by sovereignty and humanitarian intervention respectively, the then Secretary-General of the UN, Kofi Annan, wondered,

> if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?[7]

The international response to this query, first embodied in the report of the ICISS and later the WSO Document, consists largely in the enshrining of a series of principles of RtoP which will demarcate the provinces of the nascent concept from the legal perimeters of sovereignty on the one hand, and humanitarian intervention on the other.

Interestingly, the ICISS had chosen not to revamp the debate on humanitarian intervention, despite the apparent closeness of the doctrine to RtoP, by altogether avoiding the use of the phrase 'humanitarian intervention'. The reason for the ICISS's choice of term, or more specifically, its avoidance of 'humanitarian intervention', was due to policy objections. As the body noted,

> We have responded in this respect to the very strong opposition expressed by humanitarian agencies, humanitarian organisations and humanitarian workers towards any militarisation of the word 'humanitarian': whatever motives of those engaging in the intervention, it is anathema for humanitarian relief and assistance sector to have this word appropriated to describe any kind of military action.[8]

The subversion of an essentially legal term by policy considerations, which was clearly what the ICISS pandered to in this instance, does not necessarily solve any problem, or, in fact, makes too much of a compelling case. To be sure, States have always used force to deliver humanitarian assistance (this is not humanitarian intervention, but assistance). In such cases, as with Somalia in 1994, the justification for the use of force is simply to facilitate the delivery of humanitarian aid and assistance to needy populations, especially where fighters deliberately make it impossible for food and other materials to reach needy people in conflict. In fact, countless UNSC resolutions have encouraged the use of force or 'all necessary means' to facilitate the implementation of UN mandates which, almost invariably, include the delivery of aid to needy peoples. Thus, if we accept the reasoning of the humanitarian agencies, which provided the ICISS with the rationale for jettisoning the term 'humanitarian

avoidance of the phrase has not had any real effect on the discourse, but on the contrary, has actually fuelled the relapse into the 'humanitarian intervention debate', underscores the limited utility of appealing to superficial rationality.

The second reason proffered by the ICISS for jettisoning the phrase 'humanitarian intervention' is more persuasive. As the Commission said, 'the use of an inherently approving word like "humanitarian" tends to prejudge the very question in issue – that is, whether the intervention is in fact defensible'.[9] Indeed, using the term 'humanitarian intervention' in the context of RtoP prejudges – and, thus, potentially compromises – the arguable, potentially self-justifying and self-sustaining identity of RtoP.

As a concept, RtoP thus operates on the principle that a State has the primary responsibility to protect its people. If a State fails in this responsibility, that still does not give outsiders the right to automatically intervene in the State. Rather, the international community must render assistance to that State, in terms of capacities to enable it meet to its responsibility. However, if, despite this assistance, a State is 'unwilling or unable' to protect its people, then the international community's responsibility is activated.[10]

The measures that the international community may take in vindicating its right under paragraph 139 are staggered: they range from diplomatic and humanitarian to means under Chapter VI and VIII of the UN Charter. Should these measures fail to redress the situation, then:

> we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[11]

This statement has been interpreted as not imposing any hard obligation on the international community, but rather, merely pointing 'toward a voluntary, rather than a mandatory, engagement', and that 'states commit themselves to act only 'on a case-by-case basis' through the Council, which again stands in contrast to the assumption of a systematic duty'.[12]

Whether this is a correct reading of paragraph 139 is open to debate. However, it should be pointed out that as a matter of practice, States rarely assume international obligations under non-binding instruments such as the WSO Document on mandatory terms. Yet, by adopting flexible or voluntary expressions, as they do in paragraph 139, it does not necessarily follow that States intend bad faith: on the contrary, it may simply manifest their desire to leave themselves a bit of 'wriggle

to protect in the WSO Document. For diplomatic intervention, it envisages that this would be undertaken by the UN (Chapter VI) and regional organisations (Chapter VIII). However, with regard to military intervention as the last resort, the Security Council is the only organ expressly nominated for that purpose (Chapter VII). This schema raises some interesting questions. Does this mean that regional organisations are precluded from undertaking military intervention regarding RtoP, since they are confined to Chapter VIII? And what do we make of the fact that Chapter VIII itself does permit regional enforcement action under certain circumstances? Certainly, the international community's responsibility to protect is activated whenever a State fails its responsibility, but what if the ultimate representative of that international community, the Security Council, is, like the State, 'unwilling or unable' to act as it has in fact been on several occasions?

3 Regional Organisations and Residual Responsibility to Protect: The 'Ezulwini Consensus' and the Particular Case of the AU

At the 7th Extraordinary Session of the AU Executive Council at Ezulwini, Swaziland on 7 and 8 March 2005, the AU adopted the 'Ezulwini Consensus', a document which embodies a common African position on several issues contained in the UN Secretary-General Report of the High-Level Panel on Threats, Challenges and Change, including UN reform.[13] Although the principal objective of the Ezulwini meeting pertained to the agitation for two permanent seats for Africa on the UNSC, the AU Assembly used the opportunity to pronounce its position on many other issues. Regarding RtoP, the Consensus states that 'an authorisation for the use of force by the Security Council *should be* in line with the conditions and criteria proposed by the Panel, but this condition *should not undermine the* responsibility of the international community to protect'.[14]

This statement is quite telling, particularly because six months before the world would warm towards RtoP, Africa had not only recognised the inevitability of the concept, but was already pondering ways of ensuring that the concept did not become hostage to Security Council power, like many initiatives before it. The statement is equally important for another reason. It implies the basis upon which the AU would claim to retain a residual responsibility for undertaking military intervention towards RtoP.

Obviously, the AU accepts the primacy of the Security Council deploying military operations, but only insofar as the Council behaves responsibly, which means, as the AU puts it, the Council applies the High-Level Panel conditions in a way that *undermines* the ability of the international community to discharge RtoP.

proportionality and a balance of convenience.[15] These are resoundingly subjective matters, and the probability that the Security Council will bring its awkward politiking to bear on the conditions at a critical time, given its rather appalling record of inaction, is almost assured.

At Ezulwini, the AU was not under any illusion that the Security Council would ever apply these conditions in a manner that would guarantee that African lives would not be lost to the shenanigans of Security Council politics. Precedents of the Security Council's extremely costly inaction in African conflicts, particularly during the 1994 Rwanda genocide, have left many Africans comprehensively disillusioned about leaving the implementation of RtoP to the exclusive charge of the Security Council, especially with respect to the use of force to halt or avert humanitarian disasters. As a precaution, the AU declared at Ezulwini that:

> Since the General Assembly and the Security Council are *often far from the scenes of conflicts and may not be in a position to undertake effectively* a proper appreciation of the nature and development of conflict situations, *it is imperative* that Regional Organisations, *in areas of proximity to conflicts, are empowered to take actions* in this regard. The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; *although in certain situations*, such approval could be granted 'after the fact' in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[16]

To be sure, the High-Level Panel was also mindful of the risk of leaving it all to the Security Council. As it notes in paragraph 202 of its report, 'the Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all'. Notwithstanding this realisation, the Panel

> endorse[s] the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[17]

Notwithstanding, the Panel attempted to ally States' fears about compromising RtoP on the platform of the Security Council's inaction. Adopting a subtle strategy, the Panel laid the full weight of the responsibility to protect on the Security Council, cajoling the organ as bearing an almost sacred responsibility towards humanity. Bringing RtoP within those issues that the Security Council can always deal with,

> step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a 'threat to international peace and security', not especially difficult when breaches of international law are involved.[18]

It will be recalled that three years earlier, the ICISS has exercised itself on the same issue. It states that:

> the Commission is in absolutely no doubt that there is *no better or more appropriate* body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty ... That was the overwhelming consensus we found in all our consultations around the world. If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that *the central role of the Security Council will have to be at the heArt of that consensus.* The task is *not to find alternatives to the Security Council as a source of authority,* but to make the Security Council work much better than it has.[19]

The ICISS' insistence on the Security Council exercising exclusive authority over forcible RtoP measures is to be understood against the background of the fear expressed by many States about leaving such an important decision regarding the use of force within sovereign States to individual States. Additionally, the body was clearly guided by the collective security structure of the UN Charter, since it explicitly referred to Charter VII provisions.[20] Given that the Security Council is already vested with the primary responsibility to maintain international peace and security (Article 24 UN Charter), and is empowered to take enforcement actions against States (Chapter VII), it seems natural that it is the organ favoured with the central role for implementing RtoP.

In an attempt to discourage States from prospecting for *alternatives* to the Security Council's exclusive competence over forcible interventions for RtoP purposes – which neither the Panel nor the ICISS favoured[21] – the Panel sought ways to make the Security Council function more responsibly. It appealed to the permanent members of the Council, 'to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses'.[22] The World Summit perpetuated this effort by including the appeal in the Draft WSO Document as a way of averting the strategic use of the veto to undermine RtoP. However, under enormous pressure, principally from the US, the World Summit ditched the clause,

The Security Council's objection to the proposal that it refrains from vetoing resolutions related to egregious crimes makes the case for it retaining exclusive powers over authorisation of the use of force in RtoP cases untenable to the AU. For the Union, the choice is between leaving everything to the Security Council and risking doing nothing, and taking steps towards protecting human lives prior to worrying about compliance with legal obligations. The AU clearly, and arguably quite rightly too, prefers the latter.

From its statement at Ezulwini quoted above, it is clear that, like any other regional organisation, the AU intends to exercise full control over the implementation of RtoP in conflicts occurring in Africa. While the Union obviously does agree that Security Council approval is required for military actions, it nevertheless reserves for itself the right to act first and then seek retroactive approval, as the situation may warrant. In other words, the AU signalled at Ezulwini that it does not regard Article 53(1) of the UN Charter, under which regional organisations are obligated to seek Security Council authorisation for their enforcement actions, to be always applicable. For the AU, this disaggregated authorisation regime is a sound compromise between those advocating that only the Security Council may implement RtoP (such as the ICISS) and those who believe, as the US argued at the World Summit, that unilateral actions should be permitted under certain circumstances.

The argument may be made that since the AU Ezulwini Consensus antedated the World Summit, its position on residuality has subsequently been overtaken by the latter, which leaves the authority over the use of force exclusively to the Security Council. *Pace*, since the World Summit, several AU members States have reiterated their stance on the role of regional organisations in implementing RtoP. During the Security Council Open Debate on Maintenance of Peace and Security in Africa, UNSC 28 August 2007, the representative of Benin, Jean-Marie Ehouzou, stated that:

> It is clear that the United Nations system in conducting peacekeeping operations has, until recently, operated with marginal involvement by regional organisations. The time has come to make the necessary changes in order to make it possible for the organisations to fully play their role in the collective security system established by the Charter – both in terms of the doctrine of peace operations and in the allocation of related resources.[24]

In Africa, the AU and sub-regional organisations such as the Economic Community of West-African States (ECOWAS) will most likely assert their right to intervene on the basis of the WSO Document, which clearly envisages some sort of cooperation between the Security Council and regional organisations, and the Ezulwini

have the requisite human resources and allied capacities to physically undertake such a task is another issue altogether.

Precedents including ECOWAS' interventions in Liberia and Sierra Leone indicate that such sub-regional organisations, in particular ECOWAS, should be expected to intervene militarily in their Member States to protect peoples' lives. Fortunately, ECOWAS does not suffer the legal ambiguity of Article 4(h) of the AU Act.[25] In 1999, the organisation adopted a very important protocol, which entitled it to take enforcement actions in any of its Member States without their consent.[26] Since then, ECOWAS has applied the protocol on several occasions, including repelling Faure Eyadema's unconstitutional ascendancy to the Togolese presidency after the death of his father, and imposing arms embargoes on Guinea and Niger in 2009.

The indignation of African States against conferring the Security Council with exclusive responsibility to protect peoples derives from a history of costly disappointments and betrayals suffered by Africa, inflicted by the notoriously selective collective security of the UN. Such unprincipled application of collective security has instigated African States to openly defy some Security Council decisions. For instance, the Organisation of African Unity's (OAU's) Assembly of Heads of State and Government adopted the Ouagadougou decision,[27] which mandated its members to disregard the Security Council sanctions imposed on Libya pursuant to the Lockerbie Affair.[28]

However, one must be cautious when interpreting such rare acts of defiance. True, the deep frustration with Security Council inaction that is often felt by many African States sometimes makes astute compliance with their international obligations difficult. But to then describe such disregarded Charter rules (for example, that the Security Council must authorise regional enforcement actions) as mere 'legal niceties' is to totally miss the point.[29] When States ignore the Security Council's decisions, including their obligations under the UN Charter, it is certainly not because they believe that such decisions and obligations are worthless: it is rather a cold reminder to force the Council's conscience to acknowledge the fact that its irresponsible behaviour and discriminatory practices pose a serious threat to its legitimacy, and to how much it can inspire cooperation from States.

As a matter of fact, the High-Level Panel itself recognised the fact that the Security Council often undermines its own legitimacy. Nevertheless, the Panel recommended working to strengthen the organ from within:

> One of the reasons why States may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But the solution is not to reduce the Council to impotence and irrelevance: it is to work from within

Having dealt briefly with the basis for the AU's, and regional organisations' more generally, residual authority to take military action for RtoP purposes, the chapter now turns to examine the regulatory and institutional mechanisms through which the Union may implement RtoP.

4 The Constitutive Act of the AU: Does 'Non-Indifference' Mean 'Military Intervention'?

4.1 Article 4(h) as an Innovation

Article 4(h) of the AU Act confers the Union with the 'right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'. The vast majority of commentators regard this provision as embodying the doctrine of humanitarian intervention, apparently because it addresses the prevention of egregious international crimes.[31]

Prior to the advent of the AU, no single international organisation had provided for humanitarian intervention in its treaty. Indeed, the controversy surrounding the doctrine was mostly doctrinal, since States themselves hardly ever assert the right of humanitarian intervention in their practice. For instance, despite the bibulous commentary that trailed NATO's aerial bombardment of the former Yugoslavia during the Kosovo crisis,[32] that organisation never formally claimed that it acted out of humanitarian consideration, although one of its Member States, Belgium, included the claim in its defence in the case brought against 10 NATO States by Serbia at the ICJ.[33] Not even in what may be described as probably the best instance of humanitarian intervention yet, that is, Tanzania's forcible expulsion of Idi Amin from Uganda in 1979, did Tanzania claim to have acted out of humanitarian considerations. Rather, President Nyerere said he was responding to a previous attack on his country by Uganda, especially the seizure and annexation of the Kagera Salient, a Tanzanian border area with Uganda.

Indeed, it was not until 1989, when ECOWAS intervened in Liberia, apparently 'to stop the senseless killings', and the US, UK and France established a safe haven over the 36th parallel in Northern Iraq to shield the revolting Kurdish population from Saddam Hussein's atrocities in 1991, that international organisations and individual States began to formally attribute their unilateral uses of force to humanitarian intervention.[34] Even then, the fact that the bold and groundbreaking ECOWAS Collective Security Protocol,[35] adopted 10 years after its claim to humanitarian intervention in Liberia, did not incorporate humanitarian intervention, and the UK's lack of reference to that doctrine in its public justification of the NATO action,[36] 10 years after protecting Kurds in Northern Iraq allegedly on the same ground, argu-

The fact that the AU has now formally provided for the right to intervene in its Member States recently matched the erstwhile academic controversy about humanitarian intervention with practice, since it is now possible to hold the organisation to its obligations under its constitutive instrument. Accordingly, it has been argued that the article gives the Union the right to intervene in its members' conflicts, regardless of whether the State in question consents to such an intervention. Proponents further contend that the use of force to protect human lives in times of conflicts accords generally with the paradigmatic shift of the AU from the 'non-interference' stance of its predecessor, the OAU, to its own widely acclaimed 'non-indifference'. The question to ask is whether this is an accurate interpretation of Article 4(h) of the AU Act.

4.2 Article 4(h) AU Act: Common Interpretative Fallacies

It is beyond doubt that Article 4(h) of the AU Act encapsulates the principle that the AU must intervene when egregious international crimes occur in its Member States. It is less certain, however, what this intervention entails in *reality*, and how it is to be reconciled with the principle embodied by Article 4(g) obliging AU Member States not to interfere in their internal affairs. Does the so-called 'non-indifference' principle of the AU mean the same thing as 'military intervention', as many commentators tend to argue, or has the purpose of Article 4(h) simply been exaggerated? This query is critical to a consideration of how the AU intends to implement RtoP, for the precise reason that such a task implicates interfering in the internal affairs of its Member States.

There are two possible ways of interpreting the principle enshrined in Article 4(h). First, and obviously the view adopted by most commentators, is a literal interpretation, which suggests that the principle of 'non-indifference' necessarily implies the 'use of force'. This view does not withstand analysis.

During the 1999 Sirte Summit, which considered the texts of the AU Act, the OAU Secretariat identified key principles that should guide the process of the institutional and structural changes and the transformation of the OAU into the AU. The first relates to the determination, stipulated in preambular paragraph 10 of the Act, 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them [to] discharge their respective mandates effectively'.[37] Second, there is the view that the objectives and principles of the AU, enshrined in Articles 3 and 4 of the Constitutive Act, provide an *advanced degree of political cooperation* covering, *inter alia*, the promotion and defence of African common positions on issues of interest to the continent and its peoples, and so forth.[38]

It must be pointed out that the formation of the AU and the discussion of its Constitutive Act took place against the backdrop of the OAU's inability to deal

of the requisite human and material resources for the operation. While some have argued that the then president of Nigeria, Olusegun Obasanjo, was heavily inclined towards including Article 4(h) in the Act as a means of dealing with problems that, if unchecked, could lead to the massive inflow of refugees into Nigeria,[39] others have argued that the provision, along with those on good governance, democracy and human rights, was inserted merely to please foreign donors.[40]

While neither of these perspectives is easy to validate, given the absence of evidence adduced in support by their proponents, it is incontrovertible that intervention by ECOWAS in West African conflicts consternated the OAU, which saw this as a direct challenge to its relevance on the continent. Indeed, it would have been totally untenable for the AU Act not to include a provision of the nature of Article 4(h), given the mass atrocities occurring in OAU Member States. As the day's legal counsel of the OAU has noted:

> in an era in which post-independence Africa has witnessed the horrors of genocide and ethnic cleansing perpetrated on its own soil and against her own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the right to intervene in respect of such grave circumstances as war crimes, genocide and crimes against humanity.[41]

As a matter of fact, while speaking in regard to the proposed Pan-African Parliament, the then president of Mali, Alpha Konare (who would later become the first Chairperson of the AU), made it clear that 'it was not necessary for such an institution to be a supra-national body, but rather a forum that allowed for discussions and exchange of views on the AU, as well as the participation of civil society in the project'.[42] Konare's view was echoed by the majority of African rulers, who eagerly extended the proposal to embrace all the institutions and organs of the Union, including, of course, the Union itself. Not once did any of the African leaders present at Sirte refer to Article 4(h) in terms of non-consensual military intervention by the AU in its member conflicts.

An appreciation of the historical *leitmotif* of Article 4(h) is of critical relevance to the explication of its utility by the AU, even though this initial motive does not necessarily bind the article's future. Nevertheless, it goes against the history and policy of the AU to assume that it intended the provision as the basis for using force against its Member States, despite the article speaking clearly to intervention by the Union in its Member States.

Surely, if the AU intervenes politically in its Member States during a national crisis, it would be seen to have chosen the path of 'non-indifference'; but it does not then follow that it *must* intervene militarily in the situation, much less that it has an obligation or duty to undertake humanitarian intervention. To be sure, the

ian intervention under Article 4(h) would be unconvincing. If it could be said that the AU possesses such powers courtesy of a literal interpretation of that provision, as indeed a simplistic reading of that provision implies, there are various counterpoints, drawn from the *travaux préparatoires* of the AU Act and several policy instruments, that make such an interpretation at best naïve.

The view that Article 4(h) confers on the AU a right of humanitarian intervention undoubtedly has doctrinal merit; nonetheless, it underscores an acute lack of awareness of both the history of negotiation of the Union and its practice in the 10 years of its existence. It is one thing to say that the 'non-indifference' principle suggests that the AU will not keep silent in the face of wanton destruction of lives and property in any of its Member States, but it is quite another thing to then imply that the Union would always go, guns blazing, into any of its Member States to protect human lives on the basis of Article 4(h).

The intervention by the AU Mission in Sudan (AMIS) shreds any modicum of doubt relating to the conclusion drawn above.[43] The intervention by AMIS occurred in the shadows of the Ezulwini Consensus, where the AU empowered itself to intervene in its Member States regardless of the Security Council or the GA, and the World Summit that fully endorsed RtoP. Yet, despite that, there was near universal clamour for the AU to take military action against the *Janjeweed* militia, to halt the extermination of the African tribes. The organisation had implored the Government of the Sudan to allow it to deploy a peacekeeping operation. In several of the meetings held at the Union's Headquarters in Addis Ababa related to the mission, not once did any of the AU States or their officials canvass for humanitarian intervention, or any type of non-consensual action for that matter.

Yet, the AU intervention in Darfur presented the Union with the best opportunity to authorise force to protect human lives which, as will be seen below, it had asserted to be its right at Ezulwini without the Security Council's approval. And going by ECOWAS' precedents in Liberia and Sierra Leone,[44] it was highly unlikely that the Security Council would have had objections had the AU so acted, especially given that the deployment of AMIS coincided with the euphoric adumbration of RtoP at the World Summit that same year.

However, the Kenyan debacle is a different matter. Quite clearly human lives were lost, and at a critical point in the impasse, no one could predict how the situation might turn out. The AU nonetheless made a considerable diplomatic effort, one that was *sine qua non*, in the schema of the WSO Document, to any eventual recourse to military intervention by the international community. Thus, Kenya could actually be read as a perfect example of how RtoP is meant to work. The Government of Kenya, like any other State, has the primary responsibility to protect its people. But when that government itself became implicated in fraudulent elections, which instigated a massive revolt and subsequent killings, it became obvious that the State

from paragraph 139 of the WSO Document, the world must first render assistance to enable the State to vindicate its own responsibility under paragraph 138.[46] Only if, despite that assistance, the situation persists, then the international community's own responsibility can be activated. In Kenya, the fact that the Kofi-Annan-led initiative, at the behest of the AU, succeeded, shows that the staggered process for implementing RtoP envisioned by the WSO Documents was indeed effective.[47]

Measured against the two scenarios discussed above, the conclusion seems inevitable that whilst there may be merit in construing the text of Article 4(h) as conferring a right of humanitarian intervention, State practice and the history of the AU Act reveal that African States intended the article to be no more than an embodiment of a continent-wide policy, agreed by all African States, to empower their Union to intervene *politically* in matters occurring in their territories. If the AU were to ever use force in the territories of its Member States, it will be to stop non-State actors or rebel groups, such as the *Interahamwe* and the *Janjaweed*, which caused havoc in Rwanda and Darfur respectively. Even then, it will be only insofar as such groups are not acting as mere fronts for their governments, as the *Janjaweed* militia is widely believed to be. Whatever the case may be, the AU will still require the consent of the State to come into the country before dealing with such groups.[48]

Consequently, the unwritten law of the AU Act is that Article 4(j) entitling the AU Member States to request its intervention (thus, peacekeeping provisions) will remain the basis for any intervention by the Union in the internal affairs of its Member States. Tragically, as far as conferring a *right* of humanitarian intervention in its Member States' conflicts is concerned, the future of Article 4(h) remains bleak. It is just as well, therefore, that in their explication of RtoP, the authors of the ICISS Report and the WSO Document deliberately avoided adopting the phrase 'humanitarian intervention', given the strong emotional sensitivity it tends to evoke among States.

5 The African Peace and Security Architecture and RtoP

In 2002, the AU adopted the Protocol Establishing the Peace and Security Council (PSC, hereafter PSC Protocol) in accordance with Article 5(2) of the AU Act. Article 1 of the PSC Protocol describes the organ as 'a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa',[49] and responsible, *inter alia,* for promoting 'peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development'.[50] In order to ensure

The Protocol confers enormous powers upon the PSC under Article 7, the essence of which is to 'approve the modalities for intervention by the Union in a Member State, following a decision by the Assembly, pursuant to Article 4(j) of the Constitutive Act'.[52] This provision is enabled by the fact that the PSC operates under the principles contained in Article 4(h) of the AU Act,[53] and as such, is empowered to 'recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments'.[54]

Considering the enormity of its collective security powers, the PSC can be regarded as Africa's equivalent to the UNSC, except that it does not have a veto. As with the Security Council under Article 25 of the UN Charter, however, the decisions of the PSC are binding on AU member States by virtue of Article 7(3) of its Protocol.[55]

The overall architecture of peace and security in Africa centres on the interactions among the AU, the PSC and several other elements established for the purpose of maintaining peace in Africa. The relations between the AU Assembly and the PSC are clear: the former is the Union's highest decision-making body, while the latter is the organisation's collective security powerhouse. That means that the task of implementing RtoP rests squarely on the PSC. It is for the Chairperson of the AU to bring those matters that s/he considers likely to threaten the peace and security of the continent to the PSC,[56] although s/he may also use his/her good offices to resolve disputes.[57]

Both the AU Assembly and the PSC are assisted by the Panel of the Wise, a quaintly named group of five eminent Africans[58] whose responsibility it is to 'advise the Peace and Security Council and the Chairperson of the Commission on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa'.[59] There is no provision that entitles the Panel to directly engage with States in attempts to resolve conflicts. Nevertheless, such a possibility is recognised by the fact that the Panel is able to, on its own initiative, take measures towards supporting the efforts of the Assembly and the PSC.[60]

Underlining this structure is a continent-wide early warning system designed to enable the AU to nip conflicts in the bud.[61] However, once violence erupts, diplomatic activities are intensified and may be complemented by some forms of military intervention. What type of mission is to be deployed comes down to the decision of the PSC. According to Article 8(13) of the PSC Protocol,

> Decisions of the Peace and Security Council shall generally be guided by the principle of consensus. In cases where consensus cannot be reached, the Peace and Security Council shall adopt its decisions on procedural matters by a sim-

How the PSC deals with this provision will have a direct impact on its ability to take enforcement actions when African lives are threatened. In procedural matters, the organ may apply the simple majority, while in all other matters, especially those involving peace and security, a two-thirds majority is required.

On the one hand, the absence of the veto from the PSC guarantees that no single State can hold the fate of nearly one billion Africans hostage, as is possible with the UNSC. On the other hand, the insistence on a two-thirds majority, although desirable for the purpose of achieving broadly-based support for action, will have the result that in practice, almost all enforcement actions will be impossible. Certainly, in an organisation in which one rich Member State has been known to pay the financial dues of several poor members to the Union in order to elicit their support for its position, a requirement of a two-thirds majority for important decisions leaves too much to be desired. It would have been preferable if such decisions concerning peace and security had been subject to the 'simple majority' rule, with procedural matters left to a two-thirds majority.

Arguendo, in order to deploy a military operation, the PSC requires the cooperation of the regional organisation concerned. This prospect is facilitated by Article 16 of the PSC Protocol, which not only makes these organisations pArt of Africa's peace and security architecture, but also obligates the PSC and the AU Chairperson to coordinate and harmonise their activities with regional mechanisms.

The schema for AU/RECS cooperation is neither detailed in the AU Act nor elaborated in the PSC Protocol. Such details are left to the Memorandum of Understanding between the AU and RECs in the field of peace and security, which is not a concern of this chapter. What is important to note, however, is that the bone of contention in AU/REC cooperation is the deployment of the regional elements of the African Stand-by Force, a continent-wide interventionist powerhouse envisaged by Article 13 of the PSC Protocol. Details of who will authorise what are still being worked out at both the AU and RECs levels, but it is important that the AU and RECs clearly demarcate the areas of responsibility.[62]

6 The Legality of Forcible Regional Implementation of RtoP under International Law

It does not automatically follow that, just because a regional organisation asserts a residual right to use force to protect human lives, such a claim automatically meets the requirements of international law. There is no doubt that the WSO Document, the High-Level Panel Report and the ICISS Report all contribute enormously to international law, especially regarding the relations of the Security Council to other

whatever rights or privileges regional organisations claim under these instruments must be reconciled with their obligations under the UN Charter.

Unless the AU is explicitly or implicitly authorised by the Security Council to take enforcement action in a Member State, an enforcement action by the Union, even to protect human lives, risks illegality under the Charter rules.[63] If the AU undertakes an enforcement action that the Security Council does not authorise prior to the action, or takes steps towards retroactively approving, the action is potentially illegitimate and will be seen to have breached Article 2(4) of the UN Charter.

However, if the AU takes the action pursuant to a request by the concerned Member State, then this presumably becomes a peacekeeping operation under Article 4(j) of the AU Act, which does not require Security Council authorisation. But if the AU later employs military force within that operation against, say, a rebel group within that Member State, but not the State itself, this is still an enforcement action, insofar as it is aimed at extracting the compliance of the target party with international law. What makes an action *enforcement* is not the party against which it is directed, but the purpose it seeks to achieve.

A regional enforcement action taken for the sole purpose of implementing RtoP may receive accolades from the whole world, but it does not escape the legal requirements of the UN Charter. The WSO Document, and other allied instruments, may confer some authority on the international community to protect people against the most reprehensible crimes in the world, but these obligations are derived from international instruments *other than* the UN Charter; hence, by virtue of Article 103 of the Charter, the Charter would prevail over such obligations, should there ever be a conflict between the two.

The argument may be made that since Article 103 is addressed to States and not to international organisations, and since the latter are not signatories to the UN Charter, their use of force (unauthorised by the Security Council) to implement RtoP is not in collision with Article 103. Sound as this argument may seem, it is difficult to see how States could escape collectively from obligations that they individually assume under the UN Charter. In any case, the action would still violate Article 53(1) of the Charter.

From a policy standpoint, the risk of the AU using force against 'the territorial integrity and political independence of its Member States' is extremely low, given the low probability that the Union will ever deploy military force without the consent of the Member State concerned. But what if, against all expectations, it does? Then the crux of the matter is whether such force breaches Article 2(4) of the Charter, even if it clearly breaches Article 53(1) of the Charter, which regulates such use of force by regional organisations.

The time-honoured argument is that any use of force except for self-defence or

UN Charter does not recognise humanitarian intervention, it seems acceptable to States in their practice. Alternatively, they argue that since one of the purposes of the UN is to protect peoples from the scourges of war, the use of force to prevent massive human rights violations or to protect people does not violate Article 2(4). Some even go so far as to argue that since Article 2(4) is only directed against uses of force that violate the 'territorial integrity or political independence' of States, the use of force for purposes other than these does not contravene Article 2(4).

This line of argument is prone to many pitfalls. To stArt with, customary international law is at best inchoate on humanitarian intervention. Furthermore, the Charter, which prescribes protecting people from the scourges of war as one of the UN's purposes, is the same Charter that specifies the means of achieving this goal: the Security Council's actions, or actions authorised by the Security Council. Those who argue that 'territorial integrity or political independence' is not violated by RtoP obviously discount the preferences of the target State, in addition to attaching undue importance to the physical structure of a State, rather than its political essence. That argument is always thin, and has been since Anthony D'Amato first made it in regard to the US military intervention in Grenada in 1983. Without a doubt, the use of force to protect people will in all aspects violate the territorial integrity and political independence of the State concerned. Thus, D'Amato's argument cannot be used for the purposes of RtoP; that is, if it ever made any sense at all.

The ICISS attempted to escape this kind of debate by deliberately avoiding using the phrase 'humanitarian intervention', allegedly because many stakeholders that it consulted in the course of its work objected to the militarisation of humanitarianism. In the Commission's view, 'it is anathema for the humanitarian relief and assistance sector to have this word appropriated to describe any kind of military action'.[64] Obviously there is something cynical about this argument. For many years, the UN has used military force to deliver humanitarian aid, starting with Somalia in 1994. Does such an action then cease to be 'humanitarian' just because it was delivered by military force? It is highly doubtful that humanitarian organisations and workers would object to military protection in war zones for fear of the action being seen as the militarisation of humanitarianism.

It is possible that, in the future, commentators will seek refuge in the doctrinal exposition of the concept of RtoP by the ICISS in order to justify the use of force against a State without its consent. The argument will go that since RtoP is designed to help States to discharge their responsibility to protect their people, it is a benevolent act taken for altruistic reasons, reasons that are ensconced in the six conditions prescribed by the ICISS to guide RtoP. Thus, the contention will be that the use of force by the international community comes at a great cost, and is something that the community resorts to only because a State is unable to protect its

its sovereignty, which, in RtoP vocabulary, means responsibility towards people, not control over them. The State that is the beneficiary of such largesse cannot be seen to reject help from concerned outsiders. Clearly, the new meaning of sovereignty drawn up by the ICISS was skillfully delivered to States through a process that was apparently cajoling, but subliminally akin to a gentle blackmail.

7 Conclusion

The emergence of RtoP as an international norm in 2005, five years after the adoption of the Millennium Development Goals (MDGs), undoubtedly reflects the mood of the international community and its desire to rigorously concern itself with improving the lot of humanity and protecting human lives from wanton destruction, both natural and, more importantly, man-made.

To be sure, 2005 was not the first time the world had sworn to 'never again' allow the scourges of war to blight humanity, something that has already happened several times over. It did so immediately after the end of the Second World War, did so again after nearly one million lives were exterminated in Rwanda under the watch of UN peacekeeping forces. Yet, like a recidivist criminal, the international community will be taken prisoner by the shenanigans of international politics, even before the ink dries on the pages where the mantra has once again been inscribed.

The Darfur Crisis leaves a somewhat bitter pill in the mouth of a resolute international community. It was nearly five years after the catastrophe had begun before the world began to engage seriously to protect human lives in Darfur. It mattered little that the Darfur Crisis, which began in 2003, worsened from 2005, the same year the world re-committed itself to protecting human security.

There is a great desire to leave the core tasks of protecting human lives to the Security Council. The combined provisions of the UN Charter, the clear preference of States that participated in the 2005 World Summit, and the various efforts that predated that summit, such as the salutary ICISS report reviewed above, all demonstrate that the greater pArt of the world earnestly desires that the Security Council take full charge.

However, history also tells us that the UNSC is always found wanting in the darkest moments of humankind, when decisiveness, courage and forthrightness are crucial for the future of humanity. Many times over, Africa has deliberately or inadvertently become the victim of the Security Council's most profound inaction. Asking Africans to once again trust a body that has proved several times to be totally useless when their lives are at stake is thus like squeezing a stone to yield water. Yet, the dictates of civilisation, the spirit of comity and the gargantuan privileges of camaraderie impel Africans to once again entrust the Security Council with the

they deem fit. This is, to be fair, a small price for the Security Council to pay for squandering its legitimacy.

Notes

1 *Serbia and Montenegro v Canada* (& 7 other NATO States) [2004] ICJ Rep 4.
2 UNGA '2005 World Summit Outcome' (2005) UN Doc A/60/L 1 (WSO Document).
3 J Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53 *JAL* 1 at 9.
4 For a survey of the origins of RtoP, see C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *AJIL* 99; K Kindiki, 'International Law on Trial: The Darfur Crisis and the Responsibility to Protect' (2007) 9 *IntlCLRev* 445-473; 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 *AfrHRLJ* 97; AL Bannon, 'The Responsibility to Protect: The UN World Summit and the Question of Unilateralism' (2005-2006) 115 *YaleLJ* 1157; M Kalkman, 'Responsibility to Protect: A Bow Without an Arrow' (2009) *CSLRev* 75; PD Williams, 'From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture' (2007), 106/423, *AfrAff* 253; J Sarkin (n 3); CC Joyner, ' "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention' (2006-2007) 47 *VaJIL* 693, 1.
5 International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report) (December 2001) <http://www.iciss.ca/report-en.asp> (ICISS Report).
6 These will include when a State defends itself against armed attack (Art 51) UN Charter, when the Security Council authorises an enforcement action against such a State (Chapter VII) or whenever States use force against such a State, if it had been a former enemy State during the Second World War on the basis of Art 107 of the Charter. This latter article is now widely considered obsolete, given that all former enemy States – Germany, Italy and Japan – are now members of the UN. A possible fourth ground – which this writer pioneered and which has been now reflected in the constitutions of such organisations as the AU and ECOWAS – is when a State agrees that force may be used against it by an international organisation to which it belongs, as indeed was the case with ECOWAS' action against Liberia and Togo in 1997 and 2005 respectively. On this controversial consensual intervention, see A Abass, 'The New Collective Security Mechanisms of ECOWAS: Innovation and Problems' (2000) 5(2) *JC&SL* 211; A Abass, *Regional Organisation and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (HArt Publishing, Oxford 2004), particularly ch 6.
7 ICISS Report (n 5).
8 Ibid para 1.40.
9 Ibid para 1.41.
10 WSO Document (n 2) para 139.
11 Ibid.
12 C Stahn (n 4) 108.

14 African Union (Executive Council), 'The Common African Position on the Proposed Reform of the United Nation: "The Ezulwini Consensus"' (Addis Abada 2005) Ext/EX.CL/2 (VII) at 6 (The Ezulwini Consensus) (emphasis added).
15 High-Level Panel Report (n 13) para 207.
16 Ezulwini Consensus (n 13) B(i).
17 High-Level Panel Report (n 13) para 203.
18 High-Level Panel Report (n 13) para 202.
19 ICISS Report (n 5) at 49, para 6.14.
20 Ibid at 50, para 6.16.
21 High-Level Panel Report (n 13) para 197
22 High-Level Panel Report (n 13) para 256
23 AL Bannon (n 4) at 1160.
24 UNSC Chamber 'Excerpted Statement on the Open Debate on Maintenance of Peace and Security in Africa' (2007) <http://www.responsibilitytoprotect.org/files/government-excerpts-28-aug-07(2).pdf > accessed 1 April 2011.
25 For analysis and a text of this protocol, see A Abass (2000) (n 6).
26 It is interesting that to date, no single ECOWAS State has challenged the legality of ECOWAS' enforcement action on the basis of the protocol, although at least one State decided to withdraw from the organisation.
27 Organisation of African Unity (Assembly of Heads of State and Government), 'Declarations and Decisions Adopted by the Thirty-fourth Ordinary Session of the Assembly of Heads of State and Government' (1998 Ouagadougo) AHG/OAU/AEC/Dec.1 (II) (Declarations and Decisions)
28 'The Crisis Between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom' AHG/Dec.127 (XXXIV) in Declarations and Decisions (n 26). In operative para 2, the Assembly 'DECIDES not to comply any longer with Security Council Resolutions 748 (1992) and 883 (1993) on sanctions, with effect from September 1998, if the United States of America and the United Kingdom refuse that the two suspects be tried in a third neutral country pursuant to the verdict of the International Court of Justice by July 1998, date on which the sanctions will be due for review, owing to the fact that the said resolutions violate Art 27 para 3, Art 33 and Art 36 para 3 of the United Nations Charter, and the considerable human and economic losses suffered by Libya and a number of other African peoples as a result of the sanctions'.
29 B Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85 *IRRC* 852, 807-824, writing that African leaders 'have shown themselves willing to push the frontiers of collective stability and security to the limit without regard for legal niceties such as the authorisation of the Security Council', at 821.
30 High-Level Panel Report (n 13) para 197.
31 NJ Udombana 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan' (2004) 27 *HumRtsQ* 1149; K Kindiki (2003) (n 4); K Kindiki (2007) (n 4); J Sarkin (n 3).
32 A Cassesse 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *EJIL* 23; B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1.
33 *Serbia and Montenegro v. Canada* (n 1)

vention at that time', but the UK Government had, nonetheless, asserted that it acted out of humanitarian consideration.
35 Ademola Abass (2000) (n 6).
36 Instead, Jack Straw, the then Foreign Secretary of the UK, had claimed, *inter alia*, that NATO's action was to support the Security Council resolution against Iraq.
37 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001).
38 Ibid, Art 3, 4.
39 TK Tieku, 'Explaining the Clash and Accommodation Interests of Major Actors in the Creation of the African Union' (2004) 103 *AfrAff* 251.
40 NJ Udombana, 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights' (2001-2002), 17 *AmUIntlLRev* 1177.
41 M Tiyanjana, 'Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union' (2001) 9 *AYIL* 3.
42 African Union and Pan-African Parliament, 'Formation of the African Union, African Economic Community and Pan-African Parliament' (2000) <http://unpan1.un.org/intradoc/groups/public/documents/idep/unpan003885.pdf> accessed 6 October 2011.
43 A Abass, 'The United Nations, the African Union, and the Darfur Crisis: Of Apology and Utopia' (2007) 54 *NILR* 414-440.
44 A Abass, 'The Implementation of Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention' (2001-2002) 1 *MiaIntl&CompLRev* 177.
45 WSO Document (n 2) para 138 states that 'Each 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. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability'.
46 WSO Document (n 2) para 139 states that 'the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out'.
47 Some believe that the UN was responsible for the success of RtoP in Kenya. According to Ed Luck, 'the only time the UN has actually applied [RtoP], was in the case of Kenya,

make it the focus of the efforts there. And Kofi Annan, the former … Secretary General who was doing mediation on ground at the time, has said since that RtoP was the lens through which he saw his whole efforts there', restated in M Schneider, 'Implementing the Responsibility to Protect in Kenya and Beyond', <http://www.crisisgroup.org/en/publication-type/speeches/2010/implementing-the-responsibility-to-protect-in-kenya-and-beyond.aspx> accessed 1 April 2011.

48 One of the core requirements of peacekeeping operations is that deployment must be based on consent by the Host State. Although the UN Charter contains no rules on peacekeeping, it is generally believed that customary international law underwrites peacekeeping operations.

49 African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) Art 1 (PSC Protocol).

50 Ibid. Art 3(a).

51 Ibid. Art 5 (1) (a), (b).

52 Ibid. Art 7 (1) (f).

53 Ibid. Art 4.

54 Ibid. Art 7(e).

55 'The Member States agree to accept and implement the decisions of the Peace and Security Council, in accordance with the Constitutive Act'.

56 PSC Protocol (n 50) Art 10 (2) (a).

57 Ibid. Art 10(2) (c).

58 Ibid. Art 11(2).

59 Ibid. Art 11(3).

60 Ibid. Art 11(4).

61 Ibid. Art 12.

62 See A Abass, *Protecting Human Security in Africa* (Oxford UP, Oxford 2010) ch 11 in particular.

63 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Art 53(1).

64 Report (n 5) at 9, para 1.40.

16 ASEAN Responses to the Responsibility to Protect
Challenges, Opportunities and Constraints

Noel M. Morada

1 Introduction

This chapter presents an overview of the challenges and constraints in promoting the Responsibility to Protect (RtoP) norms in Southeast Asia, focusing mainly on the potential role of the Association of Southeast Asian Nations (ASEAN) in preventing mass atrocities covered by RtoP. Specifically, it examines the characteristics of states and political systems of members of ASEAN, the political dynamics of the organisation, and to what extent its traditional norms and institutional set-up serve as the main challenges to promoting RtoP in this part of the world. The chapter also identifies some entry points or opportunities for RtoP promotion to gain some ground, notwithstanding the limitations within ASEAN. It also discusses the role of the Asia Pacific Centre for Responsibility to Protect (APRtoP) in promoting RtoP in Southeast Asia through its country programmes and regional engagement, and the extent to which RtoP is appreciated by civil society groups in the region, especially those engaged in peace, conflict prevention and post-conflict rebuilding efforts.

2 The Association of Southeast Asian Nations: An Overview

ASEAN came into being in August 1967, following several failed attempts at regional cooperation in Southeast Asia. The precursors to ASEAN were the Association of