

**THE AFRICAN UNION'S RIGHT OF INTERVENTION TO RESTORE
LEGITIMATE ORDER: HUMAN PROTECTION OR REGIME
ENTRENCHMENT?**

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DECLARATION

I, THABISO CAESAR MAVUSO, do solemnly declare that the ideas presented in this dissertation are my own and they are original. This dissertation has never been presented to any other university or institution. Where other people's works have been used, due acknowledgment has been made. I accordingly present this work in partial fulfilment of the award of the Master of Laws Degree in Human Rights and Democratisation in Africa, University of Pretoria, Republic of South Africa.

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DEDICATION

To the author, editor and finisher of this work, the Almighty God, be all the glory.

To you, Mama Rejoice Bongwe Mavuso, may your soul rest in eternal peace.

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“Ngiyabonga” (I thank you)

ACRONYMS

ACDEG	African Charter on Democracy Elections and Governance
AU	African Union
DCG	Democratically Constituted Government
ECOWAS	Economic Community of West African States
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tr
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NTC	National Transitional Council
OAS	Organisation of American States
OAU	Organisation of African Unity
OSCE	Organisation on Security and Cooperation in Europe
PSC	Peace and Security Council
PDI	Pro-Democratic Intervention
R2P	Responsibility to Protect
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
Universal Declaration	Universal Declaration of Human Rights

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*'A great principle is spreading across the world like wild fire. That principle, as we all know, is the revolutionary idea that the people, not the government, are sovereign...'**

* Bureau of Public Affairs, Current Policy No. 1240 'Panama: A just cause' (1990) 2, statement of Luigi R Einaudi, US Permanent Representative to the OAS.

Chapter one: Introduction

1.1 Background

The Organisation of African Unity (OAU) was born at a time when scant attention was paid to human rights. Emphasis was placed on the need to protect the newly independent weak states and to also assist those which remained colonised to fight colonial domination. Resultantly, the fundamental principles of the OAU, amongst others, included the sovereign equality of all member states; non- interference in the internal affairs of states and respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.¹ Since human rights were not prioritised on the agenda of the OAU, coupled with its categorical vehemence on the aforementioned principles of non-interference and sovereignty, heinous atrocities and massacres of citizens by their own leaders were committed, especially three infamous dictators of the 1970s, Idi Amin of Uganda, Jean-Bedel Bokassa of Central African Republic and Macias Nguema of Equatorial Guinea.² Efforts of the OAU to prevent the 1994 Rwanda genocide failed since the only institutional mechanism for conflict resolution was the Commission of Mediation, Conciliation, and Arbitration which, however, remained dormant from inception because African states regarded it as a ‘court’ yet they preferred non-confrontational methods of conflict resolution.³

When the OAU had run its course, the purpose for which it was created in 1963 having died, it was transformed to the African Union (AU). Its mandate was re-defined and the idea was to strengthen it so as not to be a toothless bulldog like its precursor. This saw a drastic relaxation of the non-interference and sovereignty principles, and a shift from state protection to human protection through the inclusion of human and peoples’ rights.⁴ Of paramount importance for purposes of this paper was the inclusion of the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances,

¹ Charter of the Organisation of African Unity, arts II & III.

² T Murithi, ‘The African Union’s transition from non-intervention to non-indifference: An ad hoc approach to the responsibility to protect’ 94 http://library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf (accessed 21 October 2012).

³ Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (Commissioned by the OAU), ‘*Rwanda: The preventable genocide*’ 11.4 . http://www.africa union.org/official_documents/reports/report_rowanda_genocide.pdf (accessed 22 June 2012).

⁴ Constitutive Act of the AU, para 9 of the preamble; Arts 3 & 4.

namely: war crimes, genocide and crimes against humanity.⁵ The African Union effectively became the first organisation, regionally and internationally, to embrace the concept of responsibility to protect within a treaty.⁶ This provision, however, has since been expansively amended to include the right of the African Union to intervene in a member state, not only in cases of serious human rights atrocities, but also where there is a threat to legitimate order and to restore peace and security.⁷ The concern of this paper, therefore, is the proposed amendment as further amplified below.

1.2 Statement of the problem

‘External military intervention for human protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda.’⁸ The right (or duty) of states to intervene in the internal affairs of another state for humanitarian purposes⁹, despite being an evolving concept, remains contentious in international law. Those who argue against it contend that it undermines customary international law and United Nations Charter principles such non-intervention, respect for territorial integrity, sovereignty and non-aggression. As Scudder¹⁰ puts it, ‘The lack of territorial sovereignty is often a key characteristic of so-called failed states where effective monopoly over the internal means of violence is lost.’ On the other hand, its proponents argue that it counters ‘the old-fashioned theory of state sovereignty, used to fend off criticisms of massacres.’¹¹ Despite the raging debate on the subject, and within seven months of its launching in July 2002, the African Union amended its Constitutive Act to expand the scope of the right of intervention in a member state in the following terms:

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 as well as a serious

⁵ AU Constitutive Act art 4(h).

⁶ D Kuwali ‘The end of humanitarian intervention: Evaluation of the African Union’s right of intervention’ *African Journal of Conflict Resolution* (2009) Vol.9 No.1, 47.

⁷ See n 12 below.

⁸ Report of the International Commission on Intervention and State Sovereignty (ICISS) ‘*The Responsibility to protect*’ VII <http://www.responsibilitytoprotect.org/index.php/publications> (accessed 24 June 2012).

⁹ In this paper, ‘Responsibility to protect’ (R2P) and ‘humanitarian intervention’ shall be used interchangeably.

¹⁰ J Scudder ‘Territorial integrity – Humanitarian intervention and R2P’ (2010)

http://www.exploringgeopolitics.org/Publication_Scudder_Jamie_Humanitarian_Interventions_R2P_Responsibility_To_Protect_Assistance_Discourse_Failed_States_Human_Rights_Legal_Moral_Questions_Preservation.html (accessed 16 September 2012).

¹¹ B Kioko ‘The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’ (2003) *International Review of the Red Cross* Vol. 85 No. 852.

threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.¹²

However, the Protocol does not define what constitutes ‘a serious threat to legitimate order’ or, at the very least, what a ‘legitimate order’ is within the context of the Protocol. The use of the phrase ‘serious threat’ implies pre-emptive intervention, which goes to the root of the international law debate on anticipatory self-defence. On legitimate order, this seems to suggest that the Union seeks to revert to its old ways of being an ‘old boys’ club’ who seek to protect each other in perpetually clinging to power whilst oppressing their people or even murdering them. This paper seeks to probe whether the inclusion of the right of intervention to restore legitimate order is not a ploy to protect regimes instead of protecting human rights. In line with Theodore Hodge’s view that the African Union is as bad as its predecessor, the OAU,¹³ it raises the question whether or not this is a recession back to the old ways of the OAU.

1.3 Research question

The main question which this paper seeks to answer is, ‘how should the AU implement the right of intervention where there is a threat to legitimate order in order to restore peace and stability?’ Within this broad question, the following subsidiary questions will be addressed:

- a) What is a ‘legitimate order’? That is to say, does this exclude a popular *coup d’état*, and can an unduly oppressive regime be classified as a legitimate order for protection under article 4(h)?
- b) How can a ‘serious threat’ to legitimate order be measured?
- c) Is the proposed right of intervention one for humanitarian purposes within the dimensions of R2P, or is it a backward political step towards regime entrenchment?
- d) How can the right of intervention in response to a threat to legitimate order be implemented without violating the United Nations Charter and customary international law?

¹² Protocol on Amendments to the Constitutive Act of the African Union (February 2003, not yet in force).

¹³ TT Hodge ‘From OAU to AU: Same Old Lady, New Dress’ 29 July 2002

<http://www.theperspective.org/oaautoau.html> (accessed 8 June 2012).

1.4 Rationale for the study

The high prevalence of conflict in Africa demands a quest for African solutions to African problems in order to ward off what Africa perceives as Western imperialism and neo-colonialism. The coming into force of the African Charter on Democracy, Elections and Governance will give impetus to the Peace and Security Council (PSC) of the African Union discharging its obligations under this Charter and, where appropriate, make such recommendations envisaged in the amended Article 4(h) of the Constitutive Act. Pending attainment of the requisite ratifications of the Protocol to the Amendment of the Act, it is worthwhile to explore the modalities of implementation of Article 4(h) of the Protocol, and that is the soul of this paper. Scholars have written at length on the responsibility to protect (R2P) and the right of intervention against the threshold of genocide, war crimes and crimes against humanity. Such scholarships, however, have not escalated the question to interventions to restore legitimate order. This study, therefore, seeks to venture into the unprecedented dimension of the right to intervene in another state in the sphere of regional organisations.

1.5 Scope and limitation of the study

This paper does not purport to be a comprehensive analysis of the duty to intervene under Article 4(h) of the AU Act. It does not cover intervention for humanitarian purposes and the responsibility to protect in situations of genocide, war crimes and crimes against humanity, for which an abundance of works is already available. This study only focuses on the last aspect of the proposed amendment of article 4(h) – that is political intervention ‘[where there is]...a serious threat to legitimate order to restore peace and stability to the Member State of the Union...’ A new form of intervention is about to emerge within the African Union, being judicial intervention to prosecute the newly invented international crime of unconstitutional change of government.¹⁴ This paper will not address judicial intervention either. Lastly, in a limited study of this kind, it will not be possible to exhaust all challenges attendant to intervention in Africa. Therefore this study will focus on those challenges which are germane to the proposed amendment of article 4(h). Other overarching challenges to Africa’s peace

¹⁴ Art 28E of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (15 May 2012), AU doc. Exp/Min/IV/Rev.7.

and security regime (such as financial, human resource and institutional challenges), which have been adequately addressed by other scholars, need not be overemphasised.

1.6 Methodology

Desktop research constitutes the major portion of the scholarship. While analysing the right of intervention to restore legitimate order, the author will critically comment on the socio-political and legal framework of the African Union within the horizon of the United Nations and customary international law.

1.7 Literature review

On intervention in civil strife and internal wars, Dugard¹⁵ distinguishes between situations where the rebels are not externally assisted, on the one hand, and where they are externally assisted, on the other hand. Regarding externally unassisted rebels he states that these are domestic matters in the exercise of self-determination and there is no right of intervention even if it degenerates into a civil war. Regarding externally assisted rebels he states that states may intervene to assist the government under attack since the assistance by external forces amounts to unlawful use of force and such intervention would be justified as collective self-defence under Article 51 of the UN Charter.¹⁶

Kuwali opines that generally, the use of force without authorisation by the UN Security Council violates Article 2(4) of the UN Charter. He further states, however, that military intervention pursuant to a treaty may be lawful in certain circumstances since such intervention is consensual and therefore not in violation of Article 2(4) of the UN Charter.

While the threshold for war crimes, genocide, or crimes against humanity is not contentious, the meaning of the 2003 amendment of article 4(h) raises serious questions. International courts and the Rome Statute of the International Criminal Court (ICC) will continue to define the parameters of the former provisions. Contrastingly, the phrase ‘serious threat to legitimate order’ does not appear in any previous instrument, either internationally or within the AU or its predecessor, the OAU.¹⁷

¹⁵ J Dugard *International Law: A South African perspective* (2011) 515

¹⁶ As above 516.

¹⁷ J Allain ‘The true challenges to the United Nations System of the use of force: The failures of Kosovo and Iraq and the emergence of the African Union’ (2004) *Max Planck Yearbook of United Nations Law* Vol.8 280.

B. Kioko,¹⁸ argues that the intervention should conform to the hopes and aspirations of the African peoples. He further contends that intervening to keep in power a predatory regime that practises bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the values and standards that the Union has set for itself, and that since decision-making within the AU is by consensus or at least two-thirds majority, any unpopular intervention or the possibility of a decision to intervene without a clear mission and purpose of restoring the values and standards of the AU is bound to fail.

1.8 Outline of chapters

This proposal constitutes an introduction of the entire project and shall accordingly be incorporated into the study as chapter one. In chapter two the study will trace the history of the right of intervention from the transition from Organisation of African Unity to African Union; the amendment of Article 4(h) from a purely humanitarian intervention to political intervention. In this chapter the author will also analyse the circumstances which led to, and the eventual (2003) amendment of the Constitutive Act of the African Union within seven months of its launching. Chapter three will form the core of this study, where the author will embark on a dissection of Article 4(h) of the Constitutive Act of the AU, amongst other things, attempting to answer questions such as, ‘what constitutes a threat to legitimate order?’; ‘legitimate order and constitutional order – can a constitutional government, albeit no longer legitimate, be protected under this provision (the so-called popular uprisings). Chapter four will deal with the challenges and prospects of the right of intervention where there is a threat to legitimate order. This chapter seeks to answer questions such as what should be the relationship between humanitarian intervention (*R2P simpliciter*) and the right to intervene in response to a threat to legitimate order; is such intervention compatible with the UN Charter - whether the African Union is not usurping the peace-keeping and peace-enforcement functions of the United Nations; and whether such intervention will not entrench regime protection at the expense of individual human rights as was the case with the OAU. The final chapter of this paper will comprise conclusions and recommendations in light of the discussions in the other chapters.

¹⁸ Kioko (n 11 above) 816.

Chapter two: Evolution of the right of intervention under the African Union

2.1 Introduction

The African Union in its present form derives its shape and colour from the failures of its predecessor, the Organisation of African Unity, to protect human rights and to respond to various socio-economic and political challenges. One of the major causes for the latter's failures was its culture of non-interference and non-intervention in the affairs of other states, which resulted in African leaders being indifferent to atrocities committed by their peers on their own people. The right of intervention in Africa therefore was unknown under the former regime. This chapter shall examine from a historical perspective the right of intervention in Africa, and how it evolved through the different epochs of pan-Africanism. The chapter shall focus on the period from which the OAU was established, the transition from OAU to AU, up to the amendment of the Constitutive Act of the AU to include the right to intervene where there is a serious threat to legitimate order and to restore peace and stability.

2.2 From OAU to AU

Pan-Africanism is the spirit underlying the AU, which historically revealed itself under the OAU¹⁹ as a collective desire to confront the socio-political challenges engulfing the continent.²⁰ The first paragraph of the Constitutive Act of the AU describes it as 'the noble ideals which guided the founding fathers of our Continental Organisation and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States.' Whilst Ghana's President Kwame Nkrumah, (the 'chief pioneer' of the OAU) had advocated for a 'United States of Africa', which was to be a supranational organisation of African states; the OAU Charter was the antithesis of Nkrumah's ideology.²¹ Instead of relinquishing sovereignty to a supranational body, it accentuated non-interference, sovereign equality and respect for territorial integrity

¹⁹ Para 5 of the preamble to the OAU Charter reflects it as 'a common determination... in response to the aspirations of our people for brotherhood and solidarity in larger unity...'

²⁰ Murithi (n 2 above).

²¹ F Viljoen *International human rights law in Africa* (2012)156

of member states.²² Its main objectives were to fight colonialism and to protect newly independent states.²³

The OAU was set up on 25 May 1963 and survived for thirty nine years when it was replaced by the AU in 2002. The objectives of each of these Organisations were patterned on the challenges Africa faced at each given time.²⁴ As Viljoen points out:

The evolution of pan-African institutions relevant to human rights reflects changing and contested notions of what African unity and solidarity entail, and may be charted on an intergovernmental-supranational continuum.²⁵

1994 marked the end of colonialism when South Africa gained independence. The old problems were over, and new challenges such as the Rwanda genocide and other civil wars emerged in the last decade of the 20th Century. The nature of war had completely changed from international armed conflicts to non-international armed conflicts, and military objectives were no longer combatants but innocent civilians. After the end of the Cold War in the 1990s, 'it was difficult to operationalise humanitarian intervention [since] at that time the UN was generally reluctant to issue Security Council resolutions that were perceived as infringing on the sovereignty of Member States.'²⁶ Meanwhile, the objectives of the OAU were changing, as human rights became a concern.²⁷ In 1993 the OAU Mechanism for Conflict Prevention, Management and Resolution was adopted as a response to Africa's perennial internal conflicts. However, the Charter's sacred provisions on non-interference and respect for territorial integrity accounted for the Mechanism's ineffectiveness.²⁸ The OAU had become redundant and irrelevant for contemporary challenges, and the need for a revised mandate of the Organisation was undoubtedly apparent. Failure of the Organisation to adapt to intervening socio-political and economic challenges could spell its extinction.

The much-cherished dream of early pan-Africanists, that of a United States of Africa, was thrown a lifeline in July 1999 at the OAU's Algiers Summit when Libyan President,

²² As above.

²³ Art II of the OAU Charter.

²⁴ E.g. the need to eradicate colonialism in dependent states and the contested boundaries among some states (disrespect of *uti possidetis*) informs the objectives of the OAU.

²⁵ Viljoen (n 21 above).

²⁶ Murithi (n 2 above).

²⁷ E.g. the African Charter on Human and Peoples' Rights was adopted in 1981.

²⁸ H Hestermeyer 'African Union replaces Organization of African Unity' (2002) German Law Journal 3.

Muammar Gaddafi invited the OAU to an extraordinary summit which was to be held in Sirte in September 1999. The aim of the summit was to discuss ways of making the OAU effective on collective security and conflicts on the continent ‘so as to keep pace with political and economic developments taking place in the world and the preparation required of Africa.’²⁹ Instead of Gaddafi’s proposal of a ‘stronger and united Africa’ member states opted for an ‘African Union’ which was to be established by a constitutive Act ‘in conformity with the ultimate objectives of [the Charter of the OAU]...’³⁰ The Sirte Declaration also mandated the Council of Ministers to prepare the legal text for the new organisation, an exercise which culminated in the adoption of the Constitutive Act of the AU in Lomé, Togo in July 2000. The Act came into force on 26 May 2001. The AU was eventually launched in Durban, South Africa in July 2002.

2.3 The text of the Constitutive Act of the AU

The launching of the AU marked the birth of the newest international regional organisation and the next phase of pan-Africanism. The Constitutive Act of the AU reflects the contest between those who favoured a supranational United States of Africa and those who clung to individual sovereignty. It depicts a middle-of-the-road approach between liberals who advocated for the protection of human rights in Africa, on the one hand, and conservatives who advocated for non-intervention and non-interference in the domestic affairs of member states. As Viljoen points out:

The AU Constitutive Act presents its reader with the paradox between a quest for greater unity, inspired by generations of pan-Africanists who promoted solidarity and cohesion, and unwavering reverence for the borders imposed in colonial times and sanctified by post-colonial governments.³¹

Articles 3 and 4 of the Constitutive Act of the AU respectively set out the principles and objectives of the Union, which is a blend of old conservative ideologies which existed under the defunct OAU and liberal approaches aimed at ‘piercing the veil’ of sovereignty.³² Relevant for purposes of this paper are three novel provisions under Article 4 of the Act. These are the

²⁹ *AHG/Dec. 140 (XXXV)*.

³⁰ Sirte Declaration (9.9.99), EAHG/Draft/Decl. (IV) Rev.1.

³¹ Viljoen (n 21 above) 172.

³² E.g. the contest between the first two objectives under Article 3 is that of the need to ‘achieve greater unity and solidarity between African countries...’ vis-a-vis the need to ‘defend sovereignty, territorial integrity and independence of Member States.’ Similarly, Article 4(a) represents a contest between ‘sovereign equality’ and ‘interdependence’ (as opposed to independence) among Member States of the Union.

right of the Union to intervene in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;³³ the right of Member States to request intervention from the Union in order to restore peace and security;³⁴ and condemnation and rejection of unconstitutional changes of government.³⁵ These were the early responses by the AU to the scourge of conflicts in Africa. They have since been escalated to broader dimensions through amendment of the Constitutive Act of the AU, establishment of the PSC as well as the proposed amendment of the Protocol on the Statute of the African Court of Justice and Human Rights,³⁶ which seeks to punish as an international crime, *inter alia*, the offence of unconstitutional change of government.

2.4 Amendment of the Constitutive Act

At the Sirte Summit of 1999 in his grandiose vision, Colonel Muammar Gaddafi presented the OAU with two options; one of a federation akin to the United States of America (envisioned as the United States of Africa), and the other being a confederation modelled on the former Soviet Union (Union of African States.)³⁷ The resultant AU was a compromise between those who favoured a revolutionary approach and those who preferred a gradualist approach to the challenges Africa faced, particularly on the subject of intervention in another Member State.³⁸

The difference in approach was characterized as being between those that wanted to run and those who wanted to walk by President Thabo Mbeki in his intervention during the debate at the 4th Extra-Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (OAU), Sirte (Libya), 9 September 1999.³⁹

The original proposal on Article 4(h) during the various Ministerial debates both in Tripoli and Lomé, when the Constitutive Act was drafted, envisaged the right of the AU to intervene to deal with situations of ‘a serious threat to legitimate order’ to restore peace and stability to member states, and to deal with situations resulting from ‘external aggression’ and ‘unrest.’⁴⁰

³³ Art 4(h).

³⁴ Art 4(j).

³⁵ Art 4(p).

³⁶ Exp/Min/IV/Rev.7.

³⁷ Kioko (n 11 above). 811.

³⁸ As above.

³⁹ As above.

⁴⁰ T Maluwa ‘The OAU/African Union and International Law: Mapping new boundaries or revising old terrain?’ (April 2004) *American Society of International Law* Vol. 98 235.

In the end, the agreed provision was that of ‘[t]he 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.’⁴¹ Regarding restoration of peace and security in a member state, it was left to individual member states to request the AU to intervene for such purposes, and the Union had no right to intervene *proprio motu*.⁴²

The adoption of the Constitutive Act did not conclude the debate on ‘supranationalism’ and ‘intergovernmentalism’.⁴³ Instead it gave impetus to developments on intervention within the Union. For instance, in 2002 the Protocol establishing PSC was adopted⁴⁴ for purposes of intervention in cases of genocide, war crimes and crimes against humanity.⁴⁵ In that same vein, Gaddafi’s ‘hangover’ for a United States of Africa following his failed attempt during the Sirte Summit in 1999, manifested itself in Durban in 2002 when he tabled ‘a range of proposed amendments to the Constitutive Act, including a single army for Africa, an AU Chairman with presidential status and greater powers of intervention in Member States – in other words, for an institution that came closer to a “United States of Africa”’.⁴⁶ The proposed amendments, however, were turned down on a point of technicality by President Thabo Mbeki of South Africa in his capacity as Chairperson of the AU. He invoked Rule 8 of the newly adopted rules of procedure requiring that items proposed by Member States must be submitted sixty days prior to the Summit together with supporting documents and draft decisions communicated to the chairperson thirty days before the session.⁴⁷

The inauguration of the AU therefore proceeded amidst proposals for the amendment of the Constitutive Act. This therefore explains why hardly two years of its coming into force, a Protocol to amend the Act was signed at the First Extra-Ordinary Summit held in Addis Ababa, Ethiopia, in February 2003 at the insistence of Libya on its previous proposals for the amendments. The salient provisions of the Protocol, which is an amendment of Article 4(h) of the Constitutive Act, read as follows:

⁴¹ Art 4(h) of the Constitutive Act of the AU.

⁴² Art 4(j).

⁴³ Viljoen (n 21 above) 181.

⁴⁴ It came into force on 26 December 2003.

⁴⁵ Art 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

⁴⁶ E Baimu and K Sturman ‘Amendment to the African Union’s right to intervene: A shift from human security to regime security’ (2003) *African Security Review* Vol 12 No 2.

⁴⁷ As above.

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 as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.

The fact that the amendment was hastily made within seven months of the launching of the AU, coupled with the fact that the recommendation of the AU Executive Council for such amendment was adopted without rigorous debate, raised expectations that the Protocol would be ratified speedily. Nine years later, however, the Protocol has been ratified by only nine states and signed by thirty six.⁴⁸ The Protocol will enter into force after thirty days of deposit of the instrument of ratification by two-thirds of the AU member states.

2.5 Conclusion

The right of intervention was unknown under the defunct OAU, whose cornerstone principles were non-intervention, non-interference and respect for territorial integrity and the sovereignty of member states. The lessons learnt from the OAU's non-interventionist regime came at a high price worth millions of human life, egregious violations of human rights by heads of state and other atrocities. In the absence of any provision allowing one member state to question another concerning matters which were 'purely domestic', the OAU proved ineffective to respond to newly evolving challenges in the continent. Yet at the same time it was becoming redundant, having achieved the objectives for which it was formed in 1963. Hence there was an apparent need for a revised mandate of the Organisation to enable it to effectively respond to African crises. It was against this backdrop that the OAU was replaced by the AU in 2002, with the Constitutive Act of the AU conferring on the Union the right to intervene in a member state in respect of mass atrocity crimes, being war crimes, genocide and crimes against humanity. In 2003 this right of intervention was amended to include intervention where there is a serious threat to legitimate order and to restore peace and stability in a member state.

While the legitimacy of the right of intervention under Article 4(h) in its current form under international law has been the subject of controversy, commentators are generally agreed that it is in line with prevailing notions of the responsibility to protect (R2P). The confinement of

⁴⁸ <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf> (accessed 23 October 2012).

the right of intervention to genocide, war crimes and crimes against humanity was premised on the understanding that these grounds of intervention raised no controversy since they now generally reflect violations of international law as shown in the statutes of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Yugoslavia (ICTY) and the Rome Statute of the International Criminal Court (ICC).⁴⁹ The extension of the right of intervention to include intervention to restore legitimate order, however, is unprecedented in international law and will keep the debate on the legitimacy of intervention alive. In the next chapter this paper will embark on an interpretative dissection of the proposed amendment. In particular, the paper will look at Article 4(h) as a form of responsibility to protect and the relationship between the right of intervention to restore legitimate order and the pre-existing threshold for intervention (that is, genocide, war-crimes and crimes against humanity). The paper will also attempt to define the concepts of a ‘legitimate order’ as well as a ‘threat’ to legitimate order, peace and security.

⁴⁹ Maluwa (n 40 above) 237.

Chapter three: Dissecting Article 4(h) – An interpretative analysis

3.1 Introduction

The transformation of the OAU into the AU came along with long-term effects to the pan-African peace and security regime, particularly on the subject of sovereignty and intervention for civilian protection.⁵⁰ In as much as the Constitutive Act of the AU provides for the right of the Union to intervene in respect of egregious human rights atrocities, the AU still aligns itself closely with the principles governing the responsibility to protect. The relationship between R2P and the amended Article 4(h) will be explored at length in chapter 4 of this paper. This chapter will focus on the import of the proposed amendment to Article 4(h) in a bid to define certain controversial words and phrases employed by the architects of the amendment Protocol. Maluwa states that earlier proposals of the right of intervention by the Union to deal with serious threats to legitimate order were rejected by member states as both premature and dangerous because the AU did not have any means and standards of assessment whether any situation constituted a serious threat to legitimate order.⁵¹

Despite these earlier observations by dissidents to the right of intervention for political reasons, the AU later proceeded to adopt the amendment Protocol but conspicuously neglected to provide definitions for such antagonistic phrases when it matters the most. This paper will therefore answer the questions: what constitutes ‘a serious threat to legitimate order’? By what yardstick is the legitimacy of the order measured? Before answering the question of what constitutes a (serious) threat to legitimate order, it is appropriate to first define what a ‘legitimate order’ is.

3.2 What is a ‘legitimate order’?

The right of intervention in another member state for political reasons⁵² before the amendment to the Constitutive Act of the AU vested in the individual member states.⁵³ The

⁵⁰ K Powell ‘The African Union’s emerging peace and security regime: Opportunities and challenges for delivering on the responsibility to protect’ (May 2005) 40.

<http://responsibilitytoprotect.org/The%20African%20Union's%20Emerging%20Peace%20and%20Security%20Regime.pdf>

⁵¹ Maluwa (n 40 above) 235.

⁵² As opposed to humanitarian intervention in cases of gross human rights atrocities.

⁵³ Art 4(j) of the AU Constitutive Act.

AU could only intervene by invitation and no *proprio motu* right of intervention existed except in cases of genocide, war crimes and crimes against humanity. The proposed amendment seeks to confer an automatic right of intervention where there is a serious threat to legitimate order; (i) ‘pursuant to a decision of the Assembly,’ and (ii) ‘upon the recommendation of the Peace and Security Council.’ It appears from this that the arbiter of fact on whether there is a ‘serious threat to legitimate order’ is the PSC, and the Assembly only acts pursuant to a recommendation by the PSC.

However, the PSC Protocol provides that the PSC shall recommend to the Assembly intervention 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 No mention of a ‘serious threat to legitimate order’ is mentioned in the PSC Protocol. As earlier noted, intervention for humanitarian purposes (R2P) raised no serious controversies because the grounds for intervention are in respect of international crimes ‘*as defined in relevant international conventions and instruments.*’ Since the additional ground of ‘a serious threat to legitimate order’ was not envisaged at the time of adoption of the PSC Protocol, and in the absence of any international convention or instrument defining the same, a lacuna was thus created.

Maluwa⁵⁵ and other commentators suggest that the interpretation used to define an ‘unconstitutional change of government’ may shed light on the meaning of ‘a serious threat to legitimate order’. Baimu and Sturman submit that the closest interpretation of what constitutes a ‘serious threat to legitimate order’ can be found in the OAU’s definition of an ‘unconstitutional change of government’ being:

- i. military coup d’etat against a democratically elected Government;
- ii. intervention by mercenaries to replace a democratically elected Government;
- iii. replacement of democratically elected Governments by armed dissident groups and rebel movements;
- iv. refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁵⁶

⁵⁴ Art 7(e) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU.

⁵⁵ Maluwa (n 40 above), 237; see also E.Y Omorogbe ‘A club of incumbents: The African Union and coups d’etat’ *Vanderbilt Journal of Transitional Law* Vol.44 123 at 134.

⁵⁶ Baimu & Sturman (n 46 above), definition taken from Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI).

It therefore raises the question whether ‘constitutionality’ of the government is the same as its ‘legitimacy’. In the subsection below this paper shall briefly examine whether measuring the legitimacy of a government in terms of its constitutionality is the proper approach.

3.2.1 ‘Constitutionality’ or ‘legitimacy’?

States are legal persons in international law, acting through governments as their proxies. The question of legitimacy of a government comes to the fore where recognition of the government by other states, either in diplomatic relations or for purposes of membership in international organisations, is required. The question of legitimacy of governments has always been a controversial one in international law.⁵⁷ There are no objective criteria of assessing the legitimacy of a government and states resort to their subjective standards, which has led to some governments recognized by some states while others do not.⁵⁸

In the *Tinoco Concessions Arbitration (Great Britain v Costa Rica)* case⁵⁹ the ‘Tinoco regime’ seized power through a military *coup* in Costa Rica in 1917. It remained in power until 1919. During its reign, the Tinoco regime was recognized as legitimate by some states, but not by superpowers such as Great Britain. The Tinoco entered into several contracts and concessions of oil with Great Britain. After the collapse of the Tinoco regime in 1919, Great Britain instituted action against Costa Rica to recover debts arising from the contracts concluded with the Tinoco regime. Costa Rica disputed the legitimacy of the Tinoco regime and its capacity to contractually bind the state. It further contended that Great Britain itself did not recognise the Tinoco regime and therefore could not enforce the oil concessions conferred on British citizens. The matter came before the United States Chief Justice, William H. Taft, in his capacity as sole Arbitrator, who held that:

The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence

⁵⁷ J D’Aspremont ‘Legitimacy of governments in the age of Democracy’ (2006) *New York University Journal of International Law and Politics* Vol.38 878.

⁵⁸ As above.

⁵⁹ Arbitration between *Great Britain and Costa Rica*, Opinion and award of William H. Taft, Sole Arbitrator (18 October 1923) 1 RIAA (1923) 369. Reprinted (1924) *American Society of International Law* Vol. 18, No. 1 147-174.

recognise its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government within its own jurisdiction?⁶⁰

The *ratio* for the above dictum lies in the fact that a *coup* is capable of constituting a new government and to hold otherwise would mean that all governments which came into power through unconstitutional means are illegitimate. Nevertheless, ‘undoubtedly recognition by other powers is an important evidential factor in establishing proof of the existence of a government in the society of nations.’⁶¹ This case favours what may be termed a *de facto* government approach to legitimacy in that whosoever is in *de facto* control of the state to the exclusion of all other forces should be recognised as the legitimate government. However, caution should be exercised in taking the *Tinoco* decision; first for the reason that it is outdated and not reflective of contemporary international law. Being a 1923 decision, it is not alive to the international community’s concern on democracy, human rights and good governance. Secondly, modern day state practice, particularly on collective security, shows a trend towards non-recognition of governments which come into power through illegal means, commonly referred to as unconstitutional changes of government. Unlike in the pre-World War II era, where ‘the might of the powerful’ prevailed over ‘the will of the people’, contemporary practice favours the latter. To a large extent, democracy has been the main criterion for measuring governmental legitimacy today.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁶²

However, the mere holding of periodic and genuine elections does not always reflect the will of the people, thus bringing into question the legitimacy of that government. D’Aspremont points out that most scholars have failed to draw a distinction between ‘legitimacy pertaining to the *source of power* and legitimacy relating to the *exercise of power*.’⁶³ He describes these as *legitimacy of origin*, and *legitimacy of exercise*. He goes on to distinguish between ‘*internal legitimacy*’ (that is the way in which the government is viewed by its people) and ‘*external legitimacy*’ (which is the way the government is seen by other governments). For the most part, of international law does not concern itself with internal legitimacy but only

⁶⁰ As above, p.154.

⁶¹ As above, p.152.

⁶² Article 21(3) of the Universal Declaration of Human Rights 1948. See also, D’Aspremont (n 56 above) 887-9.

⁶³ D’Aspremont (n 57 above) 881.

looks at external legitimacy. It is argued that both internal legitimacy and external legitimacy should be considered where intervention to restore legitimate order is sought.

To most scholars, the source of power of the government is the primary determinant of legitimacy since it shows that the government is a ‘government by the people’. Roth explains that ‘almost all states—whether liberal democracies, one-party revolutionary states, military dictatorships, or traditionalist regimes—subscribed to the notion that “the will of the people” constitutes the ultimate source of governmental legitimacy.’⁶⁴ However, this monolithic view of legitimacy focuses on procedural legitimacy – the holding of regular and free elections – and ignores substantive legitimacy – that is, whether the government still reflects the will of the people post-elections.⁶⁵

Within the context of this paper, particularly on the use of ‘unconstitutional change of government’ to define ‘a serious threat to legitimate order’ the author posits that measuring legitimacy of the government solely in terms of the constitutionality of its coming into power may be misleading. Democracy is wider than the mere holding of elections. According to the Economist Democracy Index (2012), only Mauritius is a full democracy in Africa, while 9 countries are flawed democracies, 11 hybrid democracies and 23 are authoritarian regimes.⁶⁶ A liberal democracy is ‘a political system marked not only by free and fair elections, but also by the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion and property.’⁶⁷ An illiberal democracy, on the other hand, is ‘a democratically elected government exercising its power in violation of the substantive elements of democracy.’⁶⁸

The sweeping across of the ‘third wave’ democracy in the post-Cold-War saw the proliferation of political parties to replace authoritarian regimes, and the holding of regular elections. This, however, has not resulted in democratisation in Africa. The resultant governments do not necessarily reflect the ‘will of the people’. Making reference to Abraham Lincoln’s idea of a government of the people by the people for the people, Fombad states:

⁶⁴ BR Roth, *Governmental illegitimacy in international law* (2000) 38.

⁶⁵ D’Aspremont (n 57 above) 884-894.

⁶⁶ Economist Intelligence Unit Democracy Index 2012.

⁶⁷ F Zakaria ‘The rise of illiberal democracy’ 22.

http://closer2oxford.ro/uploads/2012/06/12/The_Rise_of_Illiberal_Democracy.gf1ruw.pdf (accessed 22 September 2012).

⁶⁸ D’Aspremont (n 57 above) 913.

If the idea behind democracy is no more than rule by the popular will, this can be achieved with or without a constitution. But even where it is based on a constitution, this may not necessarily produce or result in constitutionalism. Many of the notorious absolutisms of the twentieth century have been produced by popular elections. In Africa it is difficult to forget the notorious dictatorships of Jean Bedel Bokassa, Sese Seko Mobutu and Marcias Nguema who staged elections at one point or another to legitimize their hold to power.⁶⁹

It is therefore not surprising to note how the OAU affirmed ‘that *coups* are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect the rule of law based on peoples’ will expressed through the ballot and not the bullet’⁷⁰, yet many OAU governments came into power through military *coups* and to this present day, most incumbents still resort to repressive methods of consolidating their hold to power. Before concluding the issue of unconstitutional change of government as an interpretative guide to what constitutes a serious threat to legitimate order, it is apposite to briefly discuss the African Charter on Democracy Elections and Governance (ACDEG). It is beyond the scope of this paper to comprehensively discuss the ACDEG and reference to it is made only in respect of how it blends with the rest of the African peace and security mechanisms, particularly on the aspect of intervention.

3.2.2 The African Charter on Democracy Elections and Governance

The ACDEG is an overt commitment of the AU to promote universal values and principles of democracy, good governance and human rights and the right to development.⁷¹ It further seeks to entrench in the Continent a culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies.⁷² It is an instrument aimed at promoting both human rights and democracy, which are a *sine qua non* for development. The ACDEG not only endorses the principles enshrined in the Lomé Declaration and other related instruments as discussed above, but it takes the matter further. It does not confine itself to acquisition of power (legitimacy of origin) but also concerns itself with how incumbents retain power.⁷³ In

⁶⁹ CM Fombad ‘Challenges to constitutionalism and constitutional rights in Africa and the enabling role of Political Parties: Lessons and perspectives from Southern Africa’(2007) *American Journal of Comparative Law* Vol.55 No.1 6.

⁷⁰ Lomé Declaration (n 55 above).

⁷¹ 5th paragraph of the preamble to the ACDEG.

⁷² 7th Paragraph of the preamble to the ACDEG.

⁷³ Art 23 governs means of ‘accessing’ and ‘maintaining’ power.

addition to the four acts of what constitutes an unconstitutional change of government listed in the Lomé Declaration,⁷⁴ the ACDEG adds a new act, being, ‘[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.’⁷⁵ These acts of unconstitutional changes of government have been incorporated verbatim for penal purposes in the definition of the international crime of unconstitutional change of government under the proposed Draft Protocol on Amendments to the Protocol to the Statute of the African Court of Justice and Human Rights.⁷⁶ This Protocol adds a further new form of unconstitutional change of government, being ‘[a]ny substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.’⁷⁷

Article 23 of the ACDEG is elaborate enough and ‘tailor-made’ to address challenges prevailing in Africa. The Lomé Declaration did not envisage situations where incumbent heads of state would shift goalposts by manipulating the rules and changing constitutions in order to perpetually cling to power.⁷⁸ However, the prohibition of a literal amendment or revision of the constitution or legal instruments mentioned in Article 23(5) of the ACDEG is not watertight to be relied upon in determining who is a legitimate (or democratically elected) government. It fails to acknowledge issues of the independence of the judiciary (or the lack thereof), as it is possible to manipulate the courts to interpret the constitution in favour of those in power. For instance, the Constitutional Court of Senegal’s decision that the incumbent President Abdoulaye Wade was entitled to stand elections for the third consecutive term (because his first term did not count under the new Constitution) was questionable and sparked violence in Senegal.⁷⁹ A similar situation arose in Niger in 2010 when President Mamadou Tandja, being prohibited by the Constitution from running for a third presidential election, removed the presidential limits from the Constitution and extended his presidential tenure for another term.⁸⁰ However, in the Niger case the Constitutional Court

⁷⁴ See n 56 above.

⁷⁵ ACDEG Art 23(5).

⁷⁶ See n 14 above.

⁷⁷ As above, art 28E (1)(f).

⁷⁸ The classical example being that of Nigeria’s President Olusegun Obasanjo whose Bill to amend the constitution to enable him to run for a third presidential term was rejected by Nigerian Senate.

⁷⁹ ‘Senegal clashes erupt as court clears Wade poll bid’. BBC News 28 January 2012.

<http://www.bbc.co.uk/news/world-africa-16770305>.

⁸⁰ Institute for Security Studies, Peace and Security Council Report (2010) 2-3

http://www.iss.co.za/uploads/No8March_2010.pdf.

of Niger declared the President's actions unconstitutional, which led to the President's dissolution of Parliament and the Constitutional Court.⁸¹

The ACDEG seems to conclude the debate on whether 'a serious threat to legitimate order' is the same as an 'unconstitutional change of government'. It confirms that 'legitimate order' 'unconstitutional change of government' and 'democracy' are used synonymously in the African peace and security instruments. This is inferred from Article 25(3) of the ACDEG which provides that:

Notwithstanding the suspension of the State Party [for an unconstitutional change of government], the Union shall maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.⁸²

It appears, therefore, that the universally accepted measurement of the legitimacy of a government is by reference to its democratic character.

A great principle is spreading across the world like wild fire. That principle, as we all know, is the revolutionary idea that the people, not the government, are sovereign. This principle has, in the last decade ... acquired the force of historical necessity ... Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.⁸³

This paper cannot agree any further with the views expressed above. The overwhelming view of scholars is that the yardstick to legitimacy should be democracy. It is an unfortunate fact worth noting, however, that the ACDEG is a separate treaty 'outside' the Constitutive Act of the AU. Accordingly, it is binding only to those states which have ratified it. In discharging its mandate, the PSC shall be guided by the various treaties and declarations of the AU, including the ACDEG. There is an inherent temptation that the PSC will be influenced by the principles of the ACDEG or even invoke the measures provided for therein when making recommendations under article 4(h), more so because of the close relationship between the ACDEG and the Lomé Declaration. While the Lomé Declaration may be of general application to all member states of the AU, it is not a treaty and has no binding force on

⁸¹ As above. See also 'Niger Leader Dissolves Parliament' BBC News, May 26, 2009, <http://news.bbc.co.uk/2/hi/africa/8067831.stm>.

⁸² My underlining.

⁸³ Bureau of Public Affairs, Current Policy No. 1240 'Panama: A just cause' (1990) 2, statement of Luigi R Einaudi, US Permanent Representative to the OAS. Cited in JN Maogoto 'Democratic Governance: An emerging Customary Norm?' 2003 *University of Notre Dame Australia Law Review*, Vol. 5.

member states, whereas the ACDEG is binding upon all states which have ratified it. It would therefore be proper to stimulate rapid ratification of the ACDEG in order to enhance the right of intervention under article 4(h). In the next section of this chapter, this paper shall now turn to the question of what constitutes a serious threat to legitimate order.

3.3 What is a ‘serious threat’ to legitimate order?

Maluwa points out that the absence of a definition of ‘a serious threat to legitimate order’ either in the Constitutive Act or in the amendment Protocol is not a strange one, as concepts such as ‘threat to peace,’ ‘breach of the peace,’ and ‘act of aggression’ are not defined anywhere yet used repeatedly in the UN Charter.⁸⁴ Despite the absence of any *a priori* definition of these concepts, the General Assembly and Security Council have been able to interpret these clauses.

This lack [of definition] was intentional. At San Francisco an area of discretion was intentionally left to the [Security] Council. ... In practice the problem may be one of acquiring accurate factual knowledge of events, rather than one of legal definition.⁸⁵

From a teleological viewpoint, he argues that the omission to define these concepts has enhanced the dynamism of the Charter in that it has been interpreted as a living instrument, attuning to the changing circumstances to reflect the intentions of the drafters. He therefore opines that the PSC can effectively use this ‘discretion’ to define each situation according to its surrounding circumstances. This view, however, fails to take into account the landscape in which this ‘margin of appreciation’ operates in the AU context. Under the UN Charter, once the Security Council has made a determination on whether there is a ‘breach of the peace’ ‘threat to peace’ or ‘an act of aggression’ it also has the ultimate say on what measures or action is to be taken, particularly in cases of intervention. The General Assembly has to execute that decision without questioning it.⁸⁶ Under the AU peace and security regime, however, the PSC can only *recommend* to the Assembly of Heads of State and Government, and it is the latter’s prerogative to take a *decision* on whether to authorize intervention under Article 4(h). The AU’s *realpolitik* will still pose a challenge to the implementation of the PSC’s recommendations.

⁸⁴ Maluwa (n 40 above) 236.

⁸⁵ P Sands & P Klein, *Bowett’s law of international institutions* (2001) 51-52.

⁸⁶ See Article 25 of the UN Charter.

To borrow from Abraham Lincoln's tired aphorism democracy being a government of the people by the people for the people,⁸⁷ the PSC has to be guided by the 'will of the people' in determining the existence of a threat to legitimate order. A government by the people (electoral democracy) is not conclusive proof of such will. It should continue to enquire whether the government is for the people (substantive democracy). Therefore, there should be no dogmatic approach in assessing any situation under Article 4(h). There is need for guidance on how to strike a balance between the need to protect human rights vis-à-vis the need to promote peace and security in Africa. While it is imperative to respond to the security challenges Africa is faced with, care need to be taken not to discount human protection for regime entrenchment. The UN Secretary General's High-level Panel on Threats, Challenges and Change stated that:

What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the twenty-first century, but too often States have failed to respect and promote them. The collective security we seek to build today asserts a shared responsibility on the part of all States and international institutions, and those who lead them, to do just that.⁸⁸

The purpose of the intervention therefore should be to protect democratically constituted governments from internal illegal seizures of power rather than external intervention to impart democracy where it is perceived lacking. Murithi states that, 'because of the propensity towards military adventurism, regime change, bringing or exporting freedom and democracy by force, vigilance is required in the operationalisation of R2P.'⁸⁹ The above values mentioned by the High-level Panel are no 'magic formula' for every situation that may arise. Each case should be decided on its own special circumstances. Questions such as 'who is a legitimate government during an uprising?' may arise, and there is no one-size-fits-all answer to it. On the question of recognition by the UN of the representation of a Member State, the UN General Assembly recommended that:

whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the

⁸⁷ American Government Archive, 'What is Democracy'. <http://www.america.gov/st/democracy-english/2008/May/20080619223145eaifas0.5311657.html> (accessed 13 August 2012).

⁸⁸ Report of the High-level Panel on threats, challenges and change 'A more secure world: our shared responsibility' A/59/565 <http://www.un.org/secureworld/report.pdf> (accessed 13 August 2012).

⁸⁹ Murithi (n 2 above) 13.

question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case⁹⁰

Commenting on how the AU responded to the Arab Spring uprisings in North Africa, Sturman writes that the view taken by some Members of Parliament under the Peace and Security Committee of the Pan-African Parliament when the issue was debated was that taking to the streets to remove heads of state from power amounted to an unconstitutional change of government, since constitutional democracy allows for removal from power through elections.⁹¹ ‘The point was made that there is a fine line between a spontaneous expression of the will of the people and mob rule, since the peoples’ will may be determined haphazardly by estimation of numbers (often filtered by the media), and not by an accurate vote.’⁹² This line of interpretation has been criticised as failing to take into consideration that the African peace and security system seeks to protect a ‘democratically elected’ government and not a dictatorship such as Gaddafi, which has never known elections since 1969. This has been contrasted with the situation in Tunisia and Egypt where the uprising’s legitimacy depended on a judgment of the quality of elections won by these leaders in the past.⁹³

The PSC’s response to the ‘Arab Spring’ uprisings demonstrates the elasticity of the ‘margin of appreciation’ it enjoys in respect of each given situation. Concerning the situation in Egypt it viewed the uprising as ‘the aspirations of the Egyptian people’ and concerning the situation in Libya it condemned the indiscriminate attacks on protesters. In the Egyptian situation the Council noted the ‘deep aspirations of the Egyptian people’ in their quest for regime change and opening up political space; and also expressed the AU’s solidarity with the Egyptian people in their desire for democracy.⁹⁴ Concerning the situation in Libya, while condemning the indiscriminate attacks and excessive use of lethal force against protesters by the Gaddafi troops, the PSC also underscored ‘that the aspirations of the people of Libya for democracy, political reform, justice and socio-economic development are legitimate and [urged] that they be respected.’⁹⁵ What clearly stands out from the above situations is the fact that the PSC

⁹⁰ GA Res 396, UN GAOR, 5th sess, Supp No 20, [1], UN Doc A/1775 (14 December 1950). <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/94/IMG/NR005994.pdf?OpenElement>

⁹¹ K Sturman, ‘The African Union and the “Arab Spring”’: An exception to new principles or return to old rules?’, *South African Institute of International Affairs*, 3.

⁹² As above.

⁹³ As above.

⁹⁴ Communiqué of the 260th meeting of the PSC (16 February 2011) PSC/PR/COMM.(CCLX).

⁹⁵ Communiqué of the 261st meeting of the PSC. (23 February 2011) PSC/PR/COMM (CCLXI)

used the ‘will of the people’ yardstick to analyse the respective situations. Furthermore, each situation was decided on its peculiar circumstances.

Despite the PSC’s discretion to flexibly analyse and interpret each situation, the wording of the amendment Protocol is an unhappy one. The use of the phrase ‘serious threat to legitimate order’ juxtaposed with the phrase ‘grave circumstances, namely: war crimes, genocide and crimes against humanity’ implies that a lesser threshold is required for intervention where there is a threat to legitimate order than is required for the protection of civilians from atrocities. It raises the question why human peril has to reach such heinous proportions before intervention may be authorised, whereas for political purposes, a ‘serious threat’ will suffice as a trigger for intervention. Baimu and Sturman pose the question whether demonstrations calling for regime change should be regarded as threats to legitimate order.⁹⁶ They conclude by observing that even though the Lomé Declaration did not include such protest actions, the amendment is broad enough to encompass them. For all intents and purposes, however, the values of any collective security system should be to protect all states, weak and strong, not because of any inherent goodness in them but in the furtherance of their individual obligations to foster dignity, human security and justice.

3.4 Conclusion

Under international law, how a new government comes into power - whether by ballot or bullet, constitutionally or by *coup d’etat* - should not be the concern of other states.⁹⁷ However, the scourge of internal conflicts which have marred Africa since the end of the Cold-War prompted the AU, in the interests of collective regional security, to adopt a ‘non-indifference’ approach to internal conflicts. The general view of the AU is that a greater percentage of the conflicts relate to democratic governance and changes of government. As part of the measures adopted by the AU to address these challenges, the Union proposes to intervene where there is a serious threat to legitimate order and to restore peace and stability in a member state. It was noted that the notion of ‘a serious threat to legitimate order’ has not been defined anywhere in international law. The aim of this chapter, therefore, was to decipher the meaning of a ‘legitimate order’ and what constitutes a threat to it. Before

⁹⁶ Baimu & Sturman (n 46 above).

⁹⁷ *Tinoco case* (n 59 above).

defining what constitutes a ‘serious threat’ the paper first enquired as to who is a legitimate order.

Historically, a legitimate government was whosoever was in *de facto* control of the state irrespective of how he gained such control. This is the view adopted by Professor Hans Kelsen who posits as follows:

Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become - on the whole - efficacious; and it ceases to be valid as soon as it loses this efficacy ...The Government brought into permanent power by a revolution or coup d’etat is, according to international law, the legitimate government of the state, whose identity is not affected by these events.⁹⁸

It has been observed, however, that the ‘efficacy’ test no longer stands the test of time since modern international law favours democracy instead. This paper continued to argue that the concept of democracy has been restrictively interpreted by scholars in determining whether a government is legitimate or not. They tend to focus on how a regime comes into power and ignore how that regime continues to exercise its power. In other words, this paper takes the view that legitimacy has a procedural and a substantive element. The procedural aspect of legitimacy relates the acquisition of power, (whether through elections, dynasty or coup), while the substantive aspect concerns the continued exercise of power to reflect the ‘will of the people’.

It is in this vein that the paper agrees with the views of other scholars that the meaning of a ‘legitimate government’ can be deduced by reference to the definitions of an ‘unconstitutional change of government’. Just as the UN Security Council has discretion to interpret what constitutes a ‘threat to peace,’ ‘breach of the peace,’ and ‘act of aggression’ under Article 39 of the UN Charter, the AU PSC also enjoys a ‘margin of appreciation’ in determining what constitutes a serious threat to legitimate order. However, the danger with the AU system is that once the PSC has made such determination, the matter is still subject to the rigorous politics of the Assembly since the PSC only makes a recommendation and it is the Assembly which takes the final decision of whether to intervene or not.

⁹⁸ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg translation). New York: Russell, 1961 220-221; cited in Maogoto (n 83 above) 2.

Chapter four: Implementing the right of intervention – prospects and challenges under Article 4(h)

4.1 Introduction

Africa's unparalleled problems have been on the rise since the last decade of the 20th Century; ranging from genocide, war crimes, crimes against humanity, civil strife, *coups d'état*, HIV and poverty. On the other hand, international assistance and intervention from western countries has been gradually decreasing, hence reasserting the quest for African solutions to African problems. Former UN Deputy Secretary-General, Louise Frechette, in her speech at the sixth Institute for Defence Studies and Analyses Asian Security Conference, noted that Western nations are continuously avoiding peacekeeping operations in poor countries especially Africa. Frechette pointed an appalling discrepancy in the UN peacekeeping missions in that:

There is a manifest imbalance between the 30,000 NATO peacekeepers deployed in tiny Kosovo and the 10,000 UN peacekeepers deployed in [the Democratic Republic of the] Congo, which is the size of Western Europe, and where some 3.5 million people may have died as a result of fighting since 1998.⁹⁹

Nations with better equipped troops deploy token contingents to Africa yet they remain willing troop-contributors in other missions abroad.¹⁰⁰ It is therefore imperative for Africa to discard reliance on external support and develop as well as strengthen its institutions to solve its problems, particularly on collective security and intervention. Whatever the purpose or justification, however, intervention in its manifold facets remains a contentious issue in international law.¹⁰¹

This chapter shall analyse the prospects and challenges to the implementation of the right of intervention under Article 4(h) of the AU Act. The first section shall look into the relationship between the proposed amendment of Article 4(h) and humanitarian intervention (R2P) *simpliciter*. This comparison and contrast of R2P with intervention to restore peace and

⁹⁹ 'Rising demand for peacekeeping stretches UN's resources, Frechette says' UN News Centre (27 January 2004) <http://www.un.org/apps/news/storyAr.asp?NewsID=9579&Cr=peacekeeping&Cr1=> (accessed 30 September 2012).

¹⁰⁰ T Deen 'Rich avoid peacekeeping for the poor, says UN' (27 January 2004).

<http://www.commondreams.org/headlines04/0127-10.htm> (accessed 30 September 2012).

¹⁰¹ GR Mashudu 'Post-Cold War military intervention in Africa' (2011) *South African Journal of Military Studies* Vol.39 No. 33.

stability will inform the debate on intervention and the international law concept of sovereignty, which will be discussed in the next section. This discussion on intervention and international law shall be with specific reference to Article 4(h). In this regard, arguments in favour of a nuanced approach to sovereignty shall be advanced. The paper will also answer the question whether the amendment seeks to foster human security or is intended to entrench regimes, making reference to a few examples of practices of the AU in response to coups d'état in Africa.

4.2 Humanitarian intervention (R2P) and intervention where there is a threat to legitimate order

Humanitarian intervention has been defined as ‘coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.’¹⁰² In the previous chapter it was observed that intervention in response to a serious threat to legitimate order is synonymous to intervention in response to unconstitutional changes of government, commonly referred to as pro-democratic intervention (PDI). This paper shall therefore adopt the definition of PDI, which shall be used interchangeably with intervention to restore legitimate order. Levitt defines PDI in the following terms:

State practice and treaty law in Africa indicate that, today, PDI is an intervention by a state, group of states, or regional organization in another state involving the threat or use of force in order to protect or restore a democratically constituted government (DCG) from unlawful and/or violent seizures of power, especially when the circumstances that underpin such seizures threaten a substantial part of a state’s population with death or suffering on a grand scale.¹⁰³

Before the amendment, Article 4(h) did not raise much controversy since the grounds of intervention were serious mass atrocity crimes as defined by the ICC and other tribunals. Intervention against that threshold has been interpreted as being more of a ‘duty’ rather than a ‘right’ hence the use of the phrase ‘responsibility to protect.’¹⁰⁴ Although the Constitutive Act

¹⁰² Danish Institute of International Affairs *Humanitarian Intervention Legal and Political Aspects* (1999) 11.

¹⁰³ JI Levitt, Pro-Democratic intervention in Africa, 24 *Wisconsin International Law Journal* 785 (Westlaw), 788.

¹⁰⁴ See Report of the ICISS, (n 8 above) which states that “‘*The Responsibility to Protect*’, rest on the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must

of the AU makes reference to a ‘right of the Union’ to intervene, it has always considered itself bound by the principles governing R2P. However, as Baimu and Sturman correctly point out, the new ground of intervention has nothing in common and is in disharmony with the other grounds of intervention.¹⁰⁵ It is not an international crime, it has not been defined anywhere and cannot be considered as an issue of the ‘greatest concern to the international community.’¹⁰⁶

PDI concerns itself with the protection of constitutionally constituted governments and their preservation from any illegal seizures of power. It does not concern itself with the removal of an unwanted regime in another state, unless such regime is unduly repressive to the point of violating its peoples’ right to self-determination.¹⁰⁷ The flip-side of this argument is that if the international community fails to intervene to remove an unduly repressive government, similarly any intervention to stop rebels from unseating an unduly oppressive government would be a violation of the peoples’ right to self-determination. This is the underlying view of those who subscribe to the ‘democratic entitlement’ theory.¹⁰⁸

Humanitarian intervention, on the other hand, concerns itself with protecting civilians from mass atrocity crimes like genocide, war crimes and crimes against humanity where the state is unwilling or unable to protect them. The primary difference between PDI and R2P therefore lies in the fact that one is based on sovereign consent or authorisation by the UN Security Council, while the other one is based on sovereign irresponsibility or failure to protect its citizens. ‘Today, PDI is typically, but not exclusively, based on state consent (whether treaty-based or ad hoc) or authorized by the UN Security Council.’¹⁰⁹ R2P finds its basis on the bifurcated perception of sovereignty as a responsibility that states primarily have a duty to protect citizens from atrocities, failing which, such responsibility *ipso facto* shifts to the international community.¹¹⁰

be borne by the broader community of states.’ See also, FM Deng *Sovereignty as a responsibility: Conflict management in Africa* (1996).

¹⁰⁵ Baimu & Sturman (n 46 above).

¹⁰⁶ As above.

¹⁰⁷ Levitt (n 103 above).

¹⁰⁸ See TM Franck ‘The Emerging Right to Democratic Governance’(1992) 86 *American Journal of International Law* 46.

¹⁰⁹ Levitt (n 103 above).

¹¹⁰ ICISS (n 8 above).

It is apparent from the foregoing that in all types of intervention, be it R2P or PDI, sovereignty is still the benchmark. The AU's decision to include the right of intervention for political purposes within the right of intervention for humanitarian purposes will more likely trigger the debate on sovereignty and intervention in international law. It therefore becomes necessary to consider the question of Article 4(h)'s compatibility with international law with a view to harmonizing it with R2P.

4.3 Compatibility of Article 4(h) with international law

Despite this discord between R2P and intervention where there is a threat to legitimate order, they are not mutually exclusive though. This paper argues that there is a common thread running through both grounds of intervention, being that both aim to protect fundamental human rights, and to maintain peace and security. This section therefore analyses the international law debate on intervention proceeding on the premise that R2P and PDI are not irreconcilable grounds of intervention.

Before the end of the Cold-War and throughout the history of international law, democracy was not the concern of the international community. This view was affirmed by the International Court of Justice (ICJ) in *Nicaragua v United States of America*¹¹¹ where the United States Congress justified its intervention in Nicaragua on the basis that it had found that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship.' Court stated that:

However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests ... The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

What stands out clearly from the above excerpt is that the cornerstone of international law is the principle of State sovereignty. The contemporary debate between interventionists and restrictionists still hinges on this 'fundamental' principle. Restrictionists on the one hand subscribe to the Westphalian understanding of sovereignty which is underpinned by the

¹¹¹ Case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v United States of America* ICJ (27 June 1986) ICJ Reports (1986) 14 at 133; See also the 'Corfu Channel case' (*United Kingdom v Albania*) ICJ (9 April 1949) I.C.J. Reports (1949) 4.

notion that ‘states have the right to autonomously determine their own domestic authority structures - the corollary of that being no intervention in the internal affairs of other states.’¹¹²

Non-interventionists argue that any form of intervention is bound to be illegal since it violates the sovereignty and territorial integrity of states, which is protected under Article 2(4) of the UN Charter.¹¹³ Article 2(4) of the UN Charter provides that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This Realist perception of sovereignty is based on the principle of sovereign equality of all states, which is the first principle of the United Nations.¹¹⁴ Sovereignty therefore implies that there is no higher power other than the state itself. ‘If sovereignty implies that there is “no higher power” than the nation-state, then it is argued that no international law norm is valid unless the state has somehow “consented” to it.’¹¹⁵ Rules of international law are therefore not imposed on states from above, but apply horizontally deriving their binding effect from the consent of each state.¹¹⁶

From an interventionist perspective, it is argued that sovereignty is not a bar to both R2P and PDI. Building up on arguments already advanced to justify intervention for humanitarian purposes, it is argued that if ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’¹¹⁷, then there is no basis for a segmented approach to intervention. Whether be it for humanitarian or political purposes, intervention should be permitted as long as it serves a legitimate purpose and for the common good of the international community. This paper argues in favour of four exceptions to the rule of non-intervention in international law. These are consent; intent to

¹¹² H Kreisler ‘Sovereignty (Conversation with Stephen D. Krasner on his book “Sovereignty: Organised Hypocrisy”)’ 3. <http://globetrotter.berkeley.edu/people3/Krasner/krasner-con3.html> (accessed 4.10.12)

¹¹³ R Guraziu ‘Is humanitarian intervention in the affairs of another state ever justified?’ (2008) *Global Security Political and International Relations* 3. <http://www.atlantic-community.org/app/webroot/files/articlepdf/Is%20humanitarian%20military%20intervention%20ever%20justified.pdf> (accessed 4.10.12).

¹¹⁴ Art 2(1) of the Charter of the United Nations.

¹¹⁵ JH Jackson ‘Sovereignty-Modern: A new approach to an outdated concept’ (2003) *American Society of International Law* Vol. 97 No.4 782.

¹¹⁶ Dugard (n 15 above) 3.

¹¹⁷ Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993) A/CONF.157/23.

violate political independence and territorial integrity; ‘residual responsibility’ outside the UN Security Council; and what one may call ‘an Africanist approach to sovereignty.’

4.3.1 Consent

Scholars in support of R2P argue that intervention for humanitarian purposes is justified on the basis of the state’s responsibility to protect its citizens.¹¹⁸ This is the view shared by the UN Secretary-General’s High Level Panel on Threat, Challenges and Change which stated that, ‘whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.’¹¹⁹ If the sovereign state cannot protect its citizens, then that responsibility shifts secondarily to the broader international community and, in that case, the rule changes from being one of non-intervention to one of non-indifference.

The overwhelming view among supporters of intervention is that in the case of R2P consent of the state in which the intervention is done is not required since such a state is deemed to have sacrificed its sovereignty through its failure or unwillingness to protect its citizens. The goal of curbing ongoing human torment alone provides the legal basis for the intervention; therefore state consent is moot.¹²⁰ With respect to PDI, however, intervention can only be done with the consent of the state in which there is a serious threat to legitimate order. Wippman states that, as a general rule of international law, measures which do not involve the use of force, or are under-taken with the consent of the affected state, are not prohibited under the international law principle of non-intervention.¹²¹ ‘By contrast, measures involving the use of force must be authorized by the Security Council in response to a threat to international peace and security, unless consent of the recognized government is obtained.’¹²²

¹¹⁸ See for instance D. Kuwali ‘Art. 4(h) + R2P: Towards a doctrine of persuasive prevention to end mass atrocity crimes’ (2008-2009) *Interdisciplinary Journal of Human Rights Law* Vol.3 No.1 55 at 62; Guraziu (n 113 above); Report of the ICISS (n 8 above).

¹¹⁹ Report of the High-level Panel on Threats, Challenges and Change (n 88 above).

¹²⁰ Levitt (n 103 above).

¹²¹ D Wippman ‘Pro-Democratic intervention in Africa’ *Houston Journal of International Law* Vol. 19, 659 at 668.

¹²² Wippman (As above) 669.

The International Law Commission (ILC) in its Draft Articles on the Responsibility of International Organisations affirmed this position of international law.¹²³

The classical examples of consent to relinquish sovereignty, where countries have voluntarily subjected themselves to supranational institutions are the countries of the European Union. Individuals can bring cases directly to the European Court of Human Rights, for instance, and the Court issues decisions which are directly binding on Member States. Kreisler calls this ‘pooled sovereignty’.¹²⁴ In his distinction between R2P and PDI, Levitt states that ‘today, PDI generally derives its legality from the doctrines of consent (ad hoc or treaty based) but not yet from customary international law, wherein proponents of humanitarian intervention argue its legal basis.’¹²⁵

Making specific reference to intervention under Article 4(h), Kuwali submits that it is arguable that intervention under Article 4(h) does not violate Article 2(4) of the UN Charter because it is consensual intervention.¹²⁶ While this argument is true for intervention generally, it is incorrect to argue R2P based on consent since humanitarian protection from heinous crimes is a duty resting on the state and international community, and this duty overrides sovereignty and the requirement to seek consent if the state breaches it. It is nevertheless a valid argument for purposes of the amended Article 4(h) since a new ground of intervention outside R2P *simpliciter* has been introduced, being intervention to restore legitimate order.

Wippman is quick to point out, however, that military intervention agreements are susceptible to challenge for being in violation of *jus cogens* norms as well as Article 103¹²⁷ of the UN Charter since they go to the heart of the values attaching to sovereignty and also implicate larger concerns about international order.¹²⁸ He nevertheless contends that military intervention pursuant to a treaty may be lawful under certain circumstances, and PDI is one such instance. In those cases, only the will of the democratically constituted government is

¹²³ Article 20, International Law Commission Draft Articles on the Responsibility of International Organisations (2011) A/CN.4/L.778.

¹²⁴ Kreisler (n 112 above).

¹²⁵ Levitt (n 103 above) 4.

¹²⁶ Kuwali (n 6 above) 46.

¹²⁷ Article 103 of the United Nations Charter provides that obligations under the Charter shall prevail over any other treaty obligations.

¹²⁸ D Wippman ‘Pro-Democratic intervention in Africa’ (2002) *American Society of International Law* Vol. 96 143 at 145.

considered, and any *de facto* powers lack the authority to revoke that consent or to challenge the intervention.¹²⁹ This paper therefore accedes to the view of many scholars on PDI that intervention in response to a serious threat to legitimate order does not violate international law if done with the valid consent of the democratically elected government.

4.3.2 Intention to violate territorial integrity or political independence

Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of another State or in any manner inconsistent with the Purposes of the UN. Article 2(7) provides that there should be no intervention in any matters which are essentially within the domestic jurisdiction of any Member State. In line with these Principles, the UN General Assembly declared that no state or group of states has the right to intervene in the internal affairs of any other state directly or indirectly, and that no state shall organize, assist, incite or tolerate any subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interference in civil strife in another state.¹³⁰ It accordingly declared that all peoples have the right to freely determine, without external interference, their political status.

Article 2(4) does not forbid the use of force *per se*, but only outlaws those acts which are directed against the territorial integrity or political independence of a state. ‘Hence if a genuine... intervention does not result in territorial conquest or political subjection ... it is a distortion to argue that it is prohibited by article 2(4).’¹³¹ Contextualizing this proposition within the discussion of intervention under Article 4(h) of the AU Act, it goes back to the discussion in chapter 3 as to what constitutes a serious threat to legitimate order.

The peoples’ right to self-determination is protected under international law from external intrusion. The purpose of pro-democratic intervention should not be protecting an incumbent regime even if it is unpopular with its people, but should be for the maintenance of peace and security as well as protection of human rights. Levitt correctly sums it up that PDI in Africa only concerns itself with how a regime comes into power, and not how it conducts itself

¹²⁹ As above.

¹³⁰ Declaration on principles of international law Concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, UNGA/RES/2625(XXV), Supp. No.28 (24 October 1970).

¹³¹ Guraziu (n 113 above).

while in power.¹³² Under international law, an unpopular regime or state is no less entitled to exist free from outside interference in its domestic issues than a popular one.¹³³ However, there is no rule of international law prohibiting internal forces from dethroning an unduly repressive regime; instead the law protects such action under the peoples' right to self-determination.¹³⁴ Dugard states that sovereign states are entitled to choose their own governments either by ballot or by bullet, and other states may not interfere with this process even if it degenerates into a civil war.¹³⁵ In line with this view, Luttwak in his controversial work, *'Give war a chance'*, argues that external intervention in civil wars does not solve the problem but only intensifies and prolongs it.¹³⁶ He argues that, '[t]oo many wars nowadays become endemic conflicts that never end because the transformative effects of both decisive victory and exhaustion are blocked by outside intervention.'¹³⁷ This article has been criticised as suggesting that the international community should blindfold itself to conflicts happening in other countries even if innocent civilians have become military objects and human atrocities are heinously committed, as was the case in Rwanda and Srebrenica.¹³⁸ States may only intervene where the rebels are externally assisted, in which case the incumbent regime together with its allies would be acting in collective self-defence.¹³⁹

The foregoing views, however, fail to take cognizance of the changing nature of the law on intervention, particularly in contemporary human rights discourse where the UN, states and non-state actors intervene intrude to a certain extent in domestic issues. According to Levitt,

Interventions come in all different shapes and sizes, but generally may be categorized along a continuum of intrusiveness. On the less intrusive end of the 'spectrum of intervention' are activities conducted by invitation or permission of the host state or which are non-coercive in nature. On the more intrusive end are actions undertaken with the objective of changing policy within states, with the most intrusive measure being the application of military force.¹⁴⁰

¹³² Levitt (n 103 above) 3.

¹³³ As above.

¹³⁴ Article 2(7) of the UN Charter; see also the Declaration on principles of international law Concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (n 130 above).

¹³⁵ Dugard (n 15 above) 514.

¹³⁶ EN Luttwak *'Give War a Chance'*, *Foreign Affairs*, July/August 1999 (Volume 78, Number 4) in Guraziu (n 113 above) 10.

¹³⁷ As above.

¹³⁸ Guraziu (n 113 above) 10.

¹³⁹ Dugard (n 15 above) 515.

¹⁴⁰ JI Levitt *'Embracing the elephant: Perspectives on humanitarian operations'* 11th ACUNS/ASILWorkshop, *International organization studies* (5-18 August 2001), University of Namibia, 4.
http://www.drjeremylevitt.com/files/Embracing_the_Elephant_.pdf

For intervention not to be against international law, it must be for a just cause. Making particular reference to intervention where there is a serious threat to legitimate order, Kioko argues that the intervention should conform to the hopes and aspirations of the African peoples.¹⁴¹ In his view, intervention to keep in power a predatory regime that practises bad governance, commits gross and massive violations of human rights or refuses to hand over power after losing in elections is not in conformity with the values and standards that the Union has set for itself.¹⁴²

It is also worth noting that the Constitutive Act of the AU still affirms the principle of non-interference by any Member State in the internal affairs of another state.¹⁴³ In its Common African Position on the Proposed Reform of the United Nations (also known as ‘The Ezulwini Consensus’), writing on the subject of collective security and the use of force, the AU affirmed that ‘it is important to reiterate the obligation of states to protect their citizens, but this should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states.’¹⁴⁴ This negates any inference of an intention to violate the territorial integrity of any AU Member State, more so since the right of intervention vests in the AU and not in any individual state. It is difficult, however, to reconcile this *proprio motu* right of the Union to intervene with the right of individual member states to request intervention from the Union to restore peace and stability.¹⁴⁵ Nevertheless, these two rights can co-exist since one is intervention by (prior) consent while the other is intervention by invitation.

4.3.3 ‘Residual responsibility’ outside the UNSC

The Security Council remains the bedrock of international peace and security. ‘In order to ensure *prompt and effective* action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security ...’¹⁴⁶

It is argued, however, that since the UN Security Council is endowed with ‘primary’ responsibility for the maintenance of international peace and security, somewhere outside the Security Council resides ‘secondary’ responsibility. In terms of the Charter, such

¹⁴¹ Kioko (n 11 above).

¹⁴² As above.

¹⁴³ Article 4(g).

¹⁴⁴ ‘The Ezulwini Consensus’ 7th Extraordinary Session (7-8th March 2005) Ext/EX.CL/2(VII).

¹⁴⁵ Article 4(j) of the AU Constitutive Act.

¹⁴⁶ Article 24 of the UN Charter (emphasis added).

responsibility must be discharged ‘promptly and effectively’. If therefore the Security Council cannot discharge its duties promptly and effectively, then international organisations may assume their secondary role.

The AU’s right to intervene under Article 4(h) can and should co-exist with the Security Council’s primary responsibility for the maintenance of international peace and security in Article 24 of the UN Charter. The merit of this view is derived from the AU’s PSC Protocol which articulates that the UN has the primary responsibility for maintaining international peace and security, but it also notes that the AU has the primary responsibility for peace, security and stability in Africa.¹⁴⁷

Put differently, the AU sits in a position of complementarity with the UN Security Council, and its peace and security mechanisms may be used to fill-in the gap where the promptitude and efficiency of the latter is stifled by vetoes and other internal politics. This fact was noted by the AU in its ‘Ezulwini Consensus’ where it stated that since the General Assembly and UN Security Council are often far from the scenes of conflicts and may not be rightly positioned to effectively appreciate the nature and exigency of the conflict situation, and that it is therefore imperative that Regional Organisations, which are in close proximity to the conflict, should be empowered to take action in this regard.¹⁴⁸ The Union highlighted the fact that intervention of Regional Organisations, as far as may be practicable should be approved by the Security Council; although in certain situations, where such prior approval could not be obtained, the Security Council may grant it ‘after the fact’.¹⁴⁹

4.3.4 African solutions to African problems: An Africanist perspective on sovereignty

The Charter of the United Nations since 1945 has been amended only once¹⁵⁰, despite the ever changing nature of human security challenges in international law. The UN Charter and the composition of the Security Council are no longer a true reflection of the wishes and aspirations of the international community. Dugard notes that the UNSC and its permanent members reflect the power relations of 1945, being the time when it was constituted. He states that today, states such as Germany, Japan, India, Brazil, South Africa, Egypt and

¹⁴⁷ Kuwali (n 6 above).

¹⁴⁸ ‘The Ezulwini Consensus’ (n 144 above).

¹⁴⁹ As above. The usual examples of *ex post facto* approval of unauthorised military intervention are NATO’s intervention in Kosovo (1999) and the ECOWAS intervention in Sierra Leone (1997).

¹⁵⁰ A 1963 amendment to increase the number of elected members of the Security Council from six to ten members. GA Res. 1991 (XVIII), 17 December 1963. The amendments entered into force on 31 August 1965.

Nigeria probably have more claim to a permanent seat on the Security Council than the United Kingdom and France.¹⁵¹

In his speech at the 67th Summit of the UN General Assembly, South African President Jacob Zuma lamented that despite eighteen years of debate for reform of the Security Council, no progress has been made. He further underscored the need for Africa's representation since more than seventy percent of the agenda of the UN is about Africa, yet Africa is not represented.¹⁵²

The peace and security challenges engulfing Africa are worsening by each day. Africa has experienced escalated *coups d'état*, loss of human life, internal displacements and refugees since the end of the Cold-War. As observed in chapter two of this paper, African states and regional organisations, particularly under the OAU, are historically the best (or even worst) conservative adherents to the international law principles of sovereignty, non-intervention and political independence. The Rwanda genocide of 1994 and other human atrocities in countries like Uganda, Democratic Republic of Congo, Sudan and Liberia have been blamed on the OAU's sacred principles of non-interference in the domestic affairs of Member States.

The paradigm shift in the African peace and security system came along with the UN Secretary-General's plea to the international community to seek durable solutions to human suffering. The UN Secretary-General posed the question that:

... 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?¹⁵³

The contribution of Africa to the *corpus* of international law is invaluable, ranging from environmental law, refugee law, human rights law, unconstitutional changes of government and of late to the law on intervention and the responsibility to protect.¹⁵⁴ Levitt, a staunch supporter of the African peace and security system, opines that 'the continent's intervention regime is more advanced and legally coherent than any other, including that of the North

¹⁵¹ Dugard (n 15 above) 479.

¹⁵² 'Statement by President Jacob Zuma of the Republic of South Africa to the General Debate of the 67th Session of the General assembly, New York' All Africa <http://allafrica.com/stories/201209260493.html> (accessed 5.10.12).

¹⁵³ ICISS Report (n 8 above), VII.

¹⁵⁴ Maluwa (n 40 above).

Atlantic Treaty Organization (NATO) - a fact that deserves greater attention in scholarly literature and among policy makers.¹⁵⁵ Richardson points out that in actual fact, we are now in the second phase of Africa's contribution to international law, the first being during the decolonization era between the late 1950s and 1970s.¹⁵⁶ In his article, Richardson states that it has been a practice stretching back some five centuries through European colonialism that some countries continued to undermine Africa and never thought it capable or being mandated to invoke or prescribe international law. Hence they continue to this day to try to give Africa lessons of how to govern itself.¹⁵⁷

In international studies, Africa is viewed as a pariah – a basket case, not a market place. In law schools most academic consider African states to be objects rather than subjects of international law. This explains why a significant portion of the wide body of literature on the law of use of force, more generally peacekeeping and humanitarian intervention, is heavily biased and flawed. The geopolitical, Eurocentric, and linear bias in Western legal academia is astounding when it is applied to Africa.¹⁵⁸

It is not unheard of that when there is a paradigm shift in international law, it is met with contentions. When the United States invaded Panama in 1989 under 'Operation Just Cause', the Organisation of American States (OAS) condemned the actions of the US and rejected the notion that a state could legitimately invade another state and use coercive measures to influence domestic issues in seating a democratically elected government against the will of those in effective control of the state.¹⁵⁹ A few years later, however, the same OAS was quick to condemn attempted coups in Surinam and Venezuela and was against the 'autogolopes' in Peru and Guatemala.¹⁶⁰ This evolving trend has been endorsed through commitments by both the OAS and the Organisation on Security and Cooperation in Europe (OSCE), which have undertaken to take action towards unconstitutional seizures of power in governments.¹⁶¹

¹⁵⁵ Levitt (n 103 above) 4.

¹⁵⁶ HJ Richardson 'Peacemaking practices "from the south": Africa's influence (African contributions to the law of peacekeeping)' (2002) *American Society of International Law*, Vol. 96 135 at 136.

¹⁵⁷ As above.

¹⁵⁸ As above 137.

¹⁵⁹ See JC Tuomala 'Just Cause: The Thread That Runs So True' (1994) *Dickinson Journal of International Law* http://works.bepress.com/jeffrey_tuomala/2.

¹⁶⁰ D Wippman 'Defending democracy through foreign intervention' *Houston Journal of International Law* Vol.19 659 at 660.

¹⁶¹ Wippman (as above) making reference to the Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS General Assembly, 21st Sess, 3d plen. sess.1, OEA/ser. P/AG/doc.2734/91 (1991); Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-finding, Oct. 3, 1991, 30 I.L.M. 1670; Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, 29 I.L.M. 1305 (1990).

To sum it up, it is therefore argued that despite the controversy surrounding the proposed right of intervention under Article 4(h) of the AU Act, it is nonetheless a path breaking model. It contributes to the development of international law and, if not abused, it will come handy in addressing Africa's peace and security problems. It bridges the gap between international law, human rights and democracy which has been caused by the historical failure of international law to pay attention to human rights and democracy, holding that they were purely domestic issues. Sceptics of intervention may still argue that conferment of the right of intervention on the AU will give rise to abuse of this right causing shift of focus from human security to regime protection. In the section below this paper shall look into the practice of the AU in response to peace and security threats.

4.4 Human security or regime entrenchment?

Baimu and Sturman have posed the question whether the amendment of Article 4(h) aims to protect human rights or seeks to entrench incumbent regimes.¹⁶² They conclude that 'Yet on closer inspection, particularly considering the *raison d'être* of such moves, it becomes clear that this amendment is not intended to protect the individual rights but to entrench the regimes in power. Three arguments can be advanced in support of this contention.' The first reason they advance being that the original proponent of this idea (Muammar Gaddafi) when he sought to extend this right to the Union he wanted to protect African regimes from countries such as the United States which had appropriated to themselves power to effect regime change in countries where they considered their economic interests to be at stake. The second reason is that there is a tendency among African leaders to act in solidarity and shield one another from political adversaries. Lastly, they see no reason for such amendment, except to suspect some mischief on the part of African leaders, since both article 4(g) and article 4(j) seek to address such issues.¹⁶³

While there may be some merit in them, the foregoing views of the learned authors, however, may not hold true in all respects. If, for example, the 'driving force' behind the amendment was Colonel Gaddafi, and the amendment being made to appease him, then his influence within the AU ended with his demise. This assumption was proven wrong by the AU PSC's response to the situation in Libya where it underscored the aspirations of the people of Libya

¹⁶² Baimu and Sturman (n 46 above).

¹⁶³ As above.

for democracy, political reform and regime change.¹⁶⁴ In her article on R2P in Libya during the uprising, Sturman writes that the decision of the AU not to impose sanctions on Libya is inconsistent with the Union's practice of rejecting unconstitutional changes of government.¹⁶⁵ This paper holds the view that the AU's response to Libya was properly guided by the aspirations of the Libyan people rather than a dogmatic approach to coups and their constitutionality. To decide otherwise would be a clear intention to entrench a regime even if the people no longer wanted it.

On the argument that there is a tendency among African leaders to act in solidarity, this is the greatest threat to the proper implementation of this new right of intervention. State practice within the OAU indicates that while the OAU Charter condemned assassinations and coups, the Organisation accepted whosoever was in effective control of the state regardless of how he came into power.¹⁶⁶ After ten successful coups between 1990 and 1997, the OAU changed its approach in favour of a total rejection of unconstitutional changes of government. After analysing the AU responses to the successful *coups* in Togo (February 2005), Mauritania (August 2005 and August 2008), Guinea (December 2008), Madagascar (March 2009), and Niger (February 2010), Omorogbe concludes that:

When responding to *coups*, the AU has consistently favoured the constitutional order, irrespective of the conduct of incumbent regimes, the claims made by those challenging them, or the likelihood that the *coup* might advance democracy. As a result, the AU's actions have generally protected incumbent governments.¹⁶⁷

Whether the above result was achieved by default or by design, the AU has been adapting its approaches towards striking a happy balance between the need to maintain regional peace and security by rejecting unconstitutional changes of government, on the one hand, and the need to protect democracy and human rights, on the other hand. Correctly so, Omorogbe in his conclusion observes that the AU's responses to unconstitutional seizures of power have not been uniformly successful in striking this balance. He points out that the responses to the *coups* in Togo (2005) and Mauritania (2008) resulted in electoral endorsement of those who unconstitutionally came into power. Nevertheless, the AU learnt from its mistakes and adopted a new stance that perpetrators of unconstitutional changes of government should be

¹⁶⁴ Communiqué of the 261st meeting of the PSC. (23 February 2011) PSC/PR/COMM (CCLXI).

¹⁶⁵ Sturman (n 91 above)

¹⁶⁶ Omorogbe (n 55 above).

¹⁶⁷ As above, 138.

disqualified from participation in the electoral processes aimed at restoring democracy.¹⁶⁸ This position was implemented in response to the coups in Guinea, Madagascar and Niger.

As observed in chapter three of this paper regarding responses to the ‘Arab-spring’ uprisings, a further refined approach was adopted by the PSC where it was guided by factors such as aspirations of the people for democracy, political reform, justice and socio-economic development. It is worth pointing out, however, that politics within the AU where Heads of State continue to protect one another, pose a major threat to the implementation of the right of intervention. Using the uprising in Libya as an example, despite the fact that by August 2011 over forty countries had already recognised the National Transitional Council (NTC) as the de facto government, the AU maintained that it will not recognise it as a legitimate government but called for an ‘inclusive government’ which would include members of the old regime.¹⁶⁹ As observed by Omorogbe¹⁷⁰, in what he calls ‘a club of incumbents’, the tendency of the AU has been to sympathise with the old regime either by forging coalition governments¹⁷¹ or by totally rejecting the coup even if it commanded popular support.¹⁷² The issue of coalition governments and their popularity or otherwise is a subject of another day.

One of the arguments raised above in favour of a right of intervention in Africa was that such a model will compensate the shortcomings of the UN Security Council which are primarily caused by the politics involved among its permanent members. The major threat to such complementarity, however, lies in the fact that the PSC will *recommend* to the AU Assembly and only the latter may take a decision to invoke the right of intervention. Coercive intervention is highly contentious in international law and decision-making within the AU Assembly may prove as difficult as decision-making within the UN Security Council. This is because ‘The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union.’¹⁷³ Such a high threshold for decision-making may prove difficult to attain hence a vicious cycle from the failures of the UN system

¹⁶⁸ This position is now codified in the ACDEG, article 25.

¹⁶⁹ ‘African Union refuses to recognise rebels’ Channel4 News <http://www.channel4.com/news/libyan-rebel-government-moves-to-tripoli> (accessed 7.10.12).

¹⁷⁰ Omorogbe (n 55 above).

¹⁷¹ He makes reference to the *coup* in Togo where despite the AU successfully restoring constitutional order after rejecting a civilian government that came into power through a coup, the result was to validate the *coup* through the election of Faure Gnassingbe.

¹⁷² He makes an example of the 2005 coup in Mauritania where President Maaouya Ould Sid’Ahmed Taya was ousted from power in a bloodless coup which was popular and thousands of people demonstrated to support it.

¹⁷³ Art 7(1) of the Constitutive Act of the AU.

to those of the AU system. It would be appropriate if the PSC could take decisions rather than make recommendations to the Assembly. Even though the AU model of intervention may have its flaws, nevertheless as an emerging norm, it has good prospects of effectiveness if improved.

4.5 Conclusion

Western countries are paying less attention to Africa's peace and security challenges, despite the fact that they are ever on the rise. This therefore makes it imperative for Africa to develop its own institutions to address its peculiar challenges. This chapter evaluated the prospects as well as challenges to implementing the right of intervention under the amended article 4(h). This paper found that the new ground of intervention (that is, intervention to restore peace and stability) is not related to the pre-existing grounds of intervention under article 4(h), being genocide, war-crimes and crimes against humanity. Nevertheless, the new ground of intervention should raise no serious controversy since PDI is intervention with the consent of the host state, unlike R2P where the consent of the state intervened against is not required. Article 4(h) therefore evidences such consent being expressed in a multilateral treaty.

The chapter also paid attention to the compatibility of PDI with international law. A case was made for a modern approach to sovereignty rather than the outdated positivist perception of sovereignty. It was argued that the right of intervention does not violate international law and the UN Charter, first because PDI is by consent as already mentioned. Second it is not accompanied by an intention to violate the territorial integrity or political independence of another state unless it results in territorial conquest or political subjection. Thirdly, it was argued that PDI helps bridge the gap caused by stalemates as a result of vetoes within the UN Security Council. Such stalemates hinder the promptitude and effectiveness of the Security Council in discharging its primary functions in the maintenance of international peace and security. Thus, if the primary responsibility becomes impossible to be discharged, the secondary responsibility of states and regional organisations is activated.

It was finally argued that, in light of Africa's peculiar challenges and experiences, there is a need for an Africanist approach to sovereignty. It was argued that Africa should not be taught how to govern itself. The views of various scholars were rendered where they argue that Eurocentrism and western myopia, which undermine African initiatives and treat Africa as a

‘basket case’ rather than the ‘market place’ should be done away with. In the final analysis, on the question whether the amendment of the right of intervention aims to foster human security or is one aimed at regime entrenchment, this paper found that the practice of the AU has been evolving in light of its experiences and challenges. The paper found that early state practice under the OAU was one of indifference as to how a government came into power as long as it was in *de facto* control of the state. After the spate of *coups* in the 1990s, especially after the 1997 *coup* in Sierra Leone, the OAU decided to reject unconstitutional changes of government. The approaches to rejection of unconstitutional changes of government have also been changing with time and the latest responses to the “Arab-spring” uprisings were informed by factors like the aspirations of the people for democracy, political reform, justice and socio-economic development.

Chapter five: Conclusions and recommendations

5.1 Conclusions

Coercive intervention remains a highly contentious subject in international law, which represents the contest between the need to internationalise the human conscience towards respect for human rights, on the one hand, and the need to preserve the international state order which is underpinned by principles of state sovereignty and respect for their territorial integrity, on the other hand. Pessimists continue to raise questions of its legality and the possibility of an abuse of the right to coercive intervention in the affairs of another state. Optimists, on the other hand, are only concerned with the question of how to maximise the effectiveness of coercive intervention.¹⁷⁴ The African Union's right of intervention under article 4(h) of the Constitutive Act of the AU is no exception to such controversy.

The transition from the OAU to AU depicts the ever changing character of challenges facing Africa vis-a-vis what African unity and solidarity entail, which Viljoen describes as an intergovernmental-supranational *continuum*.¹⁷⁵ The birth of the AU's interventionist approach came in the wake of the perennial atrocities, often times committed by African leaders which resulted in the loss of millions of human lives. Other challenges included civil wars which resulted in millions of refugees and displacements; as well as unconstitutional changes of government. These were viewed by the AU as posing threats to human rights and regional peace and security, informing the need for a collective approach to addressing them. Among a litany of strategies formulated by the AU is the Union's the right of intervention in a Member State in respect of genocide, war crimes and crimes against humanity as reflected in article 4(h) of the Constitutive Act of the AU. This right has been expansively amended to include intervention where there is a serious threat to legitimate order and to restore peace and stability in a Member State.

In order to fully understand this 'intergovernmental-supranational *continuum*' described by Viljoen, it was imperative to analyse the right of intervention under the AU from a historical perspective. Chapter one of this study addressed that part by looking at intervention under both the OAU and the AU. Cooperation under the defunct OAU was founded upon the

¹⁷⁴ See ICISS Report (n8 above).

¹⁷⁵ Viljoen (n 21 above).

Organisation's inviolable principles of non-interference, non-intervention and respect for sovereignty and territorial integrity of member states. These principles were primarily intended for the protection of the weaker states from political interference by stronger powers. The OAU's non-interventionist approach to matters which were considered 'domestic' became fertile ground for massive violation of human rights and massacres of populations by African dictators. These dictators used sovereignty to fend off criticism by their peers. It was against that threshold that human rights became a concern to the OAU and the need to relax the sovereignty and non-interference principles.

While intervention in its original form, in line with the responsibility to protect, was for purely humanitarian purposes, such grounds of intervention proved inadequate to address Africa's new challenges, particularly civil wars and unconstitutional changes of government which continued to pose a threat to collective peace and security. Hence the traditional threshold for humanitarian intervention was increased to include the right of the Union to intervene where there is a serious threat to legitimate order and to restore peace and stability.

In chapter three, this study attempted to define what constitutes a serious threat to legitimate order as well as measuring the threshold for intervention. These concepts are not defined in any treaty or under customary international law. The paper started by defining what a legitimate order is before defining a threat to legitimate order. Scholars like Maluwa,¹⁷⁶ Omorogbe¹⁷⁷ and Baimu and Sturman,¹⁷⁸ among others, lend credence to this paper's conclusion that the OAU's definitions and interpretations of an 'unconstitutional change of government' should be used to define what a legitimate order is, as well as a threat to it. The paper argued that the 'constitutionality' of a government (or rather, its legitimacy for our present purposes) should not be defined by a simple reference to constitutional procedural requirements such as elections. Instead, discernment of the legitimacy of a government should be in terms of both its source of power (legitimacy of origin) as well as its exercise of power (legitimacy of exercise). This paper argued that for purposes of intervention where there is a threat to legitimate order and to restore peace and stability, a nuanced approach to legitimacy is more favourable. The PSC, which is the organ of the AU tasked with assessing whether there is any such threat under article 4(h) and to makes recommendations to the AU

¹⁷⁶ Maluwa (n 40 above).

¹⁷⁷ Omorogbe (n 55 above).

¹⁷⁸ Baimu & Sturman (n 46 above).

Assembly, should be informed primarily by ‘the will of the people.’ This is the view of those who view democracy as a human right under what Thomas Franck¹⁷⁹ describes as the ‘democratic entitlement’ theory.

Accordingly, it would be against the peoples’ right to self-determination and their ‘democratic entitlement’ to intervene to keep in power a despotic regime merely because those who seized power from it did so unconstitutionally. This applies with greater force where such constitutional mechanisms are non-existent or only constitute a sham to window-dress and legitimise autocracy. In this paper’s view the PSC’s approach to the so-called ‘Arab-spring’ uprisings in Libya and Egypt in 2011, which was informed primarily by the peoples’ will and their aspirations for democratic governance, political reform, justice and socio-economic development, is plausible. It is a sign of a move towards a robust approach to defining legitimacy of governments, rather than its positivistic interpretation and total rejection of unconstitutional changes of government which the AU has consistently followed in the last decade.

It is without doubt that Africa’s model of intervention, particularly on the proposed right of intervention, is a groundbreaking one. There is a need to develop and strengthen Africa’s peace and security architecture to address its unique problems. Though it appears that the right of intervention under article 4(h) is a well intended one, it will nevertheless be met with challenges. Chapter four of this study looked at the prospects and some of the challenges to the implementation of this intervention. Humanitarian intervention (R2P) and PDI both serve the ultimate purpose of protecting fundamental human rights and also preservation of peace, security and legal order. The difference between the two is that PDI is primarily based on state consent while R2P derives its legitimacy not from state consent but on the state’s failure or unwillingness to protect its citizens from egregious human rights violations. Accordingly, therefore, PDI should raise no controversy as R2P since by signing the amendment Protocol, states would have consented to such intervention to thwart a threat to legitimate order. As Levitt submits, ‘PDI in Africa does not raise the same ‘legal barriers’ as humanitarian intervention because it does not abrogate the well-settled international law doctrines on state sovereignty, territorial integrity, and non-intervention in the internal affairs of states.’¹⁸⁰

¹⁷⁹ Franck (n 108 above).

¹⁸⁰ Levitt (n 103 above) 4.

Sovereignty remains a fundamental principle of international law and any form of intervention should be measured against it. However, a refined approach to this outdated concept, described by one prominent scholar¹⁸¹ as ‘organised hypocrisy’, needs to be favoured. The Constitutive Act of the AU still upholds respect for sovereignty as one of its foundational principles, hence no intention to violate article 2(4) of the UN Charter or customary international law may be inferred. This study also argued for an ‘Africanist’ approach to the law on intervention. Africa and its organisations are historically the greatest observers of the principles of non-intervention and respect for sovereignty, and the bad lessons learnt from that experience should speak volumes towards favouring ‘pooled sovereignty’ for the sake of collective security.

5.2 Recommendations

The proposed right of intervention under article 4(h) of the Constitutive Act of the AU, if nurtured and properly exercised, will be a viable solution to Africa’s persistent peace and security challenges. Like other innovative contributions of Africa to the *corpus* of international law, it will set new global trends in human rights and democracy if translated from rhetoric to reality. In this regard it is therefore recommended as follows:

5.2.1 Interpretation of a serious threat to legitimate order

The absence of a legal definition of a ‘threat to legitimate order’ gives room to the PSC to flexibly and progressively define each situation in light of its own circumstances. The PSC must interpret the AU Act as a living instrument, endeavouring to decipher the ‘peoples’ will’ rather than dogmatically condemning all unprocedural seizures of power. A tidy distinction must be drawn between unconstitutional changes of government at the behest of opportunists and warlords which seek not to foster democracy, but the interests of a few powers, on the one hand, and those which – if given a chance – are likely to advance democracy, human rights and good governance, on the other hand. Nevertheless, even if the unconstitutional change of government has prospects of advancing democracy and broadening political space, the transition should be closely monitored and supervised by the PSC. The PSC in this respect must develop some guidelines for the Assembly ‘on how to steer popular uprisings towards the restoration or establishment of constitutional democracy, including provision for

¹⁸¹ Krasner (n 112 above).

transitional government, a time frame for elections and the consolidation of democratic institutions.¹⁸²

5.2.2 Human security versus regime protection

A happy balance must be struck between the need to condemn unconstitutional changes of government and the need to protect human rights. Fusing together R2P and PDI will be a challenge, especially where the threshold is not the same for both. The use of the phrase ‘serious threat’ for purposes of PDI and ‘grave circumstances’ in the case of humanitarian intervention implies that the protection of human life is less important than regime protection. It gives the impression that human peril has to reach such alarming proportions before the PSC could recommend intervention, whereas for PDI it need not actually occur but a serious threat will suffice. With the blending of humanitarian and pro-democratic intervention under article 4(h), it is therefore recommended that the threshold for intervention should be harmonised and no distinction should be made between the two types of intervention.

5.2.3 Abuse of right of intervention

Vigilance should be exercised in implementing the right of intervention to curb abuse of this right by vigilantes who may embark on military confrontation with those they perceive as threats to the powers that be, or to even misappropriate the right to effect regime change and smuggle democracy where it is perceived to be lacking. The right of intervention vests in the Union and not in any individual state. However, this should not suggest that the so-called powerful states in the AU cannot influence decisions in the AU. It is therefore recommended that any intervention under article 4(h) should reflect the collective interests of the African people rather than the interests of a few powers.

5.2.4 Complementarity with the United Nations Security Council

To minimise the controversy of usurpation of UN Security Council’s powers, where military intervention is the option, the AU should as far as practicable first seek authorisation by the UN Security Council. Only if the UNSC is ineffective or unwilling to act should the AU resort to military intervention in the exercise of its secondary responsibility under article 24 of the UN Charter. The proposals made in the ‘Ezulwini Consensus’ should be explored

¹⁸² Sturman (n 91 above).

further and ‘any recourse to force outside the framework of Article 51 of the UN Charter and Article 4(h) of the AU Constitutive Act should be prohibited.’¹⁸³ Furthermore, military intervention should be a measure of last resort after all other non-forcible measures have proven or are most likely to be ineffective to remedy the situation for which the intervention is made.

5.2.5 PSC to make recommendations to the Assembly?

The requirement that the PSC should make a recommendation to the AU Assembly and that it is the latter’s prerogative to decide on whether to authorise intervention poses a major challenge to the effectiveness of this right of intervention. It is likely to result in a vicious cycle whereby while trying to avoid the failures of the UN system, the AU finds itself embroiled in the deeper politics of the African system. This applies with greater force since decision-making in the AU Assembly is by consensus or, failing which, by a two-thirds majority. In light of the landscape in which African politics operate, where African leaders tend to shield each other, such a threshold may prove too high to achieve. It is recommended that decisions under article 4(h) should be regarded as procedural instead of substantive since the former requires only a simple majority. In the alternative, in a similar way as the UN Security Council, it is recommended that the PSC should be clothed with full authority to render decisions of intervention under article 4(h) instead of making recommendations to the AU Assembly, for it is a redundancy for the AU Assembly to reconsider a the matter already considered by PSC.

5.2.6 Ratification of the Protocol for the amendment of the Constitutive Act

The rate at which the the amendment Protocol to the AU Constitutive Act is being ratified gives the impression that states are reluctant to ratify the Protocol. It is now more than nine years since the Protocol was adopted yet only nine out of 54 states have ratified it so far. In light of the potentiality of this right of intervention as highlighted by this study, as well as the need to operationalise the other provisions of the Protocol, It is therefore recommended that the AU should encourage its member states to ratify the Protocol.

¹⁸³ ‘The Ezulwini Consensus’ (n 144 above).

5.2.7 Ratification of the African Charter on Democracy Elections and Governance

It is finally recommended that the AU should endeavour to stimulate ratification of the ACDEG, since it has been shown in this study that it will serve as a useful instrument in the interpretation of serious threat to legitimate order. This will minimise controversy on whether the PSC can ‘borrow’ from such instruments in relation to situations arising in states not parties to the ACDEG. It will further remedy the shortcomings of the Lomé Declaration since the latter instrument has no binding force on member states by virtue of its being soft law.

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