By all means necessary: Protecting civilians and preventing mass atrocities in Africa

Dan Kuwali & Frans Viljoen (editors)

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TABLE OF CONTENTS

Acknowledgments vi
Preface vii
Abbreviations and acronyms ix
List of contributors xiii

PART I: IMPLEMENTATION OF PROTECTION OF CIVILIANS MANDATES

1 **Introduction** 1
Dan Kuwali and Frans Viljoen

2 **Article 4(h), the responsibility to protect and the protection of civilians** 16
Dan Kuwali

3 **Defining protection of civilians in the context of armed conflicts** 41
Conor Foley

4 **Interpretation of protection of civilians mandates in United Nations Security Council Resolutions** 73
Dire Tladi

PART II: PROTECTION OF SPECIFIC POPULATIONS AND PROPERTY AT RISK

5 **Protection of civilians from wilful killing in armed conflicts** 88
Thompson Chengeta

6 **Prevention of violent extremism in Africa** 102
Dan Kuwali

7 **Protection of children in armed conflicts** 120
Cephas Lumina

8 **Protection of refugees and internally displaced persons during armed conflicts** 144
Cristiano d'Orsi

9 **Protection from sexual and gender-based violence in Africa** 167
Dan Kuwali, Catherine Nakirya and Grace Amuge

10 **Protection of minorities** 185
Dan Kuwali and Gudmundur Alfredsson

11 **Protection of cultural heritage during armed conflicts in Africa** 200
Jan F Mutton

PART III: MEANS AND STRATEGIES FOR DEALING WITH MASS ATROCITIES

12 **The role of humanitarian agencies in the protection of civilians** 222
Anna Larsson and Dan Kuwali

13 **The role of the UN Human Rights Council Special Procedures in protecting the right to life in armed conflicts** 239
Thomas Probert

14 **The role of courts in protection of civilians** 258
John-Mark Iyi

15 **Conflict prevention, peace building and prevention of mass atrocities** 288
Mphatso Boti-Phiri

16 **The role of the United Nations Security Council in protection of civilians** 306
Neville Dastoor and Dan Kuwali

PART IV: LESSONS LEARNT IN PROTECTION OF CIVILIANS IN ARMED CONFLICTS

17 **Protection of civilians in armed conflicts in West Africa** 318
Buba Bojang

18 **No peace, no war: Protection of civilians in the Great Lakes Region of Africa** 342
Bright Nkrumah and Godard Busingye

19 **Protection of civilians in the Horn of Africa** 356
Paul Phiri

20 **Protection of civilians: Experiences from the Middle East and North Africa** 372
Joe Stork

21 **The African Union's agenda on the protection of civilians: A review of its ambition and practice** 394
Solomon Dersso

22 **Asian perspectives on atrocity prevention and protection of civilians** 420
Noel M Morada

PART V: THE FUTURE OF PROTECTING CIVILIANS AND PREVENTING MASS ATROCITIES IN AFRICA

23 **Overcoming challenges in protecting civilians** 438
Gilbert Mittawa

24 **The future of protection of civilians in Africa** 456
Dan Kuwali

25 **Conclusion** 475
Dan Kuwali and Frans Viljoen

Selected bibliography 490

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Any opinion expressed in this volume is solely that of the authors and not necessarily that of the institutions they represent.

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April 2017

PREFACE

This is a timely, insightful and valuable book. The volume deals with an issue of great relevance, namely the protection of civilians and prevention of mass atrocities on the African continent, and provides insights on this topic from a range of perspectives, both theoretical and practical. It is particularly encouraging to see that authors from human rights as well as security backgrounds are represented.

The role of the international community in the protection of civilians is a complex subject, fraught with pitfalls and ambiguity. Both too much and too little international intervention can present serious dangers. States remain pillars of international security, and the main responsibility to protect the population is that of domestic governments. To that end, states have, and should have, singular powers of enforcement. Yet, in some instances they fail to exercise those powers in ways which protect the population, either by failing to eliminate threats to their population or even by posing a threat themselves. Thus, the question becomes to what extent should the international community step in to fill the protection vacuum in a particular case, without undermining the longer term role of the state and other local actors as the primary custodians of the human rights and welfare of their people.

Africa is one of the regions of the world – although by no means the only one – where this question is of particular relevance. A disproportionate percentage of global conflicts take place on this continent. While a sixth of the world's population live on the continent, a third of its conflicts play themselves out on African soil. At the same time this is not an intractable situation. While political violence is rising, there has been a decline in recent years in the extent to which these conflicts are deadly. Much remains to be done, but through well-informed and properly conceptualised interventions, the incidence and burden of violence can be reduced. The contents of this book constitute an important step in that direction.

The international system as a whole is grappling with the question of humanitarian intervention and the responsibility to protect. In Africa this was given an additional layer through the inclusion of article 4(h) in the Constitutive Act of the African Union, which provides that the continental body will function in accordance with the principle of '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.' Much of this book grapples not only with the question of how to understand the role of the international community in Africa in terms of protection of the population but also with the question of what these pious and enigmatic words about the principles on which the African Union is supposed to function mean in practice.

The Centre for Human Rights, African Military Law Forum, and the contributors to this publication, must be congratulated for bringing

together such a multi-faceted, comprehensive and academically rigorous investigation of this important issue by people who are either from the continent or are deeply interested in its future. The book poignantly provides clarity on the interface of highly amorphous notions of article 4h-intervention, responsibility to protect and protection of civilians and provides concrete recommendation on their implementation. This book will serve as a resource and in many cases as an inspiration to those involved in the process of ensuring that the African continent becomes a safer place, allowing the flourishing of all its people.

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AFISMA	African-led International Support Mission to Mali
AFL	Armed Forces of Liberia
AFRICOM	United States Africa Command
AG	armed groups
AICHR	Inter-Governmental Commission on Human Rights
AmCHR	American Convention on Human Rights
AMISEC	African Union Mission for Support to Elections in Comoros
AMLF	Africa Military Law Forum
APSA	African Union Peace and Security Architecture
AQAP	Al-Qaeda in the Arabian Peninsula
AQIM	Al-Qaeda in the Islamic Maghreb
ASDSSA	Alteration of Sex Description and Sex Status Act
ASEAN	Association for Southeast Asian Nations
ASF	African Standby Force
ATT	Arms Trade Treaty
AU	African Union
AUC	African Union Commission
AUPSC	African Union Peace and Security Council
C34	Special Committee on Peacekeeping Operations of the United Nations
CADSP	Common African Defense and Security Policy
CAR	Central African Republic
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPGL	Economic Community of the Great Lakes Countries
CEWERU	Conflict Early Warning and Response Unit
CIA	Central Intelligence Agency
CIIS	China Institute of International Studies
COI	Commission of Inquiry
COMESA	Common Market for East and Southern Africa
CRC	Convention on the Rights of the Child
CSO	civil society organisation
CVE	countering violent extremism
DDR	demobilisation, disarmament and reintegration
DIRCO	Department of International Relations and Co-operation (South Africa)
DPA	Department for Political Affairs
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
EASBRIG	East African Standby Brigade
ECOMC	ECOWAS Mission in Côte d'Ivoire
ECOMIG	ECOWAS Mission in The Gambia
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
ECOWASBRIG	ECOWAS Brigade
EECC	Eritrea-Ethiopia Claims Commission
ERC	Equity and Reconciliation Commission (Morocco)

EU	European Union
FARDC	*Forces Armées de la République Démocratic du Congo* (Armed Forces of the Republic of the Congo)
FIB	Force Intervention Brigade
FOMAC	*Force Multinationale de l'Afrique Centrale*
GCIV	Fourth Geneva Convention
GIA	Armed Islamic Group (Algeria)
GLR	Great Lakes Region
GPA	Global Political Agreement
GPC	Global Protection Cluster
HoA	Horn of Africa
HPG	Humanitarian Policy Group
HRW	Human Rights Watch
IAC	international armed conflict
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICGLR	International Conference on the Great Lakes Region
ICID	United Nations International Commission of Inquiry on Darfur
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICU	Islamist Courts Union (Somalia)
IDLO	International Development Law Organisation
IDPs	internally displaced persons
IED	improvised explosive device
IGAD	Inter-Governmental Authority on Development
IGASOM	IGAD Mission in Somalia
IGO	inter-governmental organisation
IHFFC	International Humanitarian Fact-Finding Commission
IHL	international humanitarian law
IHRL	international human rights law
IIHL	Institute of International Humanitarian Law
ILO	International Labour Organisation
IRL	international refugee law
ISS	Institute for Security Studies
KDF	Kenya Defense Force
LRA	Lord's Resistance Army
LTTE	Liberation Tiger of Tamil Eelam
M23	March 23 [2012] Movement (Democratic Republic of the Congo)
MAPROBU	Africa Prevention and Protection Mission in Burundi
MARO	Mass Atrocity Response Operations
MDF	Malawi Defence Force
MERIP	Middle East Research and Information Project
MINUSMA	United Nations Multidimensional Integrated Stabilisation Mission in Mali

MISCA	African-led International Support Mission to the Central African Republic
MNJTF	Multinational Joint Task Force against Boko Haram
MNLA	National Movement for the Liberation of Azawad
MOJWA	Movement for the Oneness and Jihad in West Africa
MONUC	United Nations Mission in the Democratic Republic of Congo
MONUSCO	United Nations Stabilisation Mission in the Democratic Republic of Congo
MOOTW	military operations other than war
MSF	*Médecins Sans Frontières*
MSU	United Nations Mediation Support Unit
MUJAO	*movement pour l'Unification et le Jihad en Afrique de l'Ouest*
NASBRIG	North Atlantic Regional Standby Brigade
NATO	North Atlantic Treaty Organisation
NCIC	National Cohesion and Integration Commission
NEPAD	New Partnership for Africa's Development
NetPeace	Network of African Journalist for Peace
NGO	non-governmental organisation
NIAC	non-international armed conflict
NSAG	non-state armed groups
NSAs	non-state actors
OCHA	Office for the Coordination of Humanitarian Affairs
ODP	Orange Democratic Movement
OHCHR	United Nations Office of the High Commissioner for Human Rights
ONUB	United Nations Operation in Burundi
OP-CAC	Optional Protocol to the Convention on the Right of the Child on the Involvement of the Children in Armed Conflict
OSCE	Organisation for Security and Co-operation in Europe
P5	Five Permanent Members of the United Nations Security Council
PoC	protection of civilians
PSC	Peace and Security Council of the African Union
PSOs	peace support operations
R2P	responsibility to protect
R2P-SCC	Security Council Committee on the Responsibility to Protect
RCI-LRA	Regional Task Force of the African Union-led Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army
RN2V	responsibility not to veto
RoE	rules of engagement
RwP	responsibility while protecting
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SALW	small arms and light weapons
SCSL	Special Court for Sierra Leone
SGBV	sexual and gender-based violence
SMS	short message service
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SSR	security sector reform
TCCs	troop contributing countries
TFG	Transitional Federal Government (Somalia)
TFIs	transitional federal institutions (Somalia)

UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMID	African Union-United Nations Mission in Darfur
UNAMID	United Nations Mission in Darfur
UNAMSIL	United Nations Assistance Mission in Sierra Leone
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Fund
UNIFAF	Unified Taskforce
UNIFEM	United Nations Development Fund for Women
UNMIS	United Nations Mission in Sudan
UNMISS	United Nations Mission to South Sudan
UNOCI	United Nations Operations in Côte d'Ivoire
UNOHCR	United Nations Office of the High Commissioner for Human Rights
UNOM	United Nations Mission in The Gambia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNPOs	United Nations Peace Operations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNSOA	United Nations Support Office of AMISOM
UPDF	Uganda People's Defence Force
WFP	World Food Programme
WSOD	World Summit Outcome Document
ZANU-PF	Zimbabwe African National Union-Patriotic Front

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CHAPTER 1 INTRODUCTION

Dan Kuwali and Frans Viljoen

1 Introduction

Recent times have witnessed indiscriminate violence and targeted attacks on civilians, peacekeepers and medical personnel by all parties to contemporary armed conflicts around the world. For instance, at the time of writing, reports were rife that the Syrian government forces had used chemical weapons against its own people.[1] Although they are protected under international human rights law (IHRL) and international humanitarian law (IHL), civilians continue to be the main casualties of conflict, often deliberately targeted rather than merely caught up in the midst of the fighting in armed conflicts. This has led to an unacceptably high toll on human life and livelihoods of civilians, and particularly in Africa. The armed conflict in the Democratic Republic of the Congo (DRC), for example, steers towards the worst end of the scale of civilian populations living in danger and misery. The dynamics of armed conflicts are often complex and their epicentres tend to shift from one locus to another as they expand geographically. The brutalities visited upon innocent civilians under siege, caused either by their own government's forces or by rebels, include sexual violence, forced population displacement and extrajudicial, summary or arbitrary executions. In a majority of cases, incumbent governments fail in upholding their constitutional and international obligations to protect civilians from such brutalities. Examples of this failure are: the genocide in Rwanda; the on-going civil strife in the DRC; and the Islamic insurgency in Kenya, Nigeria and Somalia.

Although the primary responsibility to protect populations rests with states, sometimes, it is those responsible for the protection of the civilian

1 United Nations 'Chemical-Weapons Attack in Syria Was Largest Such Event Since 2013', United Nations Security Council, *Meetings Coverages and Press Preleases,* 5 April 2017, 7915th Meeting, UN Doc SC/12777, available at https://www.un.org/press/en/2017/sc12777.doc.htm (accessed 6 April 2017).

population who undermine the security of the populations and perpetrate abuses against civilians. For some, the most potent threat to the security and human rights of the people of the DRC is the Congolese Army itself.[2] The Libyan situation in 2011, when Colonel Muammar Gaddafi ordered government troops to massacre Libyans who rebelled against his autocratic rule,[3] is another example. Several human rights organisations and humanitarian agencies published credible reports that the government in Burundi has been involved in killing nationals who were perceived to be in opposition to the ruling Pierre Nkurunziza's regime.[4]

The cases of Northern Uganda and the Eastern DRC have shown that, apart from violations by government forces, insurgents also perpetrate atrocities, often with little regard to the laws regulating the conduct of hostilities. The most vulnerable civilians include women and girls, who are often murdered, raped and sexually abused. In the DRC, for example, rape has for a long time been used as a weapon of war such that it is more dangerous to be a woman than a soldier in such situations. As demonstrated in *Prosecutor v Thomas Lubanga Dyilo* (*Lubanga* case), children are regularly taken and forced to become soldiers.[5] Those who survive these violations are frequently displaced, and take refuge in camps where they are defenceless against armed attacks and harassment.[6] Humanitarian relief workers and peacekeepers have been abducted and murdered by belligerents in conflict situations such as the Darfur region of Sudan. In Darfur, peacekeepers who are supposed to be protecting civilians have found themselves in precarious situations without the capacity and capability to protect civilians, which sends a wrong signal to the perpetrators as well as to the population whom they are supposed to protect. The irresponsible transfer of weapons and ammunition and the proliferation of illicit small arms have a direct impact on the prevention of mass atrocities, and tend to hinder a government's ability to protect its population.[7]

2 D Kuwali 'Defending the defenceless: Questions of mandate and capability to protect civilians in the Democratic Republic of the Congo' in F Tibbitts *et al* (eds) *Improving the protection of civilians in situations of armed conflict* (2011) 17.

3 See United Nations Human Rights Council 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' UN Doc A/HRC/17/44 (1 June 2011).

4 For example, 'Burundi: Crisis and warning' available at https://www.opendemocracy.net/andrew-wallis/burundi-crisis-and-warning (accessed 29 April 2016); and 'Burundi: UN investigation urges strong action in light of gross, widespread and systemic human rights violations' available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20534&LangID=E (accessed 12 April 2017).

5 *Prosecutor v Thomas Lubanga Dyilo* Case No. ICC-01/04-01/06.

6 Citizens for Global Solutions 'Protecting civilians in armed conflicts' available at http://globalsolutions.org/files/public/documents/CP-Factsheet-Protecting-Civilians-in-Armed-Conflict.pdf (accessed 30 August 2013).

7 International Coalition for the Responsibility to Protect (ICRtoP) 'A toolkit on the responsibility to protect' (2013) 33.

Atrocities can occur in times of peace and during an armed conflict. Therefore, local, national, continental and international actors must be able to recognise the factors that can indicate a risk of these atrocities. The United Nations (UN) Office on Genocide Prevention (formerly Office of the Special Adviser on the Prevention of Genocide) has developed the Analysis Framework, which outlines eight factors, including discrimination or incitement against minority communities and the presence of illegal arms, which can determine whether there may be a risk of genocide in a country situation.[8] There are two approaches to preventive measures. The first is 'upstream' prevention, which involves measures that governments can employ in their countries, such as development institutions and policies, and strengthening sectors that reduce the risk of mass atrocities. These measures are categorised into economic, governance, human rights, security, social, diplomatic, legal, early warning, inducements, sanctions and military measures. The second, 'downstream' prevention, involves responses to imminent threats of mass atrocities. These measures may be economic, political, humanitarian or military in nature, and can be undertaken by actors in the international community, including civil society, individuals, regional and sub-regional arrangements, and UN bodies.[9]

The protection of civilians is not only a moral imperative to save lives but it is also a legal obligation insofar as it is rooted in human rights and humanitarian law obligations to prevent harm to endangered civilians and ameliorate their suffering in armed conflicts.[10] Protection of civilians is also important for the maintenance of international peace and security.[11] This explains why the UN Security Council has adopted several resolutions on the protection of civilians in armed conflicts, specifically for the protection of women and children in situations of armed conflict.[12]

8 United Nations, Office of the UN Special Adviser on the Prevention of Genocide (OSAPG), Analysis Framework, available at http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf (accessed 8 May 2014).

9 International Coalition for the Responsibility to Protect (ICRtoP) (n 6 above) 21-23.

10 See The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950 (Geneva Convention IV), art 27. See also the International Covenant on Civil and Political Rights, UN Doc GA res. 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171.

11 UN S/RES/1265 (1999) Resolution on protection of civilians in armed conflicts, 17 September 1999 and UN S/RES/1296 (2000) on protection of civilians in armed conflicts, 19 April 2000, pertaining to the protection of civilians. See also Oxfam 'Protection of civilians in 2010: Facts, figures and the UN Security Council's Response' 147 Oxfam Briefing Paper (May 2011) available at http://www.oxfam.org/sites/www.oxfam.org/files/protection-of-civilians-in-2010-09052011-en.pdf (accessed 30 August 2013) 4; and Citizens for Global Solutions (n 5 above) 1–2.

12 For example: see UN S/RES/1325 (2000) Resolution on women and peace and security, 31 October 2000; UN S/RES/1612 (2005) Resolution on children in armed conflict, 26 July 2005; UN S/RES/1860 (2009) Resolution on a durable and fully respected ceasefire and the full withdrawal of Israeli forces from the Gaza Strip, 8 January 2009; UN S/RES/1888 (2009) Resolution on acts of sexual violence against civilians in armed conflicts, 30 September 2009, which specifically calls for the UN

There has been an increased effort to realise the call that 'never again' should mass atrocities happen, since the horrendous events of 1994 in Rwanda. On its part, the African Union (AU) incorporated the right to intervene in a member state in the event of war crimes, genocide and crimes against humanity in article 4(h) of its Constitutive Act.[13] In the same vein, the UN General Assembly has also committed itself to the principle of the responsibility to protect that, if national authorities are manifestly failing to protect their populations from mass atrocities, states have the responsibility to respond in a timely and decisive manner through the UNSC.[14]

Although both article 4(h)-intervention and the third pillar of the responsibility to protect entail the use of military force to protect populations from mass atrocities, there is no indication of how that force should be used to protect populations at risk. While article 4(h) and the responsibility to protect imply the use of military force, there are still legal dilemmas of the military becoming involved in civilian protection and how to actually protect civilians due to lack of a comprehensive tactical guidance.[15] Most operational guidelines as regards the execution of tasks relating to protection of civilians are of a strategic and operational nature. There is a paucity of guidelines at the tactical level where the actual protection of civilians is carried out.[16] This *lacuna* has been exposed by the implementation of the UN Security Council Resolution 1973, which was adopted following the massacre by the Gaddafi regime of its own citizens in Libya in 2011.[17] Resolution 1973 authorised the use of 'all necessary measures … to protect civilians and civilian-protected areas' under threat of attack.[18]

Secretary-General to, among others, appoint a Special Representative to provide coherent leadership on combating sexual and gender based violence; UN S/RES/1889 (2009) Resolution on women and peace and security, 5 October 2009; and UN S/RES/1894 (2009) Resolution on the protection of civilians in armed conflict, 11 November 2009, which asked, among others, for more detailed and comprehensive reporting on the protection of civilians.

13 Constitutive Act of the African Union (2000).

14 Centre for Conflict Resolution 'Preventing genocide and the responsibility to protect: Challenges for the UN, Africa, and the international community' (2007). See also Stanley Foundation 'Actualizing the responsibility to protect' 43rd Conference on the United Nations of the next decade (2008) available at http://www.stanleyfoundation.org/publications/report/UNND808.pdf (accessed 30 August 2013).

15 S Sewall *et al Mass atrocity response operations: A military planning handbook* (2010).

16 African Union 'The proposed guidelines for the protection of civilians in AU Peace Support operations' (draft guidelines for the protection of civilians) available at http://www.operationspaix.net/data/documenttexte/8763.pdf (accessed 24 August 2012). For example, Foreign and Commonwealth Office 'UK Government Strategy on the Protection of Civilians in Armed Conflict' Policy Paper, 7 December 2011 (UK Strategy) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32950/ukstrategy-protect-cvilians-arms-conflict.pdf (accessed 30 August 2013) 11.

17 United Nations Security Council Resolution 1973, 17 March 2011.

18 United Nations Human Rights Council 'Report of the International Commission of Inquiry on Libya' UN Doc A/HRC/19/68 (2 March 2012) para 4.

Following the intervention, the International Commission of Inquiry mandated by the Human Rights Council found that 'NATO conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties'.[19] In spite of these efforts, some of the very civilians who were supposed to be protected by the intervention were killed during the North Atlantic Treaty Organisation (NATO) air campaign even beyond the acceptable collateral damage threshold.[20] Despite Resolution 1973 being carefully drafted to authorise and delimit the scope of the military action to humanitarian protection, the NATO intervention went beyond the protection of civilians, targeted Gaddafi, and effected a regime change in Libya, which only ended after the death of Gaddafi.[21] Similarly, the actualisation of article 4(h) of the AU Constitutive Act has been brought into question following the refusal of the Burundian government to welcome AU peacekeepers to intervene in the crisis in the country. Although article 4(h) provides for the right of intervention by the AU with or without the consent of the host state, Bujumbura said in no uncertain terms that it will regard the AU peacekeepers as foreign interveners, therefore prone to being attacked. Nkuruziza said that '[i]f these troops come, it will be seen as an attack and the country will stand up to defend itself'.[22] The open defiance by Nkuruziza's regime in Burundi raises questions whether article 4(h) is merely a paper tiger.

Given the fact that civilians continue to be the majority of victims of atrocities despite the legal protection, there is need to find innovative and effective means of preventing mass atrocities, and in the event of failure to prevent, explore how the military should protect populations at risk, in mass atrocity response operations (MARO) under article 4(h) and the third pillar of the responsibility to protect.[23] Mass atrocity response operations under article 4(h) and the third pillar of the responsibility to protect are coercive civilian protection missions that are unique and require very specific training, capabilities, and equipment.[24] There is also a lack of

19 As above.
20 United Nations 'Responsibility to protect: Timely and decisive response' Report of the Secretary-General, UN Doc A/66/874 S/2012/578, 25 July 2012, para 55.
21 R Thakur 'Libya and the responsibility to protect: Between opportunistic humanitarianism and value-free pragmatism' Institute for Security Studies (Situation Report) (2012) 3.
22 Somali Update 'Burundi: If Nkurunziza continues defiance of AU, it would most likely be kicked out of AMISOM in Somalia' 15 December 2015 available at http://somaliupdate.com/articles/8013/BURUNDI-If-Nkurunziza-Continues-Defiance-of-AU-It-Would-Most-Likely-be-Kicked-Out-of-AMISOM-in-Somalia (accessed 29 April 2016).
23 See Sewell *et al* (n 15 above).
24 See generally Centre for Human Rights 'Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union' available at http://www1.chr.up.ac.za/index.php/news.html (accessed 23 September 2013). For an applied discussion of the Pretoria Principles, see JP Perez-Leon-Acevedo 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union' (2016) 16 *African Human Rights Law Journal* 476-504.

cohesion between mandates, intentions, and expectations, especially if civilian protection requires the use of force.

There have also been complex challenges in several situations where the UNSC has authorised the 'use of all means necessary' to protect civilians in armed conflicts.[25] A continuing challenge is the division between human rights and humanitarian organisations that envision civilian protection being a broader concept that includes humanitarian assistance and guarantees of human rights standards, whereas militarily-oriented institutions see protection as preventing physical harm. So far, the official guidelines from the UN provide little detail on what defines civilian protection.[26] Thus, there is a need to close the doctrinal gap that exist as a result of different perceptions of the term 'protection' between humanitarian organisations viewing protection in terms of the fulfilment of human rights and legal norms, and the military which sees protection as related to defence from physical harm.[27] Continuing to maintain relations with host countries is also an important issue. For example, it is not yet clear how civilians can be protected when the host government bans peacekeepers from entering the country as it has happened in Burundi, or if a host government decides to expel peacekeepers before they have completed their mandates.

Against this background, the Centre for Human Rights, Faculty of Law, University of Pretoria, with the assistance of the United States Africa Command (AFRICOM) through the Africa Military Law Forum (AMLF), on 18 and 19 September 2014 hosted a Colloquium on the protection of civilians in armed conflict, in Pretoria, bringing together over 80 academics, judges, practitioners, policy makers, military personnel, government officials and other commentators. The aim of the Colloquium was to consider the legal, procedural and practical challenges in the implementation of article 4(h) of the Constitutive Act of the African Union. Its theme was: '"All Means Necessary": Bridging the Gap between the Doctrine of R2P and the Actual Protection of Civilians in Armed Conflicts'. The objective of the Colloquium was further to identify innovative and effective means of preventing mass atrocities and, in the event of failure to prevent, to explore how humanitarian agencies and the military should protect populations at risk, pursuant to article 4(h) of the Constitutive Act of the African Union (AU) and the coercive element of the third pillar of the responsibility to protect (R2P). The broader goal of

25 See for example, AJ Kuperman 'Obama's Libya debacle: How a well-meaning intervention ended in failure' Foreign Affairs March/April 2015 Issue, available at https://www.foreignaffairs.com/articles/libya/obamas-libya-debacle (accessed 30 April 2016).

26 D Kuwali '"Humanitarian rights": Bridging the doctrinal gap between the protection of civilians and the responsibility to protect' (2013) 4 *Journal of International Humanitarian Legal Studies* 5-46.

27 K Aning & N Salihu 'The protection of civilians in peace support operations: Lessons from Côte d'Ivoire' (2012) 25 *Conflict Trends* 30.

the Colloquium was to contribute to cultivating 'a culture of protection', the reduction of the vulnerability of civilian populations, and to ensuring greater compliance with IHRL and IHL obligations as well as the specific law relating to the protection of women, girls, children, internally displaced persons (IDPs), refugees and other vulnerable populations in armed conflict. The colloquium provided recommendations to guide military and humanitarian actors in the protection of civilians and prevention of mass atrocities, focusing on the African continent. The Colloquium was sponsored by the Norwegian Government, through its Embassy in Pretoria.

Papers were peer-reviewed after the 2014 Colloquium. Authors were given an opportunity to rework their papers, and to update the information contained in their papers as at 31 December 2016. Although efforts have thus been made to update papers to incorporate some salient subsequent developments, the papers are framed by the context of their original writing.

The phrase 'all means necessary' in the title of this collection of essays refers to the competence of the UNSC, having determined that a threat to international peace and security exists and that armed force is required to give effect to this determination, to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security',[28] and to its use by the ECOWAS Authority of Heads of State and Government. But, more than that, the term refers to the injunction to use these means to 'protect civilians'. Examples of its invocation by the UNSC since 2000 include: (i) the mandate to the UN Operation in Burundi (ONUB) to take '*all necessary means* … without prejudice to the responsibility of the transitional Government of Burundi, *to protect civilians* under imminent threat of physical violence';[29] (ii) the mandate to the UN Stabilisation Mission in the Democratic Republic of Congo (MONUSCO), in the protection of civilians, 'to use *all necessary means*, within the limits of its capacity and in the areas where its units are deployed, to *carry out its protection mandate*';[30] (iii) and the authorisation of the UN Mission in Côte d'Ivoire (UNOCI) to 'use *all necessary means* to carry out its mandate, within its capabilities and its areas of deployment'.[31] Regional arrangements are also entitled to take such measures (as part of 'enforcement action'), with the authorisation of the Security Council.[32] The term 'all means necessary' has also been used in a resolution of the

28 UN Charter art 42.
29 UN S/RES/1545 (2004) Resolution on Burundi, 21 May 2004 para 5 (emphasis added).
30 UN S/RES/1925 (2010) Resolution on extension of the mandate of the UN Organization Mission in the Democratic Republic of the Congo (MONUC), 28 May 2010 para 11 (emphasis added).
31 UN S/RES/1528 (2004) Resolution on Côte d'Ivoire, 27 February 2004 para 8 (emphasis added).
32 UN Charter art 53.

ECOWAS Authority of Heads of State and Government, in the context of the refusal of the previous head of state of the Gambia, president Jammeh, to accept the results of the December 2016 presidential election. The Authority stated that it 'shall take all necessary measures to strictly enforce the results of the 1 December 2016 elections'.[33] It further requested the AU and the UN on all decisions taken on the matter of the Gambia and also requests their support for the mediation efforts of ECOWAS including the provision of technical assistance where required.[34] In a subsequent resolution, the UNSC expressed 'full support' to the ECOWAS for ensuring 'by political means first, the respect of the will of the people of the Gambia'.[35]

However, many Chapters in this book shed light on means other than UNSC resolutions to protect civilians in armed conflict. These measures include the contributions of humanitarian agencies, international human rights courts and commissions, the International Criminal Court, as well as various domestic institutions. The title of this book therefore aims to capture a broader array of measures (all means necessary, in a generic sense) and not only UNSC mandated action ('all means necessary', in the limited sense of UNSC language).

This Colloquium followed on the footsteps of an earlier conference, also hosted by the Centre for Human Rights, which took place on 6 and 7 December 2012, and was organised in collaboration with the Department of Political Sciences, University of Pretoria. Its target audience, consisting of a group of interdisciplinary academics, policymakers and practitioners in the areas of international peace and security, with a special focus on Africa, was quite similar, but it differed from the 2012 event in its very specific focus on article 4(h). The 2012 meeting considered and articulated the Pretoria Principles on ending mass atrocities pursuant to article 4(h) of the Constitutive Act of the African Union. These Principles are intended to provide greater clarity and inform action by the African Union, sub-regional actors, governments and practitioners on how to enhance their respective roles in ending mass atrocities in Africa pursuant to article 4(h), which provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[36] The papers presented at that occasion were also published, as D Kuwali and F Viljoen

33 Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government, Final Communique, 17 December 2016, Abuja, Federal Republic of Nigeria, para 38(h).

34 Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government, Final Communique, 17 December 2016, Abuja, Federal Republic of Nigeria, para 38(g).

35 UN S/RES/2337 (2017) Resolution on the outcome of the presidential elections held in Gambia on 1 December 2016, 19 January 2017 para 6.

36 Pretoria Principles on ending mass atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union (n 24 above).

(eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act*.[37]

The present book brings together the papers delivered at the 2014 Colloquium in Pretoria. Given the real and foreseeable challenges in the protection of civilians in the context of article 4(h) and the responsibility to protect, this book seeks to contribute to the development of policy guidelines in implementing article 4(h)-intervention and the responsibility to protect to ensure that protection of civilians mandates are implemented consistently and coherently.[38] In navigating operational guidelines for the protection of civilians, the contributors examine the challenges and opportunities at the intersection of IHRL and IHL, and proceed to craft concrete recommendations to guide intervention forces, especially at the tactical level on the co-application of IHRL and IHL in order to enhance the protection of civilians in article 4(h)-intervention and the responsibility to protect operations.

Although each chapter can be read as a stand-alone unit, the study is designed in a form of an interconnected monograph. This book has 25 chapters, including this introductory Chapter, which sets the stage for the discussion and the conclusion, which streamlines the arguments and recommendations advanced by the contributors. The chapters are structured under five key themes. Part I deals with the issue of implementation of protection of civilians-mandates and contains this introduction and three other chapters. In Chapter 2, Dan Kuwali explains the meaning of, and the differences among, the concepts of article 4(h)-intervention, the responsibility to protect and the protection of civilians. He narrates that the UNSC is making increasing use of its powers conferred by Chapter VII of the UN Charter to authorise peacekeeping missions to protect civilians against threats to their right to life or physical integrity. This is of both normative and practical significance and is transforming 'traditional' notions of peacekeeping. In Chapter 3, Conor Foley focuses on the meaning of protection and notes that the term 'protection of civilians' is also used in a number of other senses whose vagueness and elasticity diminishes their practical utility. In Chapter 4, Dire Tladi provides useful insights for the interpretation of protection of civilians-mandates in UNSC resolutions. Tladi considers the relevant rules for the interpretation of UNSC resolutions, focusing on those with a mandate for the protection of civilians. In particular, he assesses whether and to what extent the rules for the interpretation of treaties can be applied to the interpretation of resolutions. He interprets earlier restricted mandates for the protection of civilians and compares these to more robust

37 Oxford and New York: Routledge (2014).

38 See also United Nations Department of Peacekeeping and Department of Field Support *Civil affairs handbook* (2012) also available at http://www.un.org/en/peacekeeping/documents/civilhandbook/Civil_Affairs_Handbook.pdf (accessed 30 August 2013).

protection of civilian mandates, including Resolution 2098 (intervention brigade in the DRC) and Resolution 1973 (use of force for the protection of civilians in Libya).

Part II contains seven chapters focusing on protection of specific populations and property at risk. In Chapter 5, Thompson Chengeta discusses the protection of civilians from willful killings. Chengeta notes that willful killing of civilians is deplorable and should be condemned in the strongest terms. While there are sufficient laws providing for the protection of civilians from such forms of violence, the main challenge is with implementation and monitoring mechanisms. In Chapter 6, Kuwali confines his discussion to the protection of populations from violent extremism. His contribution is based on the fact that political instability that creates a power vacuum, security lapses, discrimination, religious marginalisation, economic crisis including social penury and the proliferation of small arms and light weapons have contributed to the breeding of extremist groups. Cephas Lumina looks at protection of children in armed conflicts in Chapter 7. Lumina laments that despite the existence of an extensive legal framework protecting children in armed conflicts, the recruitment and use of children in armed conflicts has become a pervasive feature of modern conflicts. Armed forces and armed groups continue to enlist or conscript children and to use them to participate in armed conflict, exposing them to significant risk and depriving them of some of their most basic rights. Cristiano d'Orsi offers an analysis of how to protect refugees and internally displaced persons in armed conflicts in Chapter 8. D'Orsi analyses the legal framework for the protection of refugees and internally displaced persons (IDPs) in armed conflicts in Africa in order to provide recommendations on how to find a holistic solution to protect the lives of 'individuals on the move'. According to D'Orsi, by consenting to article 4(h) in the AU Constitutive Act, African states have contracted away their sovereignty in circumstances where refugees and IDPs face challenges of the proportions envisaged in article 4(h). This, therefore, puts an obligation on the AU to assist member states adversely affected by violent conflicts to undertake resettlement and reintegration of refugees and IDPs as well as to support and facilitate humanitarian action in such situations. D'Orsi reveals that the proliferation of small arms and light weapons (SALW) on the continent has been an impediment to the return of displaced persons.

In Chapter 9, Kuwali, Catherine Nakirya and Grace Amuge deal with the most pervasive issue in armed conflicts, namely, the protection from sexual and gender-based violence (SGBV). The contributors note that both state and non-state actors (NSA) have committed a series of violations of IHL and human rights law in these conflicts. SGBV constitutes both a violation of human rights and a crime. Chapter 11, a contribution by Gudmundur Alfredsson and Kuwali, is dedicated to the protection of minorities. Alfredsson and Kuwali expose that identity-based tensions in countries such as Burundi, Rwanda and Kosovo have degraded into armed

conflicts calling for UNSC intervention. The principle of protection of populations at risk lies at the heart of the human rights rules of equal rights and non-discrimination and of the political commitment concerning the responsibility to protect by the international community. In Chapter 11, Jan Mutton extends the scope of the discussion by drawing attention to the threat posed by conflict to cultural heritage. Mutton takes stock of the laws in place that aim to protect cultural heritage in situations of armed conflict, and assesses their application in court cases by tribunals operating at the global and regional levels.

Part III critically assesses the means and strategies for dealing with mass atrocities. Anna Larsson and Dan Kuwali articulate the role of humanitarian agencies in Chapter 12. They paint a picture that there is a growing recognition for the importance of protecting civilians because of the humanitarian obligation to spare endangered populations from the effects of armed conflicts. Following this trajectory, humanitarian agencies have attempted to develop practical strategies and tools that enable the protection of the most vulnerable populations in armed conflict situations. Particular efforts have been directed to overcome the challenges of politicisation and militarisation of aid. Thomas Probert discusses the unique role of the UN Human Rights Council in Chapter 13. Probert asserts that the most obvious contribution of Special Procedures to the protection of the right to life during armed conflict is the extent to which reports to the Human Rights Council or to the UN General Assembly affirm the continued application of human rights based standards, and the continued jurisdiction of human rights mechanisms in this context. He also includes in his analysis a discussion of the General Comment on the right to life of the African Commission on Human and Peoples' Rights.

Further in Part III, John-Mark Iyi explores the options available for the judicial means of protection of civilians in Africa in Chapter 14. Iyi notes that the protection of civilians has gained momentum as a dominant theme of many UN-mandated missions across the world, some of them having robust mandates. Yet, we continue to witness shocking atrocities in armed conflicts – atrocities that challenge not only the resolve of the international community to prevent and end mass atrocities, but also to question the present tools available for this enterprise. One such tool is judicial mechanisms and the role it plays in the protection of civilians in armed conflicts. In Chapter 15, Mphatso Boti-Phiri dwells on conflict prevention under the first pillar of the responsibility to protect and within the article 4(h) framework and applies the notions of conflict prevention and peacekeeping to prevention of mass atrocities. Boti-Phiri notes that the evident lack of implementation of article 4(h)-intervention and the inconsistencies in the enforcement of the responsibility to protect in different regions of the world create an academic debate on the relevance of the concept. In Chapter 16, Neville Dastoor and Dan Kuwali provide proposals on enhancing the implementation of the responsibility to protect from the UNSC's point of view. Dastoor and Kuwali observe that the

exercise of the veto power by the permanent members (P5) of the UNSC manifests the fact that the veto is legally, politically and morally problematic. The (ab)use of the veto powers by some members of the P5 in clear cases of responsibility to protect interventions have resulted in calls for revision of the Charter to limit its use.

Part IV presents pointed perspectives by drawing lessons learnt on the protection of civilians in armed conflicts in various regions. Buba Bojang in Chapter 17 shares experiences of protection in West Africa. Bojang recounts that the Economic Community of West African States (ECOWAS) has all the necessary pillars, from legal framework, political will to the institutional structures to be able to translate the civilian protection doctrine into reality. Bojang explains how to close some gaps that ought to be bridged in order to deliver the civilians of West Africa and other parts of the world from the scourge of armed conflict. In Chapter 18, Bright Nkrumah and Godard Busingye set out to address the protection challenges in Africa's Great Lakes Region (GLR), which has experienced protracted armed conflicts with severe humanitarian consequences, especially on the civilian population. Nkrumah and Busingye have noted that incumbent governments have, in a number of cases, failed to discharge their constitutional mandates and international obligations to protect civilians from such atrocities. As a region that has experienced genocide, Nkrumah and Busingye are concerned that the criteria for invoking the responsibility to protect by the UNSC remains unclear. The authors, thus, call for the conceptualisation of normative standards on when and how the responsibility to protect can be invoked for future protection missions.

Part IV continues, in Chapter 19, with a discussion by Paul Phiri who explores issues in relation to protection in the Horn of Africa (HoA), which has faced internecine conflicts with unimaginable consequences on civilians. Phiri's key observation is that the military interventions that took place or are taking place in the HoA expose the challenges associated with military interventions for the protection of human rights. He is concerned that despite several military interventions in the HoA, civilians continue to suffer and are still exposed to mass atrocities. According to Phiri, this shows that the strategies employed by the military to execute their mission in the HoA are wanting. This Chapter details the experience of the author in promoting a civil society role in addressing violence against civilians by armed groups, following investigative reports that documented atrocities in Israel/Palestine and in Iraq. In Chapter 20, Joe Stock not only interrogates the protection of civilians in North Africa and the Middle East, but goes further to investigate the accountability mechanisms in the region. Stork has observed that governments and armed groups in the Middle East show disregard, even contempt, for the idea of protection of civilians from deliberate or indiscriminate attacks. Governments invoke national security and counter-terrorism rationales while armed groups claim exemption in the name of national liberation and communal defense, and justify unlawful attacks as reprisal for attacks by adversaries.

Part IV also deepens the volume's focus on the AU. In Chapter 21, Dersso offers an analysis of the normative and institutional frameworks that underpin and form part of the protection of civilians-agenda of the AU and the efforts towards implementing the protection of civilians-principle. While there have been moves towards the operationalisation of the protection agenda including the process of developing guidelines on protection of civilians in armed conflict, it is submitted here that there has been an inadequate understanding of the imperative of the protection of civilians and its actual implementation in all AU's peace and security engagements. In Chapter 22, Noel Morada offers Asian views. He examines the various perspectives of Asian states with regard to the prevention of atrocities and the protection of civilians, focusing mainly on the relationship between the responsibility to protect and the protection of civilians in UN peace missions; sovereignty and protection of civilians; accountability of state and non-state actors in civilian conflicts; and addressing gaps in protection mandates and implementation.

Part V is a reflection on the future of protecting civilians and prevention of atrocities in Africa. This contains a discussion by Gilbert Mittawa in Chapter 23, which considers how to overcome the prevailing challenges facing UN peace support operations in order to effectively accomplish their missions. Mittawa exposes the challenges facing peacekeepers, which include lack of political will, inadequate funding, training and equipment. In Chapter 24, Kuwali provides a critique of the African peacekeeping capability. Kuwali sees the evolution of traditional peacekeeping into various forms, including peace enforcement operations, protection of civilians, the responsibility to protect and stabilisation missions including special political missions. He observes that the deployment of peace support operations (PSOs) in complex conflict situations has brought about major policy implications. He also notes that the operationalisation of the African Standby Force, designed on the model of the traditional UN PSOs, has been overtaken by new threats to peace and security on the continent. He thus provides recommendations to the UN High-Level Panel on Peace Operations, which seeks to review the various aspects of PSOs in light of the developments and challenges in the practice and policy of such operations and the emerging threats to global peace and security.

Finally, the editors, Kuwali and Viljoen, in Chapter 25 sum up the various contributions and paint an elaborate picture for the future of protecting civilians and preventing atrocities in Africa. They note that mass atrocity response operations under article 4(h) and the third pillar of the responsibility to protect are coercive civilian protection missions that are unique and require very specific training, capabilities, and equipment. The conclusion offers recommendations on how to enhance the understanding of the legal, policy, and practical issues involved in the drafting and adoption of protection of civilians-mandates by the UNSC and their implementation on the ground.

PART I: IMPLEMENTATION OF PROTECTION OF CIVILIANS MANDATES

CHAPTER 2

ARTICLE 4(H), THE RESPONSIBILITY TO PROTECT AND THE PROTECTION OF CIVILIANS

Dan Kuwali

Abstract: *Civilians are the most victimised in contemporary armed conflicts despite being guaranteed protection by the law. Although the United Nations (UN) Security Council has passed several resolutions to use all means necessary to protect civilians, there is no common understanding of the notion of protection of civilians amongst the military, human rights actors and other humanitarian agencies. This amorphous notion has further been conflated with the evolving concepts of the responsibility to protect and article 4(h)-intervention. As such, this discussion sheds light on how to close the operational gap emanating from different perceptions of the term 'protection' amongst the practitioners. By focusing on armed conflict situations where crimes such as genocide, war crimes and crimes against humanity may occur, the discussion recommends the interpretation and implementation of the protection of civilians-mandates in such a way that the goal for intervention should be protection of populations at risk and not other ulterior motives. Since the conditions for intervention under article 4(h) and Pillar 3 of the responsibility to protect are* jus cogens *crimes subject to universal jurisdiction, the objective of using military force for the protection of civilians should be to apprehend or defeat the perpetrators of such atrocity crimes and not to effect regime change.*

Introduction

Notwithstanding the progressive development of protections provided by the law, civilians have been increasingly targeted since 1949, when the Geneva Conventions were adopted. It is estimated that one in every ten casualties in the First World War was a civilian.[1] By the Second World War, this figure had increased to five in every ten casualties. By 2000, the figure had increased to nine civilians in ten casualties in armed conflict.[2] Today, armed conflicts involve the very targeting or forced displacement of civilians – as warring parties fight over territorial control, as a means to weaken enemy forces by targeting host or supportive communities, or to

1 P Wynn-Pope 'Evolution of protection of civilians in armed conflicts' Oxfam/ Australian Government available at https://www.acmc.gov.au/wp-content/uploads/2014/09/12515_ACMC_Oxfam_paper_5.pdf (accessed 3 March 2015).

2 Wynn-Pope (n 1 above).

access natural resources. The parties involved are changing and proliferating, including non-state actors (NSAs) with uncertain chains of command that make dialogue and negotiation difficult and dangerous. Often times, as in Northern Uganda, the Eastern Democratic Republic of the Congo (DRC) and recently in Burundi, the perpetrators of atrocities are insurgents, who are often criminals and do not respect the laws regulating the conduct of hostilities.

The primary responsibility to protect populations rests with states. Unfortunately, it is sometimes, those responsible for the protection of the civilian population who undermine the security of the populations and perpetrate abuses against civilians. For example, in the DRC, the most potent threat to the security and human rights of the people has been said to be the Congolese Army itself.[3] Another example is Libya, where Colonel Muammar Gaddafi ordered his troops to massacre his own people when they rebelled against his autocratic rule in 2011.[4] In late 2015 and early 2016, armed insurgents and the government armed forces in Burundi were reported to be assaulting civilians *en masse*.[5] The unacceptable threats faced by the people of Burundi and the risk that the crisis poses to the Great Lakes Region impelled the African Union (AU) to take the unprecedented step of invoking article 4(h) of the AU's Constitutive Act, which asserts 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. In conformity with international law, it requests 'the [United Nations (UN)] Security Council to adopt, under Chapter VII of the UN Charter, a resolution in support of the present communiqué'.[6]

The protection of civilians is not only a moral imperative to save lives but it is also rooted in international human rights law (IHRL) and international humanitarian law (IHL) obligations to prevent harm to endangered civilians and ameliorate their suffering in armed conflicts.[7]

3 D Kuwali 'Defending the defenceless: Questions of mandate and capability to protect civilians in the Democratic Republic of the Congo' in F Tibbitts *et al* (eds) *Improving the protection of civilians in situations of armed conflict* Carr Center Working Paper Series, Harvard Kennedy School of Government (2011) 17.

4 See United Nations Human Rights Council 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya' UN Doc A/HRC/17/44 (1 June 2011).

5 International Crisis Group 'Crisis watch' No 149 4 January 2016.

6 African Union, The Peace and Security Council of the African Union (AU), at its 565th meeting held on 17 December 2015, Communiqué, AU Doc PSC /PR/ COMM.(DLXV) para 13(a) (i), (ii) and (iv).

7 See the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950 (Geneva Convention IV), art 27. See also International Covenant on Civil and Political Rights, UN Doc GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966) 999 UNTS 171.

Protection of civilians is also important for the maintenance of international peace and security.[8] The UN Security Council has adopted several resolutions on the protection of civilians in armed conflicts, including specific ones for the protection of women and children in armed conflict.[9] The territorial application of IHRL is beyond doubt. If a state has not derogated from its IHRL obligations, IHRL standards are fully applicable. The duty to protect its citizens against violations by private entities and state agents is a positive obligation of a state under IHRL.[10] When a state is unable or unwilling to protect its population or respect its obligations, the international community may become engaged, under the authorisation of the UN Security Council, in efforts to persuade the errant state to respect its obligations to protect civilians.[11] In so doing, the international community may take measures to prevent abuses and protect vulnerable populations from harm.[12]

While there has been development of the concept of the protection of civilians, there is a perceived 'disconnect' between the understanding of different forms of protection, the different disciplines practising or working on the protection of civilians, and the different guidance and legal regimes imposing obligations on both state and NSAs the area of protection.[13] Among the key issues that often arise, in the context of humanitarian emergencies and armed conflicts, are: securing access to affected civilian populations; and the physical security of civilians and humanitarian workers. In the same vein, the concept of the responsibility to protect as endorsed by the UN General Assembly in the 2005 World Summit Outcome states that, if national authorities are manifestly failing to protect their populations from mass atrocities, other states have the responsibility

8 For example: United Nations Security Council Resolution 1265 (17 September 1999) and SC Res 1296 (19 April 2000), pertaining to the protection of civilians. See also Oxfam 'Protection of civilians in 2010 Facts, Figures and the United Nations (UN) Security Council's Response' 147 Oxfam Briefing Paper (May 2011) available at http://www.oxfam.org/sites/www.oxfam.org/files/protection-of-civilians-in-2010-090520 11-en.pdf (accessed 30 August 2013).

9 See UN S/RES/1325 (2000) Resolution on women and peace and security, 31 October 2000; UN S/RES/1612 (2005) Resolution on children and armed conflict, 26 June 2005; UN S/RES/1860 (2009) Resolution on Middle East, including the Palestinian question, 8 January 2009; UN S/RES/1888 (2009) Resolution on women and peace and security, 30 September 2009, calling on the UN Secretary-General to appoint a Special Representative to provide coherent leadership on combating sexual and gender-based violence; UN S/RES/1889 (2009) Resolution on women and peace and security, 5 October 2009; and UN S/RES/1894 (2009) Resolution on protection of civilians in armed conflict, 11 November 2009, asking for more detailed and comprehensive reporting on the protection of civilians.

10 H Krieger 'A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC customary law study' (2006) 11 *Journal of Conflict and Security* 265.

11 United Nations 2005 World Summit, sixtieth session, UN Doc A/60/L.1/2005 15 September (2005) paras 138-139 (World Summit Outcome).

12 As above. See generally VK Holt & TC Berkman *The impossible mandate? Military preparedness, the responsibility to protect and modern peace operation* Washington, DC: The Henry L Stimson Center (2006).

13 n 1 above.

to respond in a timely and decisive manner through the UN Security Council.[14]

Therefore, this discussion seeks to provide insights on how to close the doctrinal gap that exists as a result of different perceptions of the term 'protection' between humanitarian organisations – who view protection in terms of the fulfilment of human rights and legal norms, and the military – who sees protection as related to defence from physical harm.[15] The objective of the discussion is to provide recommendations on how to implement the tripartite notions of the protection of civilians, article 4(h) of the AU Constitutive Act and the third pillar of the responsibility to protect with the goal of protecting populations at risk and not for other ulterior motives such as regime change, as was seemingly the case in the NATO intervention in Libya in 2011. The discussion focuses in situations where the protection of civilians, article 4(h) and the responsibility to protect intersect, that is to say, armed conflict situations where crimes such as genocide, war crimes and crimes against humanity may be, or are being, committed.

Protection of civilians

The genesis of the concept of protection of civilians in armed conflicts can be traced in the history of the development of the classic norms of war prescribed under early religious doctrines.[16] The need to protect the lives of civilians and other non-combatants (such as wounded, sick or prisoners of war) in armed conflicts has been universally accepted and codified in IHL. To be specific, the Fourth Geneva Convention (GCIV) coined the phrase 'protection of civilians' and has become its primary international legal basis. With the obvious failures to protect civilians in major armed conflicts in the past, the protection of civilians has become a key issue of international concern.[17] It has been under regular consideration by the UN and its principal organ, the UN Security Council, since 1999 when the first report of the UN Secretary-General on the subject was issued.[18]

14 Centre for Conflict Resolution 'Preventing genocide and the responsibility to protect: Challenges for the UN, Africa, and the International Community' (2007). See also Stanley Foundation *Actualizing the responsibility to protect* 43rd Conference on the United Nations of the next decade (2008) https://www.stanleyfoundation.org/publications/report/UNND808.pdf (accessed 30 August 2013).

15 K Aning & N Salihu 'The protection of civilians in peace support operations: Lessons from Côte d'Ivoire' (2012) 2 *Conflict Trends* 25 30.

16 V Popovski 'Siblings but not twins: PoC and R2P' United Nations University, Institute for Sustainability and Peace available at https://unu.edu/publications/articles/siblings-but-not-twins-poc-and-r2p.html (accessed 30 August 2013).

17 Bosnia-Herzegovina, Liberia, Somalia, Rwanda, Burundi, Timor-Leste, the Democratic Republic of the Congo, Sierra Leone, Kosovo, and the Darfur region of Sudan, among others.

18 Popovski (n 16 above)

The UN Security Council has set important precedents for civilian protection through its statements and resolutions, especially in the mandates of UN peacekeeping operations. The first was Resolution 1265 (1999) on the protection of civilians in armed conflicts, which was unanimously adopted by the UN Security Council.[19] Resolution 1265 addressed the Security Council's inclination to take 'appropriate measures' in response to situations where civilians are being targeted or humanitarian assistance is deliberately circumvented. The resolution also called on states to hold leaders accountable for acts of genocide, crimes against humanity and other serious violations of IHL. The most important precedent resulting from the resolution was a willingness to consider expanding the peacekeeping mandate to better protect civilian populations. Shortly afterwards, it became unofficial UN policy that when peacekeepers saw violence perpetrated against civilians, they should be 'presumed to be authorised to stop it, within their means.'[20]

In 2006, the UN Security Council passed Resolution 1674, committing it to take action to protect civilians in armed conflicts. The UN has also set civilian protection precedents in the mandates of specific missions, including the UN Mission in the Democratic Republic of the Congo (MONUC), which later changed to the UN Stabilisation Mission in the Democratic of the Congo (MONUSCO), as well as the UN/AU Hybrid Mission in Darfur (UNAMID) and the UN Mission in Sudan (UNMIS). Over time, the emphasis on civilian protection has increased and become a frequent staple for UN peace operations. Other UN organs and agencies, in particular the UN General Assembly Special Committee on Peacekeeping (known as the C34), the Department of Peacekeeping Operations (DPKO), and the Office for the Coordination of Humanitarian Affairs (OCHA), have included the topic of civilian protection in their agendas and enhanced their efforts to protect endangered civilian populations.[21]

In the protection of civilians agenda, physical protection is a matter of power, especially that of the police and the military and not non-government organisations (NGOs) or humanitarian organisations, as it is beyond their capacity. For humanitarian agencies, the protection of civilians involves the protection of vulnerable population from widespread threats of violence, coercion, and the deliberate deprivation of aid. In this sense, the protection of civilians includes all activities aimed at ensuring the full respect for the rights of the individual.[22] In the same vein, when IHL refers to protection, it refers to the defence of the legal status and the

19 S/RES/1265 (1999) Resolution on the protection of civilians in armed conflict, 17 September 1999.
20 Wynn-Pope (n 1 above).
21 As above.
22 Oxfam 'What is the "Protection of Civilians" principle?' available at http://www.oxfam.org/en/campaigns/conflict/protection-of-civilians (accessed 17 August 2014).

rights of civilians, and other 'protected persons' such as *hors de combat*, in times of armed conflict.

There are numerous actors involved in protecting civilians. National governments bear the primary responsibility for ensuring that their populations are effectively protected, and all parties to conflict – governments and armed groups – have an obligation to prevent harm to civilians in the conduct of hostilities.[23] Actors at local level also play an important role, particularly where rights activists, civil society organisations (CSOs), women's groups, and communities speak out on abuses and work to prevent violence. International actors, such as individual national governments, regional and international organisations, and the UN system all have important roles to play in raising awareness about situations, acting to prevent violence before it occurs, and taking measures to respond to grave situations of abuse.[24]

The responsibility to protect

One of the most essential conceptual innovations in the area of civilian protection and preventing mass atrocities has been the establishment and popularisation of the notion of 'responsibility to protect'. The international community's failure to protect civilians and prevent genocide in the 1990's resulted in the recognition of the need to address specific vulnerabilities of civilian populations. This led to a new international norm: the responsibility to protect. One of the three pillars of the responsibility to protect is the international responsibility to respond effectively through the UN when governments are 'manifestly failing' to protect their populations from genocide, war crimes and crimes against humanity (noting that 'ethnic cleansing' is not a separate crime as such but rather falls under crimes against humanity). The concept of the responsibility to protect has gained widespread recognition and popularity as a foundational approach to address the heinous crimes that are perpetrated against civilians – during armed conflict but also in peace time.

The notion of the responsibility to protect is cast in the following three core pillars. First, an affirmation of the primary and continuing obligation of individual states to protect their populations from mass atrocities, as well as incitement thereof. Second, a commitment by the international community to assist states in meeting these obligations; and third, acceptance by UN member states of their responsibility to respond in a timely and decisive manner through the Security Council, if national authorities are manifestly failing to protect their populations from these mass atrocities.

23 Oxfam (n 22 above).
24 As above.

Article 4(h)-intervention

Under Chapter VIII of the UN Charter, regional organisations are allowed to deal with matters relating to the maintenance of international peace and security within their region.[25] In parallel with the increased attention to the protection of civilians, article 4(h) of the AU Constitutive Act provides for the right of the AU to intervene in a member state with respect to mass atrocities, namely: war crimes, genocide and crimes against humanity. Thus, where a member state is unwilling or unable to carry out its responsibility to protect its citizens from mass atrocities, that responsibility is transferred to the AU as a regional organisation to intervene and protect the populations at risk. The AU may, therefore, be employed as a vehicle to protect populations at risk through multilateral enforcement action on the African continent. According to the wording of article 4(h) the right of intervention should be carried out by the AU as a continental body – not individual states or kin-states.[26]

Thus, the AU's article 4(h)-intervention is similar in implementation as the third pillar of the responsibility to protect, being a form of mass atrocity response operation.[27] Article 4(h)-intervention and the responsibility to protect are related to the broader agenda of the prevention of armed conflict although the atrocities that fall under article 4(h) and the responsibility to protect may occur in peace time or during an armed conflict. Both article 4(h) and the responsibility to protect are linked to, although distinct from, the protection of civilians in armed conflict agenda, which is a framework for UN diplomatic, legal, humanitarian, and human rights activities directed at the protection of population during armed conflict. As a point of departure, article 4(h) and the responsibility to protect are meant to prevent or stop mass atrocity crimes in extreme circumstances and are not intended directly to protect or to promote civil and political rights, for example.

25 Art 3(f) of the Constitutive Act of the African Union (11 July 2000) OAU Doc CAB/LEG/23.15.

26 A kin state is a state that has a connection with part of its diaspora living in a host state. The terms 'kin-minority' and 'Kin-state' were first coined by the Venice Commission in 'Report on the Preferential Treatment of National Minorities by Their Kin.' See Council of Europe, Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001 available at http://www.venice.coe.int/webforms/documents/CDL-INF(2001)019-e.aspx (accessed 15 September 2014).

27 However, see S Sewell *et al Mass atrocity response operations: A military planning handbook* (2010); see also B Martin 'The protection of civilians in the Democratic Republic of the Congo' (2012) 2 *Conflict Trends* 38; and C Hunt 'Program on the protection of civilians (background and scope) Asia Pacific Centre for the Responsibility to Protect (March 2008) available at http://www.r2pasiapacific.org/documents/Program%20on%20Protection%20of%20Civilians%20-%20Asia-Pacific%20Centre%20for%20r2p%20-%2018%20March%2008.pdf (accessed 14 April 2012).

Same river, different boats: The intercourse of PoC, article 4(h) and the responsibility to protect

The protection of civilians, article 4(h) and the responsibility to protect have their nuances not only in legal sources, but also in actors – some would engage in both the responsibility to protect and the protection of civilians, but others will have a specific mandate in just one type of protection. Some actors are very willing to act in the protection of civilians missions, and understand their mandates accordingly, but are reluctant to engage in article 4(h) and the responsibility to protect, considering it as jeopardy to their mandates. Article 4(h), the responsibility to protect and the protection of civilians share similar humanitarian concerns, yet their specificity is important. Article 4(h) and the responsibility to protect do not undermine, but rather serve as a catalyst for humanitarian action, that is to say, they are legal and political commitments, respectively, for mobilising political will and complement the protection of civilians agenda.[28] Further, the protection of civilians addresses protection issues more broadly in specific cases of armed conflict, while article 4(h) and the responsibility to protect are confined to cases where populations are threatened by war crimes, genocide and crimes against humanity regardless of whether or not the situation can be characterised as an armed conflict.[29]

The former Special Representative of the UN Secretary-General on the responsibility to protect, Edward Luck, referred to the protection of civilians and the responsibility to protect as 'cousins, but not sisters.'[30] The situation in Libya in early 2011, and the responses by regional organisations and the UN Security Council, has showed an even much closer relationship between the two concepts, leading Vesselin Popovski to call them 'sisters, but not twins'. By way of extension, since article 4(h) and the responsibility to protect share the same root, their relationship to the concept 'protection of civilians' can be seen as that of siblings but not triplets. The protection of civilians, article 4(h) and the responsibility to protect share the goal of upholding fundamental human rights and humanitarian principles, whose violation results into mass atrocity crimes, wherever they are under threat. However, each has its own nuances and limitations.[31]

The main limitation of article 4(h) and the responsibility to protect is that they do not cover all violations of human rights, nor do they cover

28 This title has been modified from the Popovski 'Siblings but not twins (n 16 above).
29 International Coalition for the Responsibility to Protect 'A toolkit on the responsibility to protect' available at http://responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf (accessed 20 December 2014) 32.
30 E Luck, cited in Popovski (n 16 above).
31 Popovski (n 16 above).

suffering from natural disasters. The threshold for what falls within the responsibility to protect, and what does not, lies in the determination of atrocity crimes, namely genocide, war crimes, and crimes against humanity. These atrocity crimes have to be systematic and planned, as such.[32] On the one hand, protection of civilians is narrower than article 4(h) and the responsibility to protect in that while all war crimes trigger article 4(h)-intervention and the responsibility to protect, not all war crimes would fall under the protection of civilians since some war crimes are not committed against civilians, but against wounded combatants or prisoners of war. On the other hand, article 4(h) and the responsibility to protect are narrower than PoC and would not apply in every armed conflict, but only in those in which mass atrocities have been systematically planned as part of the war strategy.[33]

In the case of the protection of civilians, the main limitation is that the concept emerged as relevant to situations of armed conflict only. If there is no armed conflict – where civilians are defined as the opposite of combatants – PoC transforms itself to protection of citizens in time of peace, covered by the human rights regime under IHRL.[34] Protection of civilians relates to the protection of civilians in time of war, is more limited than the protection of citizens in peace time, and also more limited than the protection of all non-combatants in times of armed conflicts.

Flowing from Popovski's theory, in many situations, the three circles of article 4(h), the responsibility to protect and protection of civilians can overlap, for example, when war crimes against civilians or crimes against humanity (including ethnic cleansing) and genocide are committed during armed conflict.[35] A situation that would fall under protection of civilians, but not article 4(h) and the responsibility to protect, is the protection of civilians threatened by escalating armed conflict if mass atrocities are not planned and committed. And a situation that would trigger article 4(h) and the responsibility to protect, but not protection of civilians, is a threat from mass atrocities planned outside an armed conflict.[36] Popovski further explains that a situation that originally was not an armed conflict can escalate into one and raise demands for protection of civilians. For example, UN Security Council Resolution 1970 described atrocities against peaceful demonstrators in Libya – not yet an armed conflict – and raises responsibility to protect (R2P) concerns due to the allegations of the

32 See art 5 of the Rome Statute of the International Criminal Court 2187 UNTS 90, (ICC Statute or the Rome Statute).

33 See Centre for Human Rights 'Pretoria Principles on ending mass atrocities pursuant to article 4(h) of the Constitutive Act of the African Union' available at http://www1.chr.up.ac.za/index.php/news.html (accessed 23 September 2013). See also Popovski (n 16 above)

34 See generally, D Kuwali '"Humanitarian rights": Bridging the doctrinal gap between the protection of civilians and the responsibility to protect' (2013) 4 *Journal of International Humanitarian Legal Studies* 5-46. See also Popovski (n 16 above).

35 n 16 above.

36 n 16 above.

commission of crimes against humanity, although, technically, this was not yet a protection of civilians situation.[37] UN Security Council Resolution 1973 describes the situation in Libya as a civil war, no longer as protests and riots; thus, protection of civilians subsequently came into consideration, in parallel with article 4(h) and the responsibility to protect.[38]

The concepts of article 4(h), the responsibility to protect and the protection of civilians converge more closely and overlap in critical situations: for example, in Bosnia-Herzegovina (1992-1995) or the Darfur region of Sudan (2003-2007). In 2011 in Libya, the situation developed from a Pillar One (domestic responsibility to protect) reminder of the obligations of Libya in UNSC Resolution 1970, to later encompass the whole scope of Pillar 3 ('timely and decisive response' when states manifestly fail to protect). In parallel, the categorisation of the situation as civil war brought the language of 'protecting civilians' into Security Council Resolution 1973 – a textbook example of a resolution for both the protection of civilians and the responsibility to protect application.[39] A reading of Resolution 1973 shows that the protection of civilians was not only an obligation of the Gaddafi regime, but of all parties to the conflict; including the obligation upon the rebels to protect civilians. As aptly analysed by Popovski, if article 4(h) and the responsibility to protect are directed at states only, the protection of civilians is an obligation for NSAs. Although article 4(h) and the responsibility to protect are narrow in scope, they have a wide panoply of means for implementation including power-sharing agreements, as was the case after the 2007/2008 post-electoral violence in Kenya and the use of military force, as was the case in Libya in2011.[40]

Below is an adopted version of Popovski's illustration of the comparison of the legal sources for article 4(h), the responsibility to protect and the protection of civilians:

37 UN S/RES/1970 (2011) Resolution on establishment of a Security Council Committee to monitor the arms embargo agains the Libyan Arab Jamahiriya, United Nations, Security Council Resolution 1970, 26 February 2011.

38 See also D Kuwali 'R2P: Why Libya and not Syria?' available at http://www.accord.org.za/downloads/brief/policy_practice16.pdf (accessed 12 February 2015).

39 n 16 above.

40 See also 'Clash of law and politics: Why Kenyatta may not be prosecuted' *The Star* 25 April 35.

Article 4(h) and the responsibility to protect	**The protection of civilians**
1949 Geneva Conventions and their Additional Protocols (war crimes)	1949 Fourth Geneva Convention (PoC), domestic and IHL
1948 Genocide Convention (genocide)	UN Security Council Resolutions: thematic (Res. 1894) and country-specific mandates PoC
1998 Rome Statute for ICC (crimes against humanity)	Refugee Laws (1951 Convention, 2009 AU Convention on IDPs)
Domestic law (Pillar 1); Bilateral, Regional law (Pillar 2)	Non-proliferation and disarmament treaties (for example the Anti-Personnel Land-Mines treaty, 2010 Convention on Cluster Munitions)
UN Charter, Chapter VI, VII, VIII measures (Pillar 3)	Universal Declaration of Human Rights, International Covenant on Civil and Political Rights
Relevant human rights laws – for example, non-discrimination of ethnic minorities	Relevant human rights laws – for example, prohibition of recruitment of children in armed forces

Thus, if all the four 1949 Geneva Conventions are relevant to article 4(h) and the responsibility to protect, only the fourth is relevant to the protection of civilians. The whole range of human rights law is obviously too broad for article 4(h), the responsibility to protect and the protection of civilians, and only parts of it will be relevant. The legal sources for the protection of civilians also would include refugee law, non-proliferation and disarmament treaties, including the prohibition of certain weapons that are indiscriminatory and those that cause superfluous injury and unnecessary suffering. Like article 4(h), the responsibility to protect and the protection of civilians can interact, as the 2011 Libya case demonstrates.[41] The novelty of UNSC Resolutions 1970 and 1973 was that it was the first joint invocation of the concepts of the protection of civilians and the responsibility to protect to stop a potential mass slaughter of civilians. The responsibility to protect was invoked by the Security Council immediately when, on 26 February 2011, it considered the urgent need to protect the Libyan people from atrocities and unanimously adopted Resolution 1970. The Council considered that the widespread and systematic attacks against the civilian population could amount to crimes against humanity, thus referring to one of the atrocity crimes and triggering

41 n 16 above.

the applicability of the responsibility to protect.[42] Acknowledging Libya's manifest failure to protect its people, the UN Security Council invoked Pillar 3 of the responsibility to protect and took all necessary measures under Chapter VII of the UN Charter.

UN Security Council Resolution 1973 invoked the concept of the protection of civilians, as the situation escalated from a riot into an armed conflict. This is an important legal determination. By making it, the Security Council could assert that its decisions on obligations under international humanitarian law and the Geneva Conventions are applicable in time of (civil) war. It also adds war crimes jurisdiction into what has already been established, but more vaguely, as R2P obligations in Security Council Resolution 1970 on the basis of potential crimes against humanity.[43] In Security Council Resolution 1973, the tripartite concepts the protection of civilians, article 4(h) and the responsibility to protect join their legal, moral and political scopes, and drove the UN Security Council to utilise 'all means necessary' under Chapter VII – including the use of force – to protect civilian populations and civilian-populated areas.[44]

Why Libya and not Syria? The politics of operationalisation of article 4(h) and the responsibility to protect

Although there have been similar atrocities in Bahrain and Yemen, among other countries, at the time of writing, the humanitarian crisis in Syria had reached the threshold warranting the implementation of the responsibility to protect Pillar 3.[45] The Syrian situation tests the international community's ability and willingness to operationalise the responsibility to protect consistently. The apparent use and abuse of the veto power by the Permanent Members of the UN Security Council (P5) makes it clear that the veto is morally problematic. Its use has resulted in calls for revision of the UN Charter to limit its use, particularly in deciding on 'humanitarian intervention,' that is to say, use of military force for humanitarian purposes without the authorisation of the UN Security Council.[46] Admittedly, calling for amendment of the UN Charter in relation to the veto power is utopian, given that any UN Charter amendment is itself subject to the power of veto. As a way forward, the 'Ezulwini Consensus' has suggested that where use of force is involved, the AU as a Chapter VIII regional

42 See UN S/RES/1970 (n 37 above).
43 n 16 above.
44 See Kuwali 'R2P: Why Libya and not Syria?' (n 38 above).
45 See Global Centre for the Responsibility to Protect (2012) *R2P Monitor* 1(1) available at http://www.globalr2p.org/media/pdf/R2P_Monitor_January2012.pdf (accessed 22 February 2012); see also statement of 10 February 2012, available at http://www.responsibilitytoprotect.org/Statement_on_Syria_10_Feb_2012_-_ENGLISH.pdf (accessed 22 February 2012).
46 B Lepard *Rethinking humanitarian intervention: A fresh legal approach based on fundamental ethical principles in international law and world religions* (2002) 362.

arrangement, must seek prior – or in urgent cases, after-the-fact – authorisation of the Security Council.[47]

The need for immediate action becomes increasingly pressing as the crisis in Syria degenerates to a breaking point. There are running battles in the country that are not sparing civilians and the violence shows no sign of abating. Unimaginable mass atrocity crimes are occurring in Syria as security forces continue to pound protesters with mortar and sniper fire.[48] The precarious situation in the Middle East has been exacerbated by the terror tactics of the non-state armed group called the Islamic State in Iraq and Syria (ISIS), which is waging war against the civilian population. Yet, the UN Security Council is paralysed over Syria, unable to agree not only on the last resort of military intervention, but even on lesser coercive measures such as targeted sanctions, arms embargo, or referral of the situation to the International Criminal Court (ICC). The lack of consensus to act decisively in the Syrian crisis may require UN member states to seek alternative means to exercise their responsibility to protect the civilian population in Syria.

Therefore, in order to garner consensus to respond to the crisis in Syria, there is a need to underscore the essence of the responsibility to protect, which is to save lives. Implementing article 4(h) and the responsibility to protect Pillar 3 should focus on saving lives from mass atrocity crimes. Article 4(h) and the responsibility to protect do not justify forced regime change nor do they validate calls for bringing about democracy and enforcing human rights by the use of armed interventions.[49] Stretching or abusing the concept to disguise regime change would result in a withering of international consensus. Implementing article 4(h) and the responsibility to protect Pillar 3 demands responsibility while protecting. What this means in practice is that the intervening forces should not overstep but rather implement any given mandate according to the letter and spirit of the relevant mandate.[50]

Although China and Russia dutifully and convincingly explained their vetoes in the present international climate, 'constructive abstention' would probably have been more appropriate than obstructing the passage of what

47 African Union (AU) Executive Council: The Common African Position on the Proposed Reform of the United Nations: 'The Ezulwini Consensus' AU Doc Ext/EX.CL/2 (VII) 7-8 March (2005) 6.

48 R Gerber 'R2P: The next decade' *Think* (2012) available at http://www.stanleyfoundation.org/articles.cfm?ID=717 (accessed 22 February 2012).

49 A Etzioni 'Is China more Westphalian than the West?' (2011) 9 *Foreign Affairs* available at http://www.foreignaffairs.com/articles/136548/amitai-etzioni-g-john-ikenberry/point-of-order (accessed 23 February 2012).

50 Decision on the peaceful resolution of the Libyan crisis, Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, Ext/Assembly/AU/Dec/(01.2011), Addis Ababa (25 May 2011) paras 5 & 7.

would otherwise be a majority resolution.[51] It should be remembered that the UN Security Council is legally obligated under article 39 of the UN Charter to examine in good faith any situations coming to its attention that could potentially be considered a threat to or breach of the peace - such as the Syrian crisis. Therefore, members of the Security Council have a particular responsibility to act (or to authorise action) on behalf of the international community in the face of mass atrocity crimes.[52] As a matter of treaty law, members of the Security Council are severally and jointly under an obligation to promote and protect human rights and humanitarian norms under the relevant treaties they are party to.[53]

Thus, if the Security Council does not authorise a convincing article 4(h) and the responsibility to protect intervention, it may be failing to discharge its legal responsibility under the UN Charter. As such, individual member states of the UN Security Council may be in contravention of their international legal obligations under the UN Charter. This is particularly so when the Security Council members allow non-legal factors to inhibit them from carrying out their responsibility to protect populations against mass atrocity crimes.[54] Further, the endorsement of article 4(h) by the AU member states coupled with the commitment of the responsibility to protect by the UN member states may curtail the discretion of the UN Security Council to remain indecisive in the face of mass atrocity crimes.[55] To avoid the paralysis of the Security Council in authorising military humanitarian campaign such as in Syria, Security Council members ought to have acted *in dubio pro humanitate* (in favour of humanity).[56] Then, the question turns to how to actually intervene to protect populations at risk of mass atrocities.

51 See also International Commission on Intervention and State Sovereignty (ICISS) *The responsibility to protect*. Ottawa, International Development Research Council (2001) 51-53; see also JI Levitt 'The responsibility to protect: A beaver without a dam' (2003) 25 *Michigan Journal of International and Comparative Law* 153−177 156 & 170.

52 United Nations 1999 *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* UN Doc S/1999/1257 38; see also KA Annan '*We the peoples': The role of the United Nations in the 21st Century* (Millennium Report of the Secretary-General of the United Nations, New York (2000) 48.

53 D Kuwali *Responsibility to protect: Implementation of article 4(h) intervention* (2011) 302.

54 R Shigekane 'Reform of the Security Council veto' in SH Bemberger *et al* (eds) *The responsibility to protect (R2P): Moving the campaign forward* (2007) 52-57 available at www.responsibilitytoprotect.org/files/R2P-Final-Report%201.pdf (accessed 1 March 2009).

55 See K Powell & S Baranyi 'Delivering on the responsibility to protect in Africa' (Policy Brief, North South Institute) (2005) 2 available at http://www.nsi-ins.ca/english/pdf/responsibility _protect_africa.pdf (accessed 1 February 2015).

56 J Zajadlo 'Legality and legitimation of humanitarian intervention: New challenges in the age of the war on terrorism' (2005) 48 *American Behavioural Scientist* 658.

Military humanitarian campaign: Mass atrocities response operations

Following the adoption of article 4(h) and the responsibility to protect, it is no longer contentious whether individual governments and the international community are responsible for protecting populations from mass atrocity violence. The question is rather how that responsibility should be exercised. To be sure, the responsibility to protect encompasses a continuum of prevention, reaction and rebuilding, with measures ranging from early warning mechanisms to diplomatic pressure, coercive measures, holding perpetrators accountable and international assistance.[57] It should be noted that since the responsibility to protect relates to a continuum, military resources can also be deployed during the preventive phase without necessarily leading to the use of force. Such military deployment may constitute, for example, the creation of buffer zones and humanitarian corridors. As can be noted, there are responses that are intended to have an immediate effect (such as preventive diplomacy and the use or threat of sanctions and international criminal prosecution) and responses that aim to achieve long-term effects (such as promoting economic development, human rights and good governance).

While conflict prevention is central to preventing mass atrocities, halting atrocities in an on-going conflict such as the Syrian crisis requires tailored engagement directed at conflict resolution as well as atrocity prevention.[58] Although peaceful proactive global engagement has been successful in crises such as those in Kenya, Guinea, Kyrgyzstan, and South Sudan, it is naïve to say that perpetrators of atrocities in an on-going conflict can be stopped by peaceful means alone. However, the dynamics and geopolitics of situations, as the situation in Syria illustrates, dictate that military intervention may not be a viable solution and that military intervention may be necessary to halt the perpetrators of mass atrocities against civilians.[59] Military action can only be justified if it holds reasonable prospects for success in halting or averting humanitarian suffering, with consequences of action not likely to be worse than the consequences of inaction. Military action must not risk triggering a greater conflagration. Thus, in campaigns to protect, intervening forces should

57 Advisory Council on International Affairs. 'The Netherlands and the Responsibility to Protect' (2011) available at http://www.aiv-advice.nl/ (accessed 22 February 2012).

58 AJ Bellamy 'Mass atrocities and armed conflict: Links, distinctions, and implications for the Responsibility to Prevent' *Policy Analysis Brief* Stanley Foundation (2011) available at http://www.stanleyfoundation.org/publications/pab/BellamyPAB2 2011.pdf (accessed 23 February 2012).

59 The Arab League proposed a plan for President Assad to step down and the formation of a national unity government to be followed by elections; the Syrian government dismissed this as a violation of Syrian sovereignty and 'flagrant interference in internal affairs'; A Slaughter 'How the world could – and maybe should – intervene in Syria' *The Atlantic* (23 January 2012), available at http://www.theatlantic.com/international/archive/2012/01/how-the-world-could-and-maybe-should-intervene-insyria/251776/ (accessed 24 February 2012).

understand fully that their mission is to protect civilians – saving strangers. In this sense, intervening forces should see themselves as 'guardian soldiers', who are using military might for altruistic purposes; and that such use of force can encounter situations where the decisions they make at the tactical level have immediate strategic and political implementation.[60]

Unless military resources are tactfully deployed to display a credible potential to use force – 'show of force' in military parlance – showing force without actual use of force could cause a military intervention to degenerate into an armed conflict in many situations since force begets force. Such military intervention could be protracted and convoluted thereby exacerbating the already dire human rights situation. Intervening forces should actively work to protect civilians from armed conflict and grave violence by using mediation and diplomatic tools to prevent violence and by acting at the earliest stage of a foreseeable crisis. However, one lesson from the 1994 genocide in Rwanda is the need to respond robustly to a state that is perpetrating atrocities against its population. When atrocities occur, troops can try to stop the violations with diplomatic persuasion, but that approach is rarely effective. When intervening forces are unable to stop atrocities by diplomatic or other coercive means, they will have no other option but to use force to stop the violence. Thus, 'in stopping mass atrocities, coercion is primary' and the use of force 'is secondary'.[61] If coercion does not work (that is, the perpetrators begin the atrocities and cannot be compelled to stop), and intervening troops must resort to use of force, atrocities often occur before use of force takes effect.[62]

In this sense, the use of force may involve the interplay between strategies of 'offence' and 'compellence'. This occurs when the intervening forces prepare for, and use force against, the perpetrators in the hope that the perpetrators will capitulate, but with the will to press forward to protect the civilians. There needs to be a continuing dynamic between the two approaches of offence (enforcement) and compellence (negotiation). The challenge for intervening forces is to decide when a situation demands the proactive use of force to protect civilians and when it requires the encouragement of negotiation and compromise. Generally, the task relating to the protection of civilians that may be prioritised is thus: first, stop the killing of civilians; second, ensure the overall protection of the peacekeeping force itself as well as that of the population; and third, create a secure environment that prevents the recurrence of atrocities.[63]

60 Kuwali (n 34 above) 39.
61 As above.
62 As above.
63 Slaughter (n 59 above).

Overcoming the paralysis in authorising article 4(h) and R2P Pillar 3-intervention

Despite the positive development towards sovereignty as responsibility, article 4(h) and the responsibility to protect, the situation in Syria has manifested that the political nature of the decision-making process within the Security Council can still impede the Council to take enforcement action to protect populations at risk. National interests also obstruct efforts to find common ground on which to build common multilateral interest. For this reason, the former UN Secretary-General Kofi Annan suggested the need to formulate 'objective criteria to determine the threshold for any form of intervention'.[64] Given the *lacuna* in a definitive determination of the legality of unauthorised article 4(h) and the responsibility to protect Pillar 3-intervention, and considering that the UN Charter does not expressly provide for enforcement action by consent, there is need to explore how such intervention can be regarded as legitimate and effective. The existence of criteria is much preferable to decision-making based exclusively upon arbitrary power and *real politik.*[65]

International law, and the UN Charter in particular, does not *a priori* in a conclusive manner regulate the conflict between the use of force and fundamental humanitarian values.[66] However, the UN Charter does not preclude recognition that fundamental human rights are enforceable beyond borders. For example, the Preamble of the Charter dictates that 'armed force shall not be used, save in the common interest'.[67] While concluding that unauthorised intervention does not have a legal basis in existing international law, the 2000 Danish Institute Report identified five possible criteria that might form the basis of a future international consensus, namely: (1) there are serious violations of human rights or IHL; (2) the Security Council 'fails to act'; (3) the intervention is undertaken multilaterally, if possible; (4) any use of force is necessary and proportionate; and (5) the intervening state(s) are relatively disinterested.[68] On its part, the International Commission on Intervention and State Sovereignty (ICISS) asserted that for an intervention to be lawful, there must be a just cause (a just cause threshold) and the following precautionary principles must also be satisfied: the right intention (*recta intentio*); a situation of last recourse (*ultima ratio*); respect for the principle of proportionality; and reasonable prospects of success.

64 Cf. UN Doc S/PV.4046, 16 September 1999. See also C Gray 'The use of force and the international legal order' in MD Evans (ed) *International law* (2003) 597.
65 F Harhoff 'Unauthorised humanitarian interventions: Armed violence in the name of humanity?' (2001) 70 *Nordic Journal of International Law* 108.
66 See Lepard (n 46 above) 29-31; ICISS Report (n 51 above) 5.
67 Charter of the United Nations, Preamble, 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945.
68 See also ICISS Report, n 51 above, xii, arts 1-3, paras 4.18 and what follows.

Likewise, while emphasising that article 51 of the UN Charter should not be rewritten or reinterpreted, the High-Level Panel distilled five criteria: seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences.[69] From the point of view of the ICISS, the just cause thresholds and precautionary principles constituted an important barrier to abuse. By establishing a common framework for intervening states to justify intervention, and for the international community to evaluate those claims, effective implementation of the responsibility to protect would make it harder for states to abuse humanitarian claims.[70] The codification of a checklist will make it more, not less, difficult for the international community to claim a humanitarian mantle to justify their interventions.[71] This view is consistent with the finding of the Kosovo Commission in 2000 that the gap between legal and legitimate humanitarian interventions is dangerous and needs to be removed by specifying the conditions for military humanitarian campaigns.[72] A case can therefore be made that where there is resistance from the target state, intervention to protect populations from mass atrocities may be undertaken if, and only if, the UNSC is either unwilling or unable to act and in situations where such enforcement action may serve as an *ultimum remedium* if other diplomatic means would clearly be inadequate.[73]

Checklist of caveats: Military intervention without UN Security Council's authorisation

In military parlance, military interventions for human protection are called 'military operations other than war' (MOOTW); and have different objectives from both traditional war-fighting and traditional peacekeeping operations. The objective of a military humanitarian campaign is, first and foremost, to protect populations and not necessarily to defeat or destroy an enemy militarily.[74] Thus, an effective article 4(h) and the responsibility to protect intervention is one that saves lives by preventing or ending violent

69 See G Puley 'The responsibility to protect: East, West, and Southern African perspectives on preventing and responding to humanitarian crises' (2005) Working Paper No 05-5, Project Ploughshares 7; High-Level Panel Report, part 3, para 207.

70 R Thakur 'No more Rwandas: Intervention, sovereignty and the responsibility to protect' 26 *Humanitarian Exchange Magazine* (2004) available at www.odihpn.org/report.asp?ID=2605 (accessed 30 August 2013).

71 See R Thakur 'Iraq and the responsibility to protect' (2004) 62 *Behind the Headlines* 1-16. See also R Thakur 'Developing countries and the intervention-sovereignty debate' in RM Price & MW Zacher (eds) *The United Nations and global security* (2004) 194-208.

72 See Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Responses, Lessons Learned*, 2000.

73 See alsoTD Gill 'Humanitarian intervention: Legality, justice and legitimacy' (2007) 24 *Utrecht Journal of International and European Law* 8-23; DC Gompert *Survival* (2006) 48 7-17, 18.

74 See ICISS Report (n 51 above) 57.

attacks on civilians, or by assisting the delivery of aid or both. It is a 'short-term activity with limited political objectives but only intended to stop the worst suffering and not to establish lasting peace or to put a political system in place'.[75] The objective of article 4(h) and the responsibility to protect Pillar 3-intervention is blurred when policymakers want an intervention to alleviate suffering and promote a political resolution to a crisis, as was the case in Somalia, Bosnia and Herzegovina and, arguably, Libya. To avoid spurious interventions that save ulterior interests other than saving lives, below are caveats intended to constitute a discursive toolbox for assessing the need for, and the modality of, intervention and the effectiveness of such intervention in a schizophrenic scenario.[76] At best, the satisfaction of the caveats suggests necessary but not necessarily sufficient factors for deciding on intervention and are proposed as guidelines only, rather than as defined legal preconditions for intervention.

Multilateralism: regional focus and support from regional states

While stopping or preventing a government from perpetrating atrocities against its own people is a laudable outcome, military intervention outside the auspices of collective security arrangements represents a sub-optimal solution to a catastrophic problem. The best verification of right or noble intentions (*recta intentio*) is to avoid unilateralism and to proceed by collective, multilateral intervention.[77] Unlike in unilateral intervention, if action is taken through the AU, for example, questions of national interest and motivation may not arise given the collective security arrangement. The right of intervention under article 4(h) is reserved solely for the AU and unilateral intervention by individual states is explicitly proscribed in article 4(g) of the AU Constitutive Act.

The duty to report and inform the UN Security Council

In order to uphold the international rule of law, the use of force should be primarily reserved for the UN Security Council, which has the pre-eminent authority to sanction the use of force. Article 53 of the UN Charter imposes a duty to report to the UN Security Council for any enforcement action by a regional organisation – an obligation that extends to reporting on the plans of intervention as well as the progress of the military operation.[78]

75 TB Seybolt *Humanitarian military intervention: The conditions for success and failure* (2007) 6.

76 The caveats are not definitive, exhaustive nor prescriptive and should be taken as cumulative. The caveats are presented with the necessary *ceteris paribus* proviso. These caveats do not constitute a simple checklist, which, if it were to accumulate enough ticks, would be seen as legitimising intervention. See D Kuwali *Responsibility to protect: Implementation of article 4(h) intervention* (2011) 306.

77 R Kolb 'A note on humanitarian intervention' (2003) 849 *International Review of the Red Cross* 132.

78 See PC Simons 'Humanitarian intervention: A review of literature' *Ploughshares Working Paper* 01- 2, 17.

While the AU can invoke article 34 of the UN Charter for the Security Council to launch investigations into situations of potential concern, the implication of paragraph 139 of the World Summit Outcome Document is that the Council should be ready to accept a situation onto its agenda where it can help to protect populations from article 4(h) and the responsibility to protect-crimes.[79]

Triggering circumstances: article 4(h) and the responsibility to protect crimes

The threat or occurrence of article 4(h) and the responsibility to protect-crimes meet the threshold that should trigger the need to enforcement action by the Security Council to prevent or stop a humanitarian crisis. For military intervention to be considered, one of two conditions must exist. First, the government of the target state must be committing, supporting, or aiding and abetting article 4(h) and the responsibility to protect crimes. Second, there must have occurred a total breakdown of law and order resulting in the commission (or more likely commission) of article 4(h) and the responsibility to protect-crimes, which the government of the target state is incapable of preventing and when the only hope of 'saving lives depends on the outsiders coming to the rescue'.[80]

Proof: clear and objective evidence of threat or occurrence of atrocities

Unauthorised intervention on the basis of article 4(h) and the responsibility to protect may be justifiable if it constitutes a reaction to objective precursors identified through balanced methods and sources. One key element of practical decision-making around any such intervention is the question of evidence of widespread deprivations of fundamental human rights. Such evidence is necessary not only in terms of the decision of whether or not to intervene but also to assist in the development of the modalities of intervention.[81] Both the AU and UN human rights mechanisms can provide information for decision-makers in concluding that 'grave circumstances' are afoot.[82] Evidence is also needed that the government of the target state has not cooperated with the UN or other inter-governmental organisations (IGOs) and non-governmental organisations (NGOs), or has systematically refused to comply with appeals, recommendations or decisions of such entities.[83]

79 N Reindorp 'Presentation to the Arria Formula Meeting' Global Centre for the Responsibility to Protect (1 December 2008) 3 (copy with the author).
80 See also World Summit Outcome (n 11 above) para 268. See also NJ Wheeler 'Saving strangers: Humanitarian intervention in international society' (2000) 34.
81 J Charney 'Anticipatory humanitarian intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231 1243.
82 Puley (n 69 above) 13.
83 See also Simons (n 78 above) 16 17.

Deadline: warning and refusal to comply by the target state

The international community or the AU, as the case may be, must call on the target state to stop its violations of fundamental human rights. The authorities of a target state must be seen to be unwilling or unable to prevent the atrocities.[84] Where the acts are not committed by the central authorities, the target state must be asked to take steps to prevent the commission of such acts or to allow IGOs into the state to assist in preventing such acts and in resolving the humanitarian crisis. The AU has a duty to call for such cooperation by the government of the target state.[85]

The requirement of a clear sense of urgency

The gravity and urgency of the situation is an important factor that should be taken into account in deciding on article 4(h) and the responsibility to protect Pillar 3-intervention. A looming genocide would deserve priority over a chronic situation of widespread or even severe insecurity. However, in conflict zones it is often difficult to substantiate allegations of violations and the urgency of the situation may demand rapid action. Hence, there is a need for a mechanism to enable the timely gathering and transmitting of reliable evidence.[86] All diplomatic means of resolving the situation commensurate with the urgency of the situation must, however, be exhausted. The simple equation is that the more urgent the situation of atrocities, the more intensive and immediate must the intervention be including any necessary military response.[87]

Ultima ratio: exhaustion of peaceful means to resolve the situation

Since military intervention is an exceptional action of last resort, every realistic attempt to invoke UNSC action or to achieve a peaceful solution must be exhausted. Before force is contemplated, there must be a good faith pursuit of all peaceful means to resolve the situation commensurate with the gravity of the situation. To actually try all possible options first entails that people will die while the AU appears indifferent as they run through a checklist. The principle of last resort does not mean that all other methods must be attempted and fail before using force is justifiable. It does not require the situation to get worse to be a humanitarian crisis or *casus belli*. What it means is that the efficacy of alternatives to military

84 See F Harhoff 'Unauthorised humanitarian interventions: Armed violence in the name of humanity?' (2001) 70 *Nordic Journal of International Law* 115.
85 Cf M Kunschak 'The African Union and the right to intervention: Is there a need for UN Security Council authorisation?' (2006) 31 *South African Yearbook of International Law* 195.
86 Puley (n 69 above) 13.
87 Danish Institute of International Affairs 'Humanitarian intervention: Legal and political aspects' (1999) 109 (Danish Institute Report).

intervention must be assessed quickly so that they can simply be bypassed if they seem not feasible.[88]

The primacy of human rights and limited military engagement

The purpose of article 4(h) and Pillar 3-intervention should be limited to stopping mass atrocities and to protecting civilians. The intervening forces should make the humanitarian objectives of the intervention clearly known in advance to the international community in order to minimise the risk of the target state invoking article 51 of the Charter to counter the intervention. Such prior and clear information should also help in the international monitoring of the intervention. Paradoxically, the decision to intervene in a war zone, where the worst humanitarian crises occur, is a political decision. Governments that commit troops to 'save strangers' have political as well as humanitarian interests at stake.[89] Therefore, a military humanitarian campaign is more likely to succeed when an intervener has clearly identified political motives in addition to humanitarian ones – as long as the political motives do not overwhelm humanitarian objectives – than when the political interests are obscure or non-existent.[90] The intervention should be limited in time and space and should not be aimed at regime change or undermining territorial integrity of the target state.[91]

Bottom-up approach to garner support of the victims and other actors

The victims in the target state must welcome article 4(h) and Pillar 3-intervention. However, this test is difficult to establish because it requires an *ex ante* assessment of popular support for intervention. It is easy to assume popular support for intervention when there is some reliable institutional litmus of public sentiment. A continuous process of communication, consultation and partnership can provide early warning and a guide to feasible strategies as well as feedback and evaluation for ongoing intervention.

A high probability of success

Military action can only be justified if it stands reasonable prospects for success in halting or averting humanitarian suffering, with consequences

88 BW Jentleson *Coercive prevention: Normative, political, and policy dilemmas* Peaceworks No 35, Washington DC: USIP (2000) 13-14.

89 See C Hinote 'Campaigning to protect: Using military force to stop genocide and mass atrocities' Paper presented at the Carr Center for Human Rights for Human Rights Policy, Cambridge, MA (15 May 2008).

90 See also TB Seybolt *Humanitarian military intervention: The conditions for success and failure* (2007) 267-268.

91 See Harhoff (n 84 above) 116.

of action not likely to be worse than the consequences of inaction. For example, when, at a minimum, the intended beneficiaries of the action are better off after the intervention than they would have been had the intervention not taken place including the number of lives saved, if possible. Military action must not risk triggering a greater conflagration. Poorly planned interventions can do more harm than good while also weakening the norm of non-intervention in international relations as the NATO intervention in Libya seems to have done.

Exit strategy: mapped-out transition to post-conflict peacebuilding

Peacebuilding involves initiatives employed to avoid a relapse into conflict, including post-conflict reconstruction of the target state. Article 4(h) and Pillar 3-interventions should credibly respond to the needs of the victims and prevent recurrence of atrocities. The legitimacy of a humanitarian campaign will depend, in part, upon the responsibility taken by the intervening states or organisation to provide assistance with social and economic reconstruction and, if necessary, the reconstruction of the civilian infrastructure. In situations involving failed states, or where a civil conflict results in secession of a part of a state, provisional government institutions will need to be established. Thus, short-term allowance for intervention must at the very least be accompanied by long-term campaigns for legitimate and practicable authority.

Appropriate use of force to achieve the goals in question

A military humanitarian campaign should be conducted strictly in accordance with the principles and rules of IHL. In this sense, the principles of necessity and proportionality require the employment of force to be tailored to the goal of saving lives and not to endangering them further.[92] Thus, the legitimacy of any particular intervention will be sustained or undermined by the extent to which the tactics of warfare exhibit sensitivity to civilian harm and the degree to which the interveners avoid unduly shifting the risks of intervention to the victims. An intervening force must have adequate personnel, training, and equipment to dominate any force that might challenge it.[93]

Mobilisation of political will

Political will to act is the *conditio sine qua non* for any effective intervention. If words mean anything, political will may be driven by article 4(h), which imposes a legal responsibility on AU member states to end mass atrocity crimes. This legal duty is strengthened by the political commitment of the

92 See Seybolt (n 90 above) 229.
93 Simons (n 78 above) 26. See also Seybolt (n 90 above) 26.

responsibility to protect, which is an international mobilisation tool for timely action. In this sense, key governments should persuade and mobilise the international community to take necessary action. Civil society should also engage in bottom-up mobilisation, making the voices of ordinary concerned citizens heard, pushing for action and holding leaders to account when action is not forthcoming.[94]

Conclusion

Implementation of the 'protection of civilians' – mandates faces myriad challenges ranging from the differences in understanding what protection entails to the actual means of protection on the ground. On the one hand, humanitarian agencies view the protection of civilians as the protection of civilians from widespread threats of violence, coercion, and the deliberate deprivation of aid, including all activities aimed at ensuring the full respect for the rights of the individual in accordance with the letter and the spirit of IHRL, IHL, laws relating to the protection of internally displaced persons (IDPs) and refugees.[95] On the other hand, peacekeepers have taken a narrow view of their protection role, seeing it primarily in terms of ensuring the physical security of civilians.[96] In parallel with the concept of the protection of civilians, article 4(h) and Pillar 3 of the responsibility to protect seek to protect populations at risk of war crimes, genocide and crimes against humanity whether during armed conflicts or peacetime. Thus, the concepts of the protection of civilians, article 4(h) and the responsibility to protect are 'in the same river, but not in the same boat'.[97]

Article 4(h) of the AU Constitutive Act provides a legal basis for intervention by the AU. At the same time, the responsibility to protect is a political commitment by UN member states to act in the face of mass atrocities. Although the UN Security Council was quick to authorise intervention in Libya, it has been reluctant to authorise intervention to protect populations at risk in Syria despite the scale and duration of atrocities in Syria being far beyond those in Libya. National interests – not legal considerations – continue to choke the Council's responsibility of authorising 'all necessary means' under Chapter VII to protect populations from atrocities. In the current international legal climate, if states find it necessary to intervene on humanitarian grounds, general acceptance of the relevant criteria would help to ensure that such interventions are governed

94 G Evans *The responsibility to protect: Ending mass atrocity crimes once and for all* (2008) 224.
95 Oxfam (n 22 above).
96 International Committee of the Red Cross (ICRC) *Strengthening protection in war: A search for professional standards* International Committee of the Red Cross, Geneva (2001) 20.
97 M Lacourt International Committee of the Red Cross, quoted in European Parliament/News 'Blurring the lines between humanitarian and military action undermines aid' available at http://www.europarl.europa.eu/news/en/headlines/content/20110415STO17907/html/Blurring-the-lines-between-humanitarian-and-military-action-undermines-aid (accessed 18 July 2013).

by predictable norms. Such an agreement on intervention would contribute to the maintenance of orderly international relations when it comes to implementing the international community's responsibility to protect populations at risk of mass atrocities.[98]

Applying definitive criteria for intervention might increase the chances of success and legitimacy for interventions to protect civilians and prevent mass atrocity crimes. For this reason, there is need for discursive 'caveats' to assess the modality and effectiveness of intervention by intervening states as well as evaluating and judging the justification for such intervention by the international community. The use of force should be a last resort but there has been no suggestion of how to use such force. Quintessentially, the conditions for intervention under article 4(h) and Pillar 3 of the responsibility to protect are *jus cogens* crimes subject to universal jurisdiction. Therefore, to pass this checklist of caveats, the objective of military humanitarian campaign on the basis of article 4(h) and the responsibility to protect should be to apprehend or defeat the perpetrators of such mass atrocity crimes. This also demands a proper and transparent procedure to ensure that it is genuinely humanitarian with the primacy of protecting populations at risk – not national interests.

98 R Caplan 'Humanitarian intervention: Which way forward?' (2000) 14 *Ethics and International Affairs* 23 32.

CHAPTER 3

DEFINING PROTECTION OF CIVILIANS IN THE CONTEXT OF ARMED CONFLICTS*

Conor Foley

Abstract: *The United Nations (UN) Security Council is making increasing use of its powers enshrined in Chapter VII of the UN Charter to authorise peacekeeping missions to protect civilians against threats to their right to life or physical integrity. The increasing propensity of the UN Security Council to authorise the use of all means to protect civilians at risk of atrocities is of both normative and practical significance and is transforming 'traditional' notions of peacekeeping. For protection to be effective there must be a common understanding as to who should be protected, from what, by whom and until when. However, the term 'protection' is also used in a number of other senses whose vagueness and elasticity diminishes its practical utility. While the concepts of protection of civilians (PoC) and the 'responsibility to protect' share some common elements, the two concepts have fundamental differences given that PoC is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political commitment. Therefore, confusing the concept with the notion of the responsibility to protect risks politicising protection, which ought to be characterised by neutrality and impartiality lest undermining the practical protection of civilians in peace support operations.*

'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'[1]

Introduction

There are now around 100 000 UN troops deployed around the world on missions authorised by the Security Council to use force to protect civilians.[2] Armed soldiers are being given lawful permission to enter into the territory of other states in order to protect people from grave violations of international human rights or international humanitarian law (IHL). For protection to be effective, there must be a common understanding of

* This Chapter first appeared as C Foley 'What do we mean by protection' (2015) 23 *Michigan State Law Review* 701 and is reproduced here with permission.

1 L Carroll *Through the looking glass* (1872) 72.

2 See 'Surge in Uniformed UN Peacekeeping Personnel from 1991 – Present' [November 2015], UN Peacekeeping Documents, available at http://www.un.org/en/peacekeeping/documents/chart.pdf (accessed 11 August 2013).

who should be protected, from what, by whom and until when. The term 'protection' can be found in international humanitarian, human rights and refugee law and UN Security Council resolutions on the protection of civilians often refer to all three bodies of law.[3] However, the 'protection' that they provide is quite different in both conceptual and practical terms and this can lead to confusion about the applicable body of law for peacekeeping missions authorised by the Security Council under Chapter VII of the UN Charter.

The term 'protection' is also commonly used by humanitarian aid workers to describe certain activities connected to the delivery of relief assistance. While notionally based on the above three legal frameworks, it is usually taken as referring to monitoring and advocacy work to ensure that assistance reaches its intended recipients, that their beneficiaries provide adequate physical protection and to 'bear witness' to violations of fundamental rights. Finally, the term is also often associated with the concept of the 'responsibility to protect' doctrine, whose proponents often describe it as 'an emerging international norm,' by which the 'international community' may occasionally substitute itself for the protection that states are expected to provide those within their jurisdiction. This article provides a brief overview of how these different terms are generally understood, their inter-relationship and potential normative significance.

Protection of civilians-mandates

On 12 February 1999, the UN Security Council, under a Canadian Presidency, held an open meeting on the matter of protection of civilians in armed conflict.[4] The Council noted with concern that civilians and humanitarian aid workers 'continued to be targeted in instances of armed conflict, in flagrant violation of international humanitarian and human rights law' and requested that the Secretary General submit 'a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict.'[5] A Presidential statement following the meeting noted:[6]

> Bearing in mind its primary responsibility for the maintenance of international peace and security, the Council affirms the need for the international community to assist and protect civilian populations affected by armed conflict […] The Council expresses its willingness to respond, in

3 UN S/RES/1265 (17 September 1999). This was the first resolution on the protection of civilians in armed conflict (PoC) adopted by the UN Security Council and referred to the need for UN personnel 'involved in peace-making, peacekeeping and peace-building activities have appropriate training in international humanitarian, human rights and refugee law.'

4 SC Press Statement 1999/6, S/PRST/1999/6 (12 February 1999) (Protection of civilians in armed conflict: Statement by the President of the Security Council).

5 SC Press Statement 1999/6 (n 4 above) para 1.

6 n 4 above, para 27.

> accordance with the Charter of the United Nations, to situations in which civilians, as such, have been targeted or humanitarian assistance to civilians has been deliberately obstructed.

The report was published in September 1999 and contained a series of recommendations on how the Security Council could 'compel parties to conflict to respect the rights guaranteed to civilians by international law and convention.'[7] In welcoming its publication, the Security Council adopted the first in a series of resolutions on the Protection of Civilians in Armed Conflict.[8] This Resolution noted, in its preamble, the 'primary responsibility under the Charter of the United Nations for the maintenance of international peace and security,' the 'importance of taking measures aimed at conflict prevention and resolution' and the 'need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis'.[9] It underlined 'the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict, including refugees and internally displaced persons, and the protection of humanitarian assistance to them' and emphasised 'the need for combatants to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of international humanitarian organizations.'[10]

7 UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/1999/957 (8 September 1999); see also UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2001/331 (30 March 2001); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2004/431 (28 May 2004); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2005/740 (28 November 2005); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2007/643 (28 October 2007); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2007/643 (28 October 2007); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' UN Doc S/2009/277 (29 May 2009); UN Secretary-General, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc S/2010/579 (11 November 2010); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', UN Doc S/2012/376 (22 May 2012); UN Secretary-General 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', UN Doc S/2013/689 (22 November 2013).

8 See generally UN S/RES/1265 (n 3 above); see also UN S/RES/1296 (19 April 2000); UN S/RES/1502 (26 August 2003); UN S/RES/1674 (28 April 2006); UN S/RES/1894 (11 November 2009) (on the protection of civilians in armed conflict, which reaffirm, *inter alia,* the relevant provisions of the United Nations World Summit outcome document); UN S/RES/1612 (26 July 2005); UN S/RES/1882 (4 August 2009); UN S/RES/1998 (12 July 2011); UN S/RES/2068 (19 September 2012); UN S/RES/1325 (31 October 2000); UN S/RES/1820 (19 June 2008); UN S/RES/1888 (30 September 2009); UN S/RES/1889 (5 October 2009); UN S/RES/1960 (11 November 2009); UN S/RES/1960 (16 December 2010) (on women, peace and security).

9 UN S/RES/1265 (n 3 above).

10 S/RES/1265 (n 3 above) 7 8.

More specifically the Resolution also expressed its 'willingness to consider how peacekeeping mandates might better address the negative impact of armed conflict on civilians'[11] and requested the Secretary-General 'to ensure that United Nations personnel involved in peace-making, peace-keeping and peace-building activities have appropriate training in international humanitarian, human rights and refugee law.'[12] The following month the Security Council authorised a peacekeeping operation in Sierra Leone, UNAMSIL, which stated the following:[13]

> Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence taking into account the responsibilities of the Government of Sierra Leone.

The decision to mandate UN forces to use force to protect civilians arose in response to a series of crises during the 1990s, which placed the 'traditional principles' of peacekeeping under increasing strain. Chapter VII mandates have been subsequently developed in other peacekeeping missions that have forced a significant re-thinking about the protection of civilians by these missions under international law. The debate in the Security Council that led to the UNAMSIL Resolution being adopted was notable for the emphasis that was placed on the 'protection provisions' of international law.[14] The Special Representative of the UN Secretary General for Children and Armed Conflict detailed the atrocities committed against children by rebel groups in Sierra Leone.[15] He was followed by the representative of the government of Sierra Leone who noted that the previous United Nations Observer Mission in Sierra Leone (UNOMSIL) 'was not equipped to deal with certain situations' in the country and stated:[16]

> This is why the Sierra Leone delegation could not help but highlight paragraph 14 of the draft resolution, which says that acting under Chapter VII of the Charter, the new United Nations Mission in Sierra Leone, in discharge of its mandate, may take the necessary measures to ensure the safety and freedom of movement of United Nations personnel and, circumstances permitting, to afford protection to civilians under imminent threat of physical violence. In the view of my delegation, whatever interpretation others may give to this particular paragraph, we regard it as an insurance policy for both international peacekeepers and innocent civilians.

11 S/RES/1265 (n 3 above) 11.
12 S/RES/1265 (n 3 above) 14.
13 S/RES/1270, 14, UN Doc S/RES/1270 (22 October 1999).
14 UN SCOR, 53 Sess, 4054 Mtg., UN Doc S/PV.4054 (22 October 1999) 1-18.
15 n 14 above, 2-5.
16 n 14 above, 6.

The representative also stressed the positive role played by Nigeria, which had led an earlier regional intervention in Liberia and Sierra Leone[17] and a representative of Nigeria was specially invited to address the Security Council.[18] Russia chaired the debate, so it did not express a view on the Resolution, but the other four permanent members of the Security Council all spoke in favour of it, along with Argentina, Bahrain, Brazil, Canada, Gambia, Malaysia, and the Netherlands.[19] This represented an extremely broad range of support for what was understood at the time to be a significant policy development within the UN.[20] China's representative spoke of the 'many rounds of consultations' that had gone into agreeing a draft that 'accommodates the requests of the Government of Sierra Leone and the African members and reflects the concerns of other Council members.'[21] Argentina described the Resolution as introducing 'a new, fundamental political, legal and moral dimension' to peacekeeping, which 'shows that the Council has learned from its own experience and that it will not remain indifferent to indiscriminate attacks against the civilian population.'[22] Brazil said that it 'augur[ed] well' for creating the conditions for 'vigorous peacekeeping involvement of the United Nations in other conflicts in Africa.'[23]

In the same year, the UN published two reports on the failure of its missions to prevent genocide in Rwanda[24] and Srebrenica.[25] A subsequent Resolution in April 2000 also indicated the Council's intention to provide peacekeeping missions with appropriate mandates and resources to protect civilians and called on peacekeepers to consider the use of 'temporary security zones […] for the protection of civilians and the delivery of assistance in situations characterised by the threat of genocide, crimes against humanity and war crimes against the civilian population.'[26]

In August 2000 the UN published the Report of the Panel on United Nations Peace Operations (the Brahimi Report).[27] This acknowledged that

17 As above.
18 n 14 above, 7-8.
19 n 14 above.
20 Malaysia, Brazil and Argentina are all leading members of the non-aligned movement who, along with Russia and China, have traditionally taken a sceptical or hostile position towards 'humanitarian interventions.' For further discussion, see C Gray 'The use of force for humanitarian purposes' in ND White and C Henderson (eds) *Research handbook on international conflict and security law* (2013) 229.
21 UN SCOR (n 14 above) 14.
22 n 14 above, 16.
23 n 14 above, 15.
24 See UN Secretary-General 'Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda' UN Doc S/1999/1257 (16 December 1999).
25 See UN Secretary-General 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The fall of Srebrenica' UN Doc A/54/549 (15 November 1999).
26 UN S/RES/1296 (n 8 above) 7 para 15.
27 See UN Secretary-General 'Report of the Panel on United Nations Peace Operations' UN Doc A/55/305-S/2000/809 (21 August 1999) (UN SG report on UNPOs).

over the previous decade, the organisation had 'repeatedly failed to meet the challenge' of saving 'generations from the scourge of war.'[28] It contained a series of recommendations designed to remedy problems that the UN had encountered in the deployment of its peacekeeping forces focussed on strategic direction, decision-making, rapid deployment, operational planning and support.[29] It also stated that UN peacekeepers

> who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.[30]

The Brahimi Report listed the logistical and resource-based challenges that the UN faced in deploying peace-keeping troops in sufficient time and number and argued that '[t]he Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates.'[31] It also noted that '[t]here are hundreds of thousands of civilians in current United Nations mission areas who are exposed to potential risk of violence, and United Nations forces currently deployed could not protect more than a small fraction of them even if directed to do so.'[32] Nevertheless, it argued: [33]

> Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect.

The report also stated as follows:[34]

> There are many tasks which United Nations peacekeeping forces should not be asked to undertake, and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.

Since the publication of the Brahimi Report, the number of UN peacekeeping missions has increased significantly and these are becoming increasingly multi-dimensional.[35] While the basic principles of 'traditional peacekeeping': consent, impartiality, and limited use of force continue to

28 As above.
29 As above.
30 n 27 above, 62.
31 n 27 above, 64(d).
32 n 27 above, 63.
33 n 27 above, 49.
34 n 27 above, 1.

be reaffirmed by the UN General Assembly,[36] missions in the field are grappling with how to apply these while confronting situations in which civilians face a range of threats.[37] The *Capstone doctrine,* published in 2008, for example, lists as part of the 'Core Business' of UN peacekeeping the '[creation of] a secure and stable environment while strengthening the State's ability to provide security, with full respect for the rule of law and human rights.'[38] It explains that

> most multi-dimensional United Nations peacekeeping operations are now mandated by the Security Council to protect civilians under imminent threat of physical violence. The protection of civilians requires concerted and coordinated action among the military, police and civilian components of a United Nations peacekeeping operation and must be mainstreamed into the planning and conduct of its core activities. United Nations humanitarian agencies and non-governmental organization (NGO) partners also undertake a broad range of activities in support of the protection of civilians. Close coordination with these actors is, therefore, essential.[39]

As discussed by Dire Tladi in Chapter 4, the concept of the protection of civilians is also now debated at an open bi-annual session of the Security Council and this has resulted in a steady stream of statements, resolutions and reports.[40] The UN General Assembly repeatedly endorsed the concept

35 C Gray *International law and the use of force* (2008) 294-54. See generally AJ Bellamy *et al Understanding peacekeeping* (2010); S Wills *Protecting civilians: The obligations of peacekeepers UN reform and the new collective security* (2010); EG Ferris *The politics of protection: The limits of humanitarian action* (2011); TG Weiss *Humanitarian intervention: War and conflict in the modern world peacekeeping* (2007).

36 Through the annual reports of the UN Special Committee for Peacekeeping Operations.

37 For the emphasis on the need to adapt to the changing nature of peacekeeping, see UN Secretary-General *An agenda for peace: Preventive diplomacy, peacemaking and peace-keeping: Report of the Secretary-General*, para 50, UN Doc A/47/277-S/24111 (17 June 1992); UN Secretary-General 'Supplement to an Agenda for Peace: Position paper of the Secretary-General on the Occasion of the Fiftieth anniversary of the United Nations' 11-15, UN Doc A/50/60-S/1995/1 (3 January 1995); Department of Peacekeeping Operations (ed) *UN Peacekeeping Operations, Principles, and Guidelines* (2008) 18 (UN Peacekeeping Operations and Guidelines). See also *The new horizon initiative: Progress report 2* Department of Peacekeeping Operations (ed) (2011); WJ Durch *et al The Brahimi report and the future of UN peace operations* (2003).

38 UN Peacekeeping Operations and Guidelines (n 37 above).

39 As above.

40 As above. See also *Draft DPKO/DFS operational concept on the protection of civilians in United Nations peacekeeping operations* UN Doc DPKO/DFS (2010); *DPKO/DFS Lessons Learned Note on the Protection of civilians in UN Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons* UN Doc DPKO/DFS (2010); *Protection of Civilian (POC) Resource and Capability Matrix for Implementation of UN Peacekeeping Operations with POC mandates*, UN Doc DPKO/DFS (Feb. 2012); *Guidelines for Protection of Civilians for Military Components of UN Peacekeeping Missions*, UN DPKO, 2010; UN Office for the Coordination of Humanitarian Affairs, *Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operations*, UN Doc OCHA (2011); D Paul & S Bagshaw 'Protect or neglect? Toward a more effective United Nations approach to the protection of internally displaced persons' (2004) available at http://www.brookings.edu/research/papers/2004/11/23humanrights-bagshaw (explaining the Brookings-SAIS Project on Internal Displacement and the UN Office for the Coordination of Humanitarian Affairs, 23 November 2004).

of the protection of civilians.[41] Guidance produced by the UN Department of Peacekeeping Operations (DPKO) and Office for the Coordination of Humanitarian Affairs (OCHA) also specifies that while the protection of civilians is primarily the responsibility of the host government and that the mission is deployed to assist and build the capacity of the government in the fulfillment of this responsibility, 'in cases where the government is unable or unwilling to fulfill its responsibility, Security Council mandates give missions the authority to act independently to protect civilians [meaning that] missions are authorised to use force against any party, *including elements of government forces*.'[42]

When the Security Council revised the mandate of the UN mission to the Democratic Republic of the Congo (DRC) in 2007, it stated 'that the protection of civilians must be given priority in decisions about the use of available capacity and resources.'[43] Security Council mandates have become increasingly detailed in spelling out the tasks of UN peacekeeping missions. Although most continue to use a similar set of formulations regarding the protection of civilians-related tasks to those contained within the UNAMSIL mandate, there have been some important developments in the language used.[44] In 2008, the Security Council Resolution on the DRC removed the reference to 'without prejudice to the responsibility to the government' and mandated the UN mission (MONUC) to: 'Ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence, in particular violence emanating from *any* of the parties engaged in the conflict.'[45] In 2014, the word 'imminent' was removed from the formulation.[46]

41 GA Res 63/280, 2, UN Doc A/RES/63/280 (20 May 2009); Rep. of the Special Comm. on Peacekeeping Operations and its Working Group, 63d Sess., 23 February 20 March 2009, 125-128, UN Doc A/63/19; GAOR, 63d Sess., Supp. No 19 (2009).

42 UN Office for the Coordination of Humanitarian Affairs (OCHA) 'Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operations' 3 (emphasis added). See also *Draft Framework for Drafting Mission-wide Protection of Civilians Strategies in UN Peacekeeping Operations* UN DPKO 2010.

43 UN S/RES/1794 (21 December 2007).

44 Since October 2008, the Security Council has published a series of reports on the protection of civilians in armed conflict tracking the issue on the Security Council agenda. See UN SC Rep. of the Security Council *Cross-Cutting Report: Protection of Civilians*, 2008 No 2 (14 October 2008); UN SC Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2009 No 4 (30 October 2009); UN SC Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2010 No 3 (29 October 2010); UN SC Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2011 No 2 (20 July 2011); UN SC Rep. of the Security Council, *Cross-Cutting Report: Protection of Civilians in Armed Conflict*, 2012 No 2 (31 May 2012); UN SC Rep. of the Security Council *Cross-Cutting Report: Protection of Civilians in Armed Conflict* 2013 No 3 (20 December 2013).

45 UN S/RES/1856 (22 December 2008) para 3(a) (emphasis added).

46 UN S/RES/2147 (28 March 2014) para 4(a)(i) ('Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation.').

However, there remain considerable ambiguities about how to interpret the protection of civilians-mandates. Although the original Secretary-General's report of 1999 set out a clear role for UN-mandated troops to provide physical protection to civilians, some subsequent reports were more ambiguous on this point.[47] Attempts to turn the concept into doctrine at the tactical and operational levels have also been fraught with difficulty.

In 2009, ten years after the deployment of the first mission with such a mandate, an independent review found that, 'the presumed "chain" of events to support protection of civilians – from the earliest planning to the implementation of mandates by peacekeeping missions in the field is [often] broken'[48] and made a series of recommendations for how the protection of civilians mandates could be better operationalised. The following year, a concept note by the UN Department of Peacekeeping Operations (DPKO) noted as follows:

> A number of senior mission leaders, mission personnel and troop and police contributors now feel that the absence of a clear, operationally- focused and practical concept for protection of civilians by United Nations peacekeeping operations has contributed to the disconnect between expectations and resources […] In the absence of a common UN position on the protection of civilians by UN peacekeeping operations, a wide range of views regarding what protection of civilians means for UN peacekeeping missions has taken root. Troop and police contributors, Member States, the Security Council, bodies of the General Assembly, as well as staff within the missions, DPKO and DFS, often understand POC in ways that may contradict one another, causing friction, misunderstanding and frustration in missions.[49]

In March 2014, a report by the UN Office of Internal Oversight Services noted that peacekeeping missions routinely avoid using force to protect civilians who are under attack, intervening in only 20 per cent of cases

47 See UN Secretary-General 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' UN Doc S/2001/331 (30 March 2001); UN Secretary-General 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' UN Doc S/2002/1300 (26 November 2002). Both of these reports focused on the humanitarian rights-based concept of protection and failed to even mention the role of internationally-mandated forces in protecting civilians against violence. However, UN Secretary-General, was much clearer in calling for physical protection of refugees and IDPs 'during transit as well as after return' and from sexual and gender-based violence. 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' UN Doc S/2004/431 (28 May 2004). See also UN Secretary-General 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' UN Doc S/2005/740 (28 November 2005) (which called on peacekeepers to provide physical protection to civilians in camps, during population movements, and in their places of origin as well as the role of peacekeepers in restoring law and order, ensuring the civilian character of IDP camps, and securing humanitarian access).

48 V Holt & G Taylor 'Protecting civilians in the context of UN peacekeeping operations' (2009).

49 *DPKO/DFS Draft operational concept on the protection of civilians in peace operations* 4, 9.

and that 'force is almost never used to protect civilians under attack.'[50] It also noted that: '[f]orce was most likely to be used to protect civilians when troops were engaged in self-defence or defence of United Nations personnel and property. In some cases, civilians had congregated in or around United Nations bases and the military component had fired on combatants to prevent their access to the base.'[51] However,

> [i]nterviewees also referred to gaps at the tactical level on the issue of how to respond to complex and ambiguous situations that might require the use of force … such as intervening in fighting between two or more armed groups when civilian casualties were likely; when armed groups were openly visible in communities, committing extortion through fear but without physical violence; when the imminence of the threat could not be evaluated; when troops were outnumbered; when reinforcements were unavailable; when it would be difficult or impossible to reach the site; or when the use of force might provoke more violence or cause more civilian casualties.[52]

As Holt and Berkman have noted, 'protection' is often vague and undefined [...]. Deploying peacekeepers without either a clear vision of how to protect civilians or the means and authority to do so may result in a tragic shortfall.'[53] Part of these difficulties is based on confusion over the meaning of the term 'protection' and the rest of this Chapter briefly discusses the other 'definitions' of the term that are commonly used in the humanitarian discourse.

Rights-based protection

In December 1991, the UN General Assembly adopted Resolution 46/182.[54] This established the Inter-Agency Standing Committee (IASC), in order to strengthen the coordination of humanitarian emergency

50 UN Office of Internal Oversight Services 'Evaluation of the implementation and results of protection of civilians-mandates in United Nations peacekeeping operations' Rep. of the Office of Internal Oversight Services, 68th Sess (7 March 2014) 19, UN Doc A/68/787 (2014) ('Of the 507 incidents involving civilians reported in Secretary-General's reports from 2010 to 2013, only 101, or 20 per cent, were reported to have attracted an immediate mission response. Conversely, missions did not report responding to 406 (80 per cent) of incidents where civilians were attacked. The rate of reported response varied across missions, reflecting the seriousness of incidents and the availability of early warning, the accessibility of incident sites and other factors.' In an annex to the report UNDPKO accepted the report's main conclusions and recommendations but noted that: 'The report, however, misses an important opportunity to assess the implementation of protection of civilians mandates in their full scope. It focuses on a last resort option – the use of force – which we should expect and hope will be a rare occurrence where missions have so many other tools at their disposal.').

51 UN Office of Internal Oversight Services (n 50 above) 23.

52 n 50 above, 52.

53 VK Holt & TC Berkman *The impossible mandate? Military preparedness, the responsibility to protect and modern peace operations* (2006) 5 & 50.

54 UN GAOR, 68th Sess, 78th plen mtg, UN Doc A/RES/46/182 (19 December 1991), an annex was attached to the Resolution and the operative paragraphs of this are referred to below.

assistance during emergencies.[55] It also contained a set of principles relating to the distribution of humanitarian assistance.[56] The Resolution emphasised respect for 'the sovereignty, territorial integrity and national unity of States' and that 'humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by [that] country.'[57] It also stressed that 'humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.'[58] However, it stated:

> The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries [...] States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.

The Resolution was passed despite concern expressed during the debate that the guidelines could be used to legitimise infringements on state sovereignty.[59]

In early 1992 three new UN Departments: DPKO, the Department for Political Affairs (DPA) and the Department for Humanitarian Affairs (later to become OCHA) were created in a major internal restructuring.[60] UN Agencies such as the UNHCR, the World Food Programme (WFP) and the UN Children's Fund (UNICEF) also significantly expanded their field presence from the start of the 1990s. This means that UN agencies are increasingly providing direct protection and assistance to people in complex humanitarian emergencies.

Since the start of the 1990s the Security Council has also passed a number of resolutions demanding unimpeded access by international humanitarian organisations to all those in need of assistance.[61] A series of

55 UN Doc A/RES/46/182 (n 54 above) para 38.
56 UN Doc A/RES/46/182 (n 54 above) paras 1-2.
57 UN Doc A/RES/46/182 (n 54 above) para 3.
58 UN Doc A/RES/46/182 (n 54 above) para 2.
59 FK Abiew *The evolution of the doctrine and practice of humanitarian intervention* (1991) 141.
60 See UN Secretary-General Review of the efficiency of the administrative and financial functioning of the United Nations: Restructuring of the Secretariat of the Organisation: Rep. of the Secretary General, UN Doc A/RES/47/212, 23, December 1992; and UN Secretary-General Review of the efficiency of the administrative and financial functioning of the United Nations: Restructuring of the Secretariat of the Organization: Rep. of the Secretary General, UN Doc A/48/218 (23 December 1993). For discussion, see RK Al-Qaq 'Managing world order: United Nations peace operations and the security agenda' (2009) 49-69.
61 See eg UN S/RES/794 (3 December 1992) (in relation to Somalia); UN S/RES/770 (13 August 1992); UN S/RES/836 (June 1993) (in relation to Bosnia-Herzegovina); UN S/RES/1216 (21 December 1998) on the crisis in Guinea-Bissau; UN S/RES/1265 (1999); UN S/RES/1296 (19 April 2000); UN S/RES/1674 (28 April 2006); UN S/RES/1738 (23 December 2006), all of which were adopted under the thematic heading of Protection of Civilians. See also UN S/RES/1502 (26 August 2003) (in relation to Iraq).

UN General Assembly resolutions have expressed similar views.[62] The Security Council has also specifically linked the denial of humanitarian access with threats to international peace and security with a growing body of resolutions on the importance of ensuring that access to such assistance is not arbitrarily prevented.[63] For example, Security Council Resolution 1502, after the attack on the UN headquarters in Baghdad in 2003, urged 'all those concerned [...] to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations.'[64]

The delivery of humanitarian assistance is increasingly being integrated into the PoC concept and being linked to protection of UN personnel and humanitarian staff in conflict zones.[65] A UN DPKO concept note on the protection of civilians in 2009 lists 'creating conditions

62 See eg GA Res, 49/139, UN DocA/RES/49/139 (1994); GA Res, 51/194, UN DocA/RES/51/194 (1996); GA Res, 54/233, UN DocA/RES/54/233 (1999); GA Res, 58/114, UN DocA/RES/58/114 (2003); GA Res, 59/141, UN DocA/RES/59/141 (2004); GA Res, 60/124, UN DocA/RES/60/124 (2005); GA Res, 61/134, UN DocA/RES/61/134 (2006); GA Res, 62/94, UN DocA/RES/62/94 (2007); GA Res, 63/141, UN DocA/RES/63/141 (2008); GA Res, 63/139 UN DocA/RES/63/139 (2008); GA Res, 63/138, UN DocA/RES/63/138 (2008); GA Res, 63/137, UN DocA/RES/63/137 (2008); GA Res, 63/136, UN DocA/RES/63/136 (2008). Some of these were generic concerning the strengthening of coordination of humanitarian assistance or protection of humanitarian personnel, while others concerned specific country situations. The increasing number of such resolutions shows its growing importance for the UN's work. See eg GA Res, 63/139, 25, 26, UN Doc A/RES/63/139 (5 March 2009) ('calls upon all States and parties in complex humanitarian emergencies, in particular in armed conflict and in post-conflict situations, in countries in which humanitarian personnel are operating, in conformity with the relevant provisions of international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations and to ensure the safe and unhindered access of humanitarian personnel, as well as delivery of supplies and equipment, in order to allow them to efficiently perform their task of assisting affected civilian populations, including refugees and internally displaced persons'). It also designates August 19th as World Humanitarian Day in memory of the UN staff killed in the bombing of Baghdad in 2003.

63 UN Office for the Coordination of Humanitarian Affairs (OCHA) *Compilation of United Nations resolutions on humanitarian assistance: Selected resolutions of the General Assembly, Economic and Social Council and Security Council resolutions and decisions* Office for the Coordination of Humanitarian Affairs Policy Development and Studies Branch, Policy and Studies Series, OCHA (2009).

64 SC Res 1502 (n 61 above) 6.

65 The UN is also protected by the Safety Convention and the International Criminal Court. See The Convention of Safety of United Nations and Associated Personnel, 9 December1994, art 7 ('(1) United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate. (2) States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9. (3) States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures'). The Rome Statute of the International Criminal Court also makes it a crime to attack 'personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the

conducive to the delivery of humanitarian assistance' as a protection of civilians- task and states:[66]

> The provision of humanitarian assistance to conflict affected civilians has long been viewed by the humanitarian community as at the core of protection activity. Missions may be called upon to help create the necessary safe and secure environment to assist with the delivery of aid, and, *in extremis*, may be requested to support the delivery of humanitarian assistance by military means.

From the start of the 1990s, UNHCR became the lead UN humanitarian agency in a number of complex emergencies and has also taken increasing responsibility for providing humanitarian assistance and protection to IDPs in many situations.[67] The protracted nature of many conflicts since then and the increasing preference for 'voluntary return' as the most desirable long-term solution to refugee crises, means that creating the conditions in which refugees can return 'in safety and dignity' has become an increasingly important part of UNHCR's work.[68] This has resulted in the agency establishing large-scale protection, assistance and monitoring projects in refugee producing countries and highlighting steps that might be taken in countries of origin with regard to the promotion of human rights or to removing the factors that force displacement.[69]

UN agencies often convene Protection Working Groups (PWGs) during complex emergencies to coordinate protection-related activities.[70] In 2005, as part of a wider process of humanitarian reform, the Global Protection Cluster (GPC) was established as an 'inter-agency forum at the global level for standard and policy setting as well as collaboration and overall coordination of activities supporting the protection response in

international law of armed conflict.' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, *The Rome Statute of the International Criminal Court*, art 8(2)(b), UN Doc A/CONF.183/9 (17 July 1998).

66 Draft DPKO/DFS (n 49 above) 13. It also noted that: 'Police also contribute to this activity through the provision of route security or security in refugee/IDP camps, as well as public order management during relief item distribution. Eleven missions are currently mandated with this task.'

67 See UN High Commissioner for Refugees (UNHCR) UNHCR's role in support of an enhanced humanitarian response to situations of internal displacement: Policy framework and implementation strategy, EC/58/SC/CRP.18 (4 June 2007).

68 UNHCR *Handbook on voluntary repatriation: International protection* (1996) ('Voluntary repatriation is usually viewed as the most desirable long-term solution by the refugees themselves as well as by the international community.').

69 See UN Doc A/RES/46/106 (16 December 1991) (mentioning the promotion of solutions to refugee problems through preventive measures).

70 Protection working groups often have sub-clusters dealing with issues such as human rights, land and property, children's rights and women's rights, which may be chaired by other UN agencies such as OHCHR, UN Habitat, UN Women and UNICEF. For further discussion see: P Wynn-Pope 'Evolution of protection of civilians in armed conflict' *United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community* (2013).

complex and natural disaster humanitarian emergencies.'[71] Many UN and non-government organisations (NGO) aid agencies employ Protection Officers, and donors often provide specific funding for protection projects.[72]

At the end of the 1990s, a series of workshops on the protection of civilians organised by the International Committee of the Red Cross (ICRC), were involving in-depth discussion among some 50 humanitarian, human rights and academic organisations/institutions. This defined 'protection' as

> all activities, aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian and refugee law). Human rights and humanitarian actors shall conduct these activities impartially and not on the basis of race, national or ethnic origin, language or gender.[73]

This is sometimes referred to as the 'rights-based' definition of protection.[74] Its all-encompassing description is intended to emphasise that humanitarian actors have responsibilities to ensure that their work does not harm those that they are trying to help.[75] It clearly obliges them to remain impartial and not to discriminate.[76] However, its normative significance beyond this is less clear and humanitarian agencies themselves appear to disagree about how it should be interpreted.[77]

The Sphere Handbook, for example, which was developed as part of a multi-agency initiative to develop a set of universal minimum standards in core areas of humanitarian response,[78] states that, 'those affected by a disaster have a right to life with dignity and, therefore, a right to assistance'.[79] In 2000 it published the first version of a 'Humanitarian

71 Global protection cluster available at http://www.globalprotectioncluster.org (accessed 20 January 2014).
72 See, eg European Commission, humanitarian protection: DG ECHO's funding guidelines (April 2009).
73 International Committee of the Red Cross 'Strengthening protection in war: A search for professional standards (2001).
74 International Committee of the Red Cross 'Professional standards for protection work carried out by humanitarian and human rights actors in armed conflict and other situations of violence (2009); Inter-Agency Standing Committee 'Growing the sheltering tree: Protecting rights through humanitarian action (2002); Global Protection Cluster Working Group *Handbook for the protection of internally displaced persons* (2007); S Swithern & R Hastie *Improving the safety of civilians: A protection training pack* (2008).
75 As above.
76 As above.
77 S Pantuliano & S O'Callaghan *The 'protection crisis': A review of field based strategies for humanitarian protection in Darfur* (2006); H Slim & A Bonwick *Protection – An ALNAP guide for humanitarian agencies* (2004); S O'Callaghan & S Pantuliano *Protective action: Incorporating civilian protection into humanitarian response* (2007).
78 The Sphere Project, available at http://www.sphereproject.org (accessed 15 August 2013).
79 The Sphere Project The Sphere Project 'Humanitarian charter and minimum standards in disaster response' 5 (2000).

Charter,' which 'defines the legal responsibilities of states and parties to guarantee the right to assistance and protection.'[80] This stated that: When states are unable to respond, 'they are *obliged to allow* [the intervention of] humanitarian organisations'.[81] However, this claim was dropped from subsequent revised editions, to be replaced by a statement that emphasised the 'moral principle of humanity' and that interventions will normally take place 'at the request of or at least with the consent of the government of the state in question.'[82]

In practice, humanitarian agencies often use the term 'protection' in four different ways. It is used in the above sense that people have the 'right' to receive humanitarian aid. It is also used to describe the monitoring and evaluation of the delivery of this aid to ensure that it reaches its intended recipients and does not cause unforeseen negative effects.[83] It can refer to physical protection of beneficiaries, usually through cooperation with host country security forces or UN peacekeeping soldiers, to provide security inside camps and protect the recipients of humanitarian aid from attacks by third parties.[84] It is also used in relation to advocacy activity where humanitarian actors may 'bear witness to' or 'document and denounce' grave violations of human rights and international human rights law (IHRL).[85]

80 As above.

81 As above (emphasis added).

82 Sphere Project (n 79 above) 20. See also The Sphere Project 2011 Edition of the Sphere handbook: *What is new?* (2011) (explaining the reason for the change in emphasis: 'The doctrine of state sovereignty means that, in practice, almost all intervention by these bodies is at the request of or at least with the consent of the government of the state in question. International non-governmental organizations (NGOs), for their part, have no formal rights or responsibilities in international law other than the right to offer assistance. The state has an obligation to provide humanitarian assistance – and if it cannot (or will not), it is obliged to allow others to do so. But ultimately, the basis for engagement by non-governmental agencies remains a moral rather than a legal one').

83 See eg International Committee of the Red Cross (n 74 above); Inter-agency Standing Committee (n 74 above); Global Protection Cluster Working Group (n 74 above); Swithern & Hastie (n 74 above); Slim & Bonwick (n 77 above). See also Caritas Australia *et al* 'Minimum agency standards for incorporating protection into humanitarian response' (2008) (describing a project recently developed by a number of aid agencies which seeks to incorporate 'protection standards' into evaluations of humanitarian programming).

84 See, eg, V Metcalfe 'Protecting civilians? The interaction between international military and humanitarian actors (Humanitarian Policy Group, working paper (2012); C De Coning *et al* 'Mission-wide strategies for the protection of civilians: A comparison of MONUC, UNAMID and UNMIS' Norwegian Institute of International Affairs (2011) 792; J Barry & A Jefferys 'A bridge too far: Aid agencies and the military in humanitarian response' Humanitarian Practice Network (2002) 37; H Slim 'Military intervention to protect human rights: The humanitarian agency perspective' The International Council on Human Rights Policy (2001); D Coquoz 'The involvement of the military in humanitarian activities' in *The challenges of complementarity: Fourth workshop on protection for human rights and humanitarian organisations* (2000); Amnesty International 'Peacekeeping and human rights' (1994).

85 Bearing witness to violations is closely associated with MSF which split from the ICRC during the Biafra crisis over the latter's perceived reluctance to speak out publicly against violations of international human rights law and IHL committed by the Nigerian government. For a brief overview of the founding of MSF, see MSF USA

The last two uses of the term sometimes cause dilemmas for humanitarian agencies, as one may involve becoming too closely linked to military forces while the other could lead to an antagonistic relationship with them. Aid agencies usually wish to maintain their neutrality in conflicts[86] and often rely on the consent of the host state, and other parties to the conflict, in order to gain access to the victims. Both activities could potentially compromise this access. As one study noted, in relation to Darfur, '[a]dvocacy by operational aid actors is frequently juxtaposed with programming, with speaking out weighed against potential costs to programmes, staff and beneficiaries.'[87]

This issue was also graphically highlighted by the experiences of the agencies working in Sri Lanka, in the spring of 2009, when government forces massacred between 40 000 and 70 000 people at the end of the country's civil war.[88] A UN appointed panel noted that the organisation 'did not adequately invoke principles of human rights that are the foundation of the UN but appeared instead to do what was necessary to avoid confrontation with the government.'[89] Some UN agencies even cooperated in the construction of 'closed camps' into which the survivors were herded for screening.[90] Both UN and NGO aid workers argued that since speaking out would result in their expulsion from the country, the

Homepage 'The founding of MSF' http://www.doctorswithoutborders.org/about-us/history-principles/founding-msf (accessed 7 March 2015). For the ICRC's view of events, see DP Forsythe 'The International Committee of the Red Cross and humanitarian assistance – A policy analysis' (1996) 314 *International Review of the Red Cross* 512.

86 While most humanitarian agencies adhere to the principle of neutrality set out in the Geneva Conventions and the ICRC statute, some believe that adherence to it can be naive or even harmful. See T Weiss 'Principle, politics and humanitarian action' (1999) 13 *Ethics and International Affairs* 1; H Slim 'Sharing a universal ethic: Principle, politics and humanitarian action' (1998) 2 *International Journal of Human Rights* 28; M Ignatieff 'International Committee of the Red Cross' in R Gutman & D Rieff (eds) *Crimes of war: What the public should know* (1999) 203; M Anderson *Do no harm: Supporting local capacities for peace through aid* (1996) ('Although aid agencies often seek to be neutral or non-partisan towards the winners and losers of a war, the impact of their aid is not neutral regarding whether conflict worsens or abates. The development of programming principles such as 'Do No Harm' or Local Capacities for Peace (LCP) are intended to ensure that humanitarian assistance should be provided in ways that contributes to 'justice, peace and reconciliation').

87 Humanitarian Policy Group 'Humanitarian advocacy in Darfur: The challenge of neutrality' (2007).

88 UN Secretary General 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011); International Crisis Group 'War crimes in Sri Lanka' (17 May 2010); *Sri Lanka's killing fields: War crimes unpunished* (Channel 4 television broadcast, 14 March 2012).

89 UN Secretary-General's Internal Review Panel *United Nations Action in Sri Lanka* (November 2012) 4.

90 n 89 above, 32 ('During the final months and then weeks of the conflict, civilians emerging from the conflict zone were severely malnourished, traumatized, exhausted, and often seriously injured. The security forces, attempting to identify LTTE cadres, screened everyone and detained 280 000 people in military-run closed internment camps – which the Government referred to as "welfare villages". In the camps, IDPs were screened again and the military detained those suspected of LTTE affiliations in "surrender" camps. There were persistent allegations of human rights violations at the screening points and in IDP camps but the UN was not permitted fully independent

'humanitarian imperative' required them to remain and that 'quiet diplomacy' could reinforce their 'protection by presence.'[91] An internal review of the performance of the UN's performance in Sri Lanka concluded that there had been a 'systemic failure' to protect the civilian population.[92]

Aid agencies are divided amongst themselves about how to respond to this 'protection' dilemma. For example, CARE International has stated that: 'Agency staff must know the basics of human rights law and IHL. Staff must know who is protected, and the threats from which they are protected.'[93] However, it is less clear what CARE believes staff should do when they see violations: [94]

> Sometimes speaking out publicly is necessary [...] The questions for an organization like CARE, however, is to establish thresholds for speaking out, since it will lead to obvious organizational and personal risks. Over time, we have gained some experience with establishing these thresholds (basically we feel obligated to speak out until such a time as a Country Director determines that speaking out will endanger staff or other program commitments).

The implication of this position, that an agency would stop denouncing violations once they reached a certain level of severity, was traditionally rejected by other organisations such as *Médecins Sans Frontières* (MSF) whose former legal director has argued:[95]

> Protecting means recognizing that individuals have rights and that the authorities who exercise power over them have obligations. It means defending the legal existence of individuals, alongside their physical existence. It means attaching the juridical link of responsibility to the chain of assistance measures that guarantee the survival of individuals [...] When providing relief in times of conflict, humanitarian organizations therefore must not separate the provision of assistance from protection [...] and must report any violations encountered in the exercise of their work.

The views of humanitarian agencies also appear to be in some considerable flux about the issue. A paper published by the Humanitarian Policy Group

protection monitoring access. The UNCT had used its 9 March briefing and subsequent documents to inform the diplomatic corps of UN efforts to be present at screening locations, but did not mention the reports of people disappearing from other screening locations to which the UN had no access. UN officials said they were confronted with a dilemma over whether to hold back and insist on respect for principles or to provide urgently needed assistance through camps that were operating in violation of international standards. The UN chose to support the camps.').

91 The author of this Chapter was carrying out an evaluation of 'protection projects' for a humanitarian aid organisation in Sri Lanka in February, March and April 2009 and these comments are based on interviews carried out with the senior staff of a number of UN and NGO humanitarian agencies working in the country at the time.

92 UN Secretary-General's Internal Review Panel (n 89 above) 80.

93 D Maxwell 'Humanitarian protection: Recommendations towards good practice for non-mandated organizations' CARE (2006).

94 As above.

95 F Bouchet-Saulnier *The practical guide to humanitarian law* (2002).

(HPG) in 2011 argued that 'it is generally accepted that protecting civilians in armed conflict and other situations of violence relates to violations of international humanitarian and human rights law, and is not limited to mere physical security but rather encompasses 'the broader spectrum of human security and human dignity.'[96] However, four years previously an HPG paper had stated that humanitarian agencies were seeking to develop

> more accessible working definitions [of protection] which emphasise safety rather than rights. These working definitions distil a distinctive humanitarian element from the all-encompassing ICRC definition, in that they focus on the more acute forms of suffering. Put simply, protection is about seeking to assure the safety of civilians from acute harm.[97]

Still others are critical of the entire concept of 'humanitarian protection.' In 2010, for example, Marc du Bois of MSF, questioned the 'obsession with protection,' which, he argued has become a 'sort of self-flagellation in the humanitarian community over the death and destruction of our beneficiaries.'[98] He maintained that claims by humanitarians that they can 'develop truly practical programming that protects people from all forms of violation, exploitation, and abuse during war and disaster'[99] amount to 'delusions of grandeur' and 'false advertising.' It is 'not the lack of protection activities or legal protections *in the first instance*, but the surplus of violence that is the primary problem.' He concluded that 'the protection of civilians during periods of violent crisis (in the sense of providing physical safety) is not our job.[100]

The ultra-elasticity of the 'rights-based definition' has also sometimes been used by UN peacekeeping missions with the protection of civilians' mandates to define 'protection' as including their own activities in distributing humanitarian assistance, monitoring violations of international human rights law and IHL, and liaison and advocacy with the national authorities.[101] However, this definition fails to provide clear legal guidance about the circumstances in which missions should use physical force to protect civilians or to address the negative and positive legal obligations that this places on missions and the UN itself. A similar

96 Humanitarian Policy Group 'Roundtable on civil-military coordination: The concept of protection: Towards a mutual understanding' (2011) 10; V Metcalfe 'Protecting civilians? The interaction between international military and humanitarian actors' Humanitarian Policy Group (2012) 1.

97 O'Callaghan & Pantuliano (n 77 above) 12.

98 M Du Bois 'Protection: Fig-leaves ad other delusions ' (2010) 46 *Humanitarian Exchange* 2 available at http://odihpn.org/wp-content/uploads/2010/03/humanitarianexchange046(2).pdf (accessed 28 April 2017).

99 As above (quoting H Slim & A Bonwick *Protection An-ALNAP guide for humanitarian agencies* (2004) 12).

100 As above.

101 See UN Secretary-General 'Report of the Secretary-General on the protection of civilians in armed conflict' S/2001/331 (30 March 2001); UN Secretary-General 'Report of the Secretary-General on the protection of civilians in armed conflict' S/2002/1300 (26 November 2002).

ambiguity can be found in the responsibility to protect concept, which is described below.

The responsibility to protect

Advocates of the 'responsibility to protect' doctrine commonly describe it as

> an emerging international norm which sets forth that states have the primary responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing, but that when the state fails to protect its populations, the responsibility falls to the international community.[102]

In September 2005, a reference to the responsibility to protect was incorporated into two paragraphs of the outcome document of the high-level meeting of the General Assembly (Outcome Document), which was subsequently adopted by the General Assembly.[103] The UN Security Council has also reaffirmed these principles.[104] In 2007 the Secretary General appointed a Special Adviser on the Responsibility to Protect, based in the office of the Special Adviser on the Prevention of Genocide.[105] The responsibility to protect can, therefore, be said to have been endorsed at the UN's highest decision-making levels and to reflect a global consensus, at least in abstract, that people should be protected against such crimes.[106] As the first Special Advisor on the responsibility to protect has noted, the concept has generated a 'staggering' number of academic theses and the 'ever-expanding literature on the responsibility to protect … could now fill a small library.'[107] However, as will be discussed further below, there is considerable confusion about precisely what – if anything – it really means in practice.[108]

102 *Frequently Asked Questions* available at http://www.responsibilitytoprotect.org/files/R2Pcs%20Frequently%20Asked%20Question.pdf (accessed 11 February 2017).
103 GA Res 60/1, UN Doc A/RES/60/1 (24 October 2005).
104 UN S/RES/1674 (n 8 above) 4; see also UN S/RES/1706 (31 August 2006).
105 UN Secretary-General, Letter dated Aug. 31, 2007 From the Secretary-General addressed to the President of the Security Council UN Doc S/2008/721 (7 December
105 2007). The latter post was upgraded to the Under-Secretary-General level while the position of R2P advisor was designated at the level of Assistant Secretary-General, on a part-time basis.
106 See generally G Evans *The responsibility to protect: Ending mass atrocity crimes once and for all* (2008); TG Weis & R Thakur *Global governance and the UN: An unfinished journey* (2010); R Thakur *The United Nations, peace and security: From collective security to the responsibility to protect* (2006); RH Cooper & JV Kohler (eds) *Responsibility to protect: The global moral compact for the 21st century* (2009); SE Davies & L Glanville (eds) *Protecting the displaced: Deepening the responsibility to protect* (2010); R Mani & TG Weiss (eds) *Responsibility to protect: Cultural perspectives in the global South* (2011).
107 EC Luck 'The responsibility to protect: Growing pains or early promise?' (2010) 24 *Ethics and International Affairs Journal* 349; EC Luck 'Sovereignty, choice, and the responsibility to protect (2009) 1 *Global Responsibility to Protect* 10.
108 See eg A Hehir & EA Heinze 'The responsibility to protect: "Never Again!" for the 21st century?' in S Takahashi (ed) *Human rights, human security, and state security: The intersection* (2014) 1 19.

The term was originally coined by the International Commission on Intervention and State Sovereignty (ICISS), established in the aftermath of NATO's military action during the Kosovo crisis of 1999[109] whose report was published in December 2001.[110] NATO's intervention had taken place without the explicit approval of the UN Security Council and appears to have violated the provisions of the UN Charter.[111] However, some argued that the scale of violations of international human rights law and IHL that were allegedly taking place in Kosovo immediately before the intervention provided at least mitigating circumstances for the action.[112] As one report has argued, the intervention was 'illegal but legitimate.'[113]

In his 1999 General Assembly report Kofi Annan, the then UN Secretary General, had famously questioned whether a hypothetical coalition of states should have 'stood aside,' if they had not received 'prompt Security Council authorization' to act in Rwanda to stop the genocide, but also warned of the danger of 'military action outside the established mechanisms for enforcing international law.'[114] Such interventions, he warned, could 'undermin[e] the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances.'[115] The following year he again posed the question that 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to a Srebrenica?'[116]

The ICISS was established, on an initiative by the Canadian government, with the expressed aim of fostering a global political

109 See generally T Judah *Kosovo: War and revenge* (2000); see generally N Malcolm *Kosovo: A short history* (1998); JA Mertus *Kosovo: How myths and truths started war* (1999); D Phillips *Liberating Kosovo: Coercive diplomacy and US intervention* (2012).

110 International Commission on Intervention and State Sovereignty, The responsibility to protect (2001) (ICISS).

111 See, eg Gray (n 35 above) 31, 39-51, 351-54; see also S Chesterman *Just war or just peace? Humanitarian intervention and international law* (2001) 53-86; see, eg ME O'Connell 'The UN, NATO, and international law after Kosovo' (2000) 22 *Human Rights Quarterly* 57.

112 See generally M Koskenniemi '"The lady doth protest too much" Kosovo, and the turn to ethics in international law' (2002) 65 *Modern Law Review* 159 (2002); A Cassese 'A follow-up: Forcible humanitarian countermeasures and opinio necessitatis' (1999) 10 *European Journal of International Law* 791; A Cassese 'Ex iniuria ius oritur: Are we moving towards international humanitarian countermeasures in the world community?' (1999) 10 *European Journal of International Law* 23; B Simma 'NATO, the UN and the use of force: Legal aspects' (1999) 10 *European Journal of International Law* 1.

113 Independent International Commission on Kosovo The Kosovo Report: Conflict, international responsibility, lesson learned (2000) 4.

114 Press Release, Secretary General, Secretary-General Presents His Annual Report to General Assembly, UN Press Release SG/SM/7136 (20 September 1999).

115 As above.

116 UN Secretary-General 'We the Peoples': The Role of the United Nations in the 21st Century, 48, UN A/54/2000 (2000).

consensus on the issue.[117] Its original title had been the 'Commission on Humanitarian Intervention', but this was changed due to concerns that the language would be seen as controversial.[118] The report noted that the term 'intervention' can cover a range of activities from the 'delivery of emergency relief assistance to military action.'[119] Its authors stated that '[t]he kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.'[120] The report recognised that interventions were often harmful, destabilising states and 'fanning ethnic or civil strife.'[121] Nevertheless, it argued:[122]

> The notion that there is an emerging guiding principle in favour of military intervention for human protection purposes is also supported by a wide variety of legal sources – including sources that exist independently of any duties, responsibilities or authority that may be derived from Chapter VII of the UN Charter. These legal foundations include fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together with the Genocide Convention; the Geneva Conventions and Additional Protocols on international humanitarian law; the statute of the International Criminal Court; and a number of other international human rights and human protection agreements and covenants.

117 For accounts of the negotiations that led to the wording adopted at the summit, see AJ Bellamy *Responsibility to protect: The global effort to end mass atrocities* (2009) 66-97; G Evans 'The responsibility to protect: An idea whose time has come ... and gone?' (2008) 22 *International Relations* 283.

118 Bellamy (n 117 above) 35; see also ICISS (n 110 above) 1.39, 1.40, 2.4 (The ICISS report recognised 'the long history, and continuing wide and popular usage, of the phrase "humanitarian intervention," and also its descriptive usefulness in clearly focusing attention on one particular category of interventions.' However, its authors 'made a deliberate decision not to adopt this terminology, preferring to refer either to "intervention," or as appropriate "military intervention," for human protection purposes.' This was partly due 'to the very strong opposition expressed by humanitarian agencies, humanitarian organizations and humanitarian workers towards any militarization of the word "humanitarian"' and, more broadly, because they felt that it 'did not help to carry the debate forward').

119 ICISS (n 110 above) 1.

120 As above.

121 ICISS (n 110 above) 31. (It also stated that '[t]he rule against intervention in internal affairs encourages states to solve their own internal problems' and that '[w]hen internal forces seeking to oppose a state believe that they can generate outside support by mounting campaigns of violence, the internal order of all states is potentially compromised'). See also n 110 above, 12 (describing forcible interventions during the Cold War).

122 ICISS (n 110 above) 16; see also ICISS (n 110 above) 73. (It notes the 'positive influence' of international non-governmental organisations (INGOs) as 'advocates of cross-border human protection' and 'stirring response – especially in the West' for military interventions.); ICISS (n 110 above) 34. ('Ideally there would be a report as to the gravity of the situation, and the inability or unwillingness of the state in question to manage it satisfactorily, from a universally respected and impartial non-government source. The International Committee for the Red Cross (ICRC) is an obvious candidate for this role, often mentioned to us, but for understandable reasons – based on the necessity for it to remain, and be seen to remain, absolutely removed from political decision making, and able to operate anywhere on the ground – it is absolutely unwilling to take on any such role.').

The report suggested that when the Security Council fails to act, the 'responsibility' may pass to the General Assembly[123] or regional organisations, including occasions when the latter act outside their area of membership.[124] As an interim measure it suggested that the Security Council's permanent members adopt a voluntary code of conduct restricting the use of their veto power[125] and 'consider and seek to reach agreement on a set of guidelines, embracing the "Principles for Military Intervention" … to govern their responses to claims for military intervention for human protection purposes.'[126]

Three years after the publication of the ICISS report, in December 2004, the UN High-Level Panel on Threats, Challenges and Change report A More Secure World: Our Shared Responsibility, endorsed the responsibility to protect-principle as an 'emerging norm,' while specifying that the responsibility was 'exercisable by the Security Council […] as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law.[127] The following year, in March 2005, the UN Secretary-General's report In Larger Freedom: Towards Development, Security and Human Rights for All, used similar language.[128] The Outcomes Document of the World Summit included two paragraphs referring to the responsibility to

123 ICISS (n 110 above) 53.
124 ICISS (n 110 above) 53-54.
125 ICISS (n 110 above) 51 (noting that '[t]hose states who insist on the right to retaining permanent membership of the UN Security Council and the resulting veto power, are in a difficult position when they claim to be entitled to act outside the UN framework as a result of the Council being paralyzed by a veto cast by another permanent member').
126 ICISS (n 110 above) 74 (stating '[t]hat the Secretary-General [should] give consideration, and consult as appropriate … as to how the substance and action recommendations of this report can best be advanced in those two bodies, and by his own further action').
127 UN Secretary-General's High Level Panel on Threats, Challenges and Change, A More Secured World: Our Shared Responsibility, 203, UN Doc A/59/5665 (2 December 2004) ('We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent').
128 UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, 135, UN Doc A/59/2005 (21 March 2005) (Annan stated, 'While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual state, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.').

protect.[129] This included a commitment 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'[130]

The significance of this commitment continues to be debated and a wide-range of views have been expressed on the subject.[131] As Hehir and Heinze have caustically noted, 'the pronouncements made about the novelty of the responsibility to protect regarding both international law and international norms, as well as its efficacy in solidifying a commitment

129 2005 World Summit Outcome, 138-39, UN Doc A/60/L.1 (15 September 2005) ('Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.').

130 World Summit Outcome (n 129 above) 139.

131 For generally supportive views, see AJ Bellamy 'The responsibility to protect – Five years on' (2010) 24 *Ethics and International Affairs* 143; G Evans *The responsibility to protect: Ending mass atrocity crimes once and for all* (2008) 47; R Thakur *The responsibility to protect: Norms, laws and the use of force in international politics* (2011); R Thakur *The United Nations, peace and security: From collective security to the responsibility to protect* (2006); TG Weiss & R Thakur *Global governance and the UN: An unfinished journey* (2010)); G Evans 'From humanitarian intervention to the responsibility to protect' (2006) 24 *Wisconsin International Law Journal* 703 703-22; G Evans 'The responsibility to protect: An idea whose time has come ... and gone?' (2008) 22 *International Relations* 283 288; RC Thakur & TG Weiss 'R2P: From idea to norm – and action?' (2009) 1 *Global Responsibility to Protect* 22. For more critical accounts, see S Chesterman 'Leading from behind': The responsibility to protect, the Obama doctrine, and humanitarian intervention after Libya' (2011) 25 *Ethics and International Affairs* 279. See also C Focarelli 'The responsibility to protect doctrine and humanitarian intervention: Too many ambiguities for a working doctrine' (2008) 13 *Journal of Conflict and Security Law* 191; C Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm?' (2007) 101 *American Journal of International Law* 99; A Orford *International authority and the responsibility to protect* (2011); A Orford 'From promise to practice? The legal significance of the responsibility to protect concept' (2011) 3 *Global Responsibility to Protect* 400 401.

by states to acknowledge that they have a *bona fide* 'responsibility' to protect, are overly sanguine and hyperbolic'.[132]

This lack of clarity has led to a number of strikingly conflicting claims about the responsibility to protect.[133] For example, Stuenkel claims that the emerging powers of Brazil, Russia, India, China and South Africa (the BRICS) have 'supported R2P in the vast majority of cases,'[134] although all are notably sceptical about UN authorised military interventions on humanitarian grounds.[135] Conversely, government members of other permanent Security Council members have made references to the responsibility to protect when seeking to justify actions that have little to do with the original concept.[136] Its ambiguity is perhaps best summarised by Thomas Weiss, who served as the ICISS Research Director and is one of its leading academic proponents:[137]

> [T]he proverbial new bottom-line is clear: when a state is unable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with Security Council approval) remains a distinct possibility.

132 A Hehir & EA Heinze 'The responsibility to protect: "Never Again!" for the 21st century?' in S Takahashi (ed) *Human rights, human security, and state security* (2004) 19.

133 See eg Press Release, General Assembly 'Delegates seek to end global paralysis in face of atrocities as General Assembly holds interactive dialogue on responsibility to protect, UN Press Release GA/10847 (23 July 2009) (statements by G Evans, E Luck, Professor N Chomsky, and Professor J Bricmont).

134 O Stuenkel 'Abstract, the BRICS and the future of R2P' (2014) 6 *Global Responsibility to Protect* 3. See also KM Kenkel 'Brazil and R2P: Does taking responsibility mean using force? (2012) 4 *Global Responsibility to Protect* (2012). Both make the point that Brazil bases its support for R2P on its agreement with the first two pillars, but differs with the 'interventionists' over the use of force.

135 For example, Brazil, Russia, India, China, and Germany all abstained from Security Council Resolution 1973, authorising military intervention in Libya, while South Africa voted in favor of it; though, it subsequently expressed reservations about NATO's military action. See See E O'Brien & R Gowan 'The international role in Libya's transition' (2012) Center on International Cooperation available at http://cic.es.its.nyu.edu/sites/default/files/libya_diplomatic_transition.pdf (accessed 11 February 2017). In 2012, BRICS issued a joint statement calling for 'respect [of] Syrian independence, territorial integrity and sovereignty.' BRICS Summit: Delhi Declaration, Council on Foreign Relations para 21 (29 March 2012) available at http://www.cfr.org/brazil/brics-summit-delhi-declaration/p27805 (accessed 11 February 2017).

136 Tony Blair, Prime Minister, Speech at Labour's Local Government, Women's and Youth Conferences (2003); Tony Blair, Prime Minister, Speech to the US Congress (2003); Tony Blair, Prime Minister, 'Prime Minister Warns of Continuing Global Terror Threat (2004) (referring to R2P in relation to the invasion of Iraq); Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov with BBC, in Moscow, Russia. (9 August 2008) (using R2P to justify military action in South Ossetia); Foreign Minister, Burma – Joint Communiqué Issued by the Ministry of Foreign and European Affairs and Ministry of Defense, in Paris, France (25 May 2008) (citing R2P in relation to a proposed forcible intervention to deliver food aid in Myanmar); J Reid, Secretary of State for Defense '20th-Century Rules, 21st-Century Conflict' (3 April 2006). See also J Reid 'I do not reject the Geneva Conventions' The Guardian (5 April 2006) http://www.theguardian.com/commentisfree/2006/apr/05/comment.politics (accessed 11 February 2017).

137 TG Weiss *What's wrong with the United Nations and how to fix it* (2008) 142.

This vagueness, and the clearly controversial nature of some interpretations that have been put on it, are particularly problematic given the widespread confusion between the responsibility to protect and the protection of civilians.

The responsibility to protect and the protection of civilians

Further to the explanation by Dan Kuwali in Chapter 2, both the protection of civilians and the responsibility to protect arose out of an initiative by the Canadian government when it occupied the Presidency of the Security Council in 1999 and shared the same overall goal of protecting civilians from grave violations of human rights and IHL.[138] The first Security Council resolution to reaffirm the two paragraphs on the responsibility to protect in the Summit Outcome document, in April 2006, was devoted to the PoC-principle,[139] and a resolution a few months later on the situation in Darfur also contained references to both the protection of civilians and the responsibility to protect.[140]

A number of states have made declarations associating the two concepts together and the Secretary General's report on the protection of civilians in 2007 contains a reference to the Summit Outcome document as an advance in PoC's 'normative framework.'[141] A PoC strategy document published by the UN Mission in the Democratic Republic of Congo (MONUC) and the UN Office for the High Commissioner for Human Rights (OHCHR) expressly refers to the responsibility to protect in three paragraphs under a section entitled 'Rationale and the Responsibility to Protect.'[142]

However, in his 2012 report on the protection of civilians, the Secretary General stated that he was 'concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect,' and that while 'the two concepts share some common elements' there were also 'fundamental differences' between them, as PoC 'is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept.'[143] In his report on the responsibility to protect, he also

138 For discussion, see R van Steenberghe 'The notions of the responsibility to protect and the protection of civilians in armed conflicts: Detecting their association and its impact upon international law' (2014) 6 *Goettingen Journal of International Law* 81.

139 UN S/RES/1674 (28 April 2006).

140 UN S/RES/1706 (31 August 2006).

141 UN Secretary-General, The Protection of Civilians in Armed Conflict, 11-12, UN Doc S/2007/643 (28 October 2007).

142 UN system-wide strategy for the protection of civilians in the Democratic Republic of the Congo (January 2010), available at http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Democratic_Republic_Congo/files/UN_Wide_Protection_Strategy_Final_150110_EN.pdf (accessed 11 February 2017).

143 UN Secretary-General 'The protection of civilians in armed conflict' 21, UN Doc S/2012/376 (22 May 2012).

noted that 'While the work of peacekeepers may contribute to the achievement of [R2P] goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives.'[144]

As Van Steenberghe has noted, the references to the responsibility to protect in some resolutions dealing with the protection of civilians have been deliberately pushed by some NGOs 'with the explicit hope of transforming the responsibility to protect from an emerging norm into established customary international law.'[145] This has led some countries to complain that the two concepts must not be 'confused or conflated,' since this could undermine the protection of civilians' accepted neutral 'humanitarian imperative.'[146] A briefing from the Global Centre for the Responsibility to Protect, in 2009, explained:[147]

> Open debates on POC have indeed been the only occasions within the formal [Security] Council agenda to reflect on the development of the R2P norm and its practice. Yet the sensitivities around the inclusion of R2P within the protection of civilians' agenda have increased in recent months. There are concerns that the POC agenda is being needlessly politicized by the introduction of R2P into the Council's work and resolutions on the protection of civilians, as those who seek to roll back the 2005 endorsement of R2P raise questions about the protection of civilians in the attempt to challenge hard-won consensus reached on both issues.

Holt and Berkman have warned that debates about the responsibility to protect could 'distract the international community from addressing the practical, immediate challenges within current operations.'[148] Willmot and Mamiya argue that, '[w]hile the international community struggled with the revolutionary strategic concepts of humanitarian intervention and the Responsibility to Protect, a quiet evolution was taking place through

144 UN Secretary-General 'Responsibility to protect: Timely and decisive response' 16, UN Doc A/66/874-S/2012/578 (25 July 2012).

145 Van Steenberghe (n 138 above) 105 112-113. 'Numerous letters have been sent by NGOs to States, before UN SC meetings on POC, in order to push those States to refer to R2P in their declarations during the meeting and in the resolution adopted at this occasion'.

146 United Nations Security Council 'Protection of civilians in armed conflict' 6531st meeting 11, UN Doc S/PV.6531 (10 May 2011) ('The protection of civilians is a humanitarian imperative. It is a distinct concept [which] must not be confused or conflated with threats to international peace and security, as described in the Charter, or with the responsibility to protect.').

147 See Global Centre for the Responsibility to Protect 'The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict' (2009) available at http://www.responsibilitytoprotect.org/files/GCR2P%20Policy%20Brief-%20The%20relationship%20between%20R2P%20and%20the%20Protection%20of%20Civilians%20in%20Armed%20Conflict.pdf (accessed 11 February 2017).

148 VK Holt & TC Berkman 'The impossible mandate? military preparedness, the responsibility to protect and modern peace operations' The Henry L Stimson Center September (2006) available at http://www.stimson.org/images/uploads/research-pdfs/Complete_Document-TheImpossible_Mandate-Holt_Berkman.pdf (accessed 11 February 2017).

UN peacekeeping, through the development of PoC'.[149] Van Steenberghe has noted that the attempts to export the language of the responsibility to protect into the responsibility to protect risks politicising a 'field characterised by neutrality and impartiality.'[150] To which it can be added that the vagueness and differing interpretations of the actual meaning of the responsibility to protect make it even more difficult to turn the protection of civilians into an effective working doctrine when the two concepts are associated together.

Responsibility while protecting

The distinctions between the responsibility to protect and the protection of civilians were further blurred by the UN Security Council authorisation when it adopted two Chapter VII resolutions on the crisis in Libya in early 2011.[151] The first of these, in February

> [d]eplor[ed] the gross and systematic violation of human rights, including the repression of peaceful demonstrators […] and reject[ed] unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.'[152]

It urged Libya to 'respect human rights and international humanitarian law' as well as ensuring 'the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country.'[153] The Resolution recalled that it was 'the Libyan authorities' responsibility to protect its population' and reaffirmed its 'strong commitment to the sovereignty, independence, territorial integrity and national unity' of the country.[154] Nevertheless, the Security Council, acting under Chapter VII of the UN Charter, imposed an arms embargo on the country and subjected key members of the Libyan government to a travel ban and an asset freeze.[155] The situation was also referred to the International Criminal Court for further investigation.[156]

On March 17, the Security Council adopted another resolution, restating many of these provisions and deploring the failure of the Libyan authorities to comply with them.[157] It also authorised: [158]

149 H Willmot & R Mamiya *Mandated to protect: Security Council practice on the protection of civilians* in M Weller (ed) *The Oxford handbook use of force in international law* (2014).
150 Van Steenberghe (n 138 above) 106-07.
151 O'Brien & Gowan (n 135 above) (discussing the international response to this crisis).
152 UN S/RES/1970 (26 February 2011).
153 As above.
154 As above.
155 As above.
156 As above.
157 UN S/RES/1973 (17 March 2011).
158 UN S/RES/1973 (n 157 above) 4.

> Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack […] while excluding a foreign occupation force of any form on any part of Libyan territory.

Two days later, NATO began a massive bombardment of Libyan air defenses and military hardware, with a focus just outside the rebel-held town of Benghazi, which was besieged by government forces.[159] NATO's campaign was to continue until the end of October when Gaddafi was captured, tortured and killed by rebels after losing control of the capital Tripoli.[160]

While the conflict was still ongoing, Britain's Prime Minister stated that his government's understanding of the UN Resolution was that it was 'limited in its scope. It explicitly does not provide legal authority for action to bring about Gaddafi's removal from power by military means.'[161] 'NATO's senior military planners have also subsequently stated that their rules of engagement (RoE) throughout the campaign were only to hit military targets and only if these had been identified as a specific threat to civilians at the time.'[162] This was a significantly narrower RoE than those used by NATO during its campaign over Kosovo, which deliberately targeted Serbian civilian infrastructure and also killed considerably more civilians.[163] Nevertheless, the fact that the campaign continued until Gaddafi had been militarily deposed and the refusal of NATO to consider

159 C Foley *Humanitarian action in complex emergencies* 1, available at http://www.atha.se/content/humanitarian-action-complex-emergencies-managing-linkages-security-agendas (accessed 11 February 2017).

160 Gaddafi's death on October 20, 2011 was captured on mobile phone videos which circulated widely on the internet. These '[v]ideos taken on mobile phones show them beating Gaddafi and manhandling him on the back of a utility vehicle. He pleads with his captors, saying, 'What are you doing? It's not allowed in Islamic law … Do you know what is right or wrong?' The men scream, 'Muammar, you dog!' as blood pours from various parts of his body. One video then shows him being sodomized with some kind of stick or knife. A gun is placed against his head and he is thrown onto a car, then dragged along the ground by his hair. Shots ring out, hidden from the camera, and his lifeless and badly scarred body is subsequently shown lying on the ground.

161 'Libya: Removing Gaddafi not allowed, says David Cameron' *BBC News* 21 March 2011, available at http://www.bbc.co.uk/news/uk-politics-12802749 (accessed 11 February 2017).

162 C Foley 'To save succeeding generations: UN Security Council reform and the protection of civilians' Ingarape Institute 27 August 2013 available at http://pt.igarape.org.br/to-save-succeeding-generations-un-security-council-reform-and-the-protection-of-civilians/ (accessed 11 February 2017). This is based on an interview with General Rob Weighill who was Director of operations during NATO's operation.

163 See also CJ Chivers 'Strikes on Libya by NATO, an unspoken civilian toll' *New York Times* 17 December 2011 available at http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all&_r=0 (accessed 19 February 2017). (According to NATO the air campaign had resulted in zero civilian casualties, '[b]utan on-the-ground examination by The New York Times of airstrike sites across Libya – including interviews with survivors, doctors and witnesses, and the collection of munitions remnants, medical reports, death certificates and photographs – found credible accounts of dozens of civilians killed by NATO in

a ceasefire or facilitate negotiations which could conceivably have led to a peaceful change of power led many to argue that it had gone beyond the terms of the March Security Council Resolution.[164]

Less than two weeks after the Security Council authorised the use of force to protect civilians in Libya, it adopted a Resolution in relation to Côte d'Ivoire, which imposed targeted sanctions on the incumbent President, Laurent Gbagbo, and some of his close associates, and reinforced the authorisation of the UN mission to use force to protect civilians.[165] Acting under this mandate, the UN mission launched operation 'Protect the Civilian Population,' using attack helicopters to destroy the government's heavy weapons in the capital city.[166] Gbagbo was captured in the presidential palace by opposition forces, backed by French tanks, and brought into custody,[167] where he was subsequently transferred to the Hague to stand trial at the International Criminal Court on charges of crimes against humanity.[168]

In November 2011, the Brazilian government, which had been on the Security Council during both operations, published a paper entitled 'Responsibility while protecting: elements for the development and promotion of a concept' (RwP).[169] This noted:[170]

> The 1990s left us with a bitter reminder of the tragic human and political cost of the international community's failure to act in a timely manner to prevent violence on the scale of that observed in Rwanda. There may be situations in which the international community might contemplate military action to prevent humanitarian catastrophes. Yet attention must also be paid to the fact that the world today suffers the painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and

many distinct attacks. The victims, including at least 29 women or children, often had been asleep in homes when the ordnance hit.' By contrast a Human Rights Watch investigation into the number of civilians killed by NATO during its air campaign over Kosovo killed between 489 and 520 civilians); see Civilian Deaths in the NATO Air Campaign (2000) 12 *Human Rights Watch* 1 15.

164 See Foley (n 162 above).

165 See UN S/RES/1975 (30 March 2011).

166 Press release, UNOCI, UNOCI calls on Gbagbo's Special Forces to lay down their arms (5 April 2011); Press release, UNOCI, UNOCI launches operation 'Protect the Civilian Population' (5 April 2011); Press release, UNOCI, UNOCI transports passengers blocked in Abidjan (5 April2011); Press Release, UNOCI, pro-Gbagbo forces ready to end combat (5 April2011); Press Release, UNOCI, 'UN Assistant Secretary-General for Human Rights visits Côte d'Ivoire' (4 April 2011).

167 A Nossiter, S Sayare & D Bilefsky, Leader's arrest in ivory coast ends standoff, *New York Times*, 11 April 2011, available at http://www.nytimes.com/2011/04/12/world/africa/12ivory.html?pagewanted=all (accessed 11 February 2017).

168 S Maupas & JP Remy 'Laurent Gbagbo appears at the Hague to face trial' *The Guardian*, 6 December 2011 available at http://www.theguardian.com/world/2011/dec/06/laurent-gbagbo-trial-the-hague (accessed 11 February 2017).

169 UN SC, transmitted by letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UN Doc A/66/551-S/2011/701 (11 November 2011) (Brazil letter to SG).

170 Brazil letter to SG (n 169 above) 8-10.

> increased the vulnerability of civilian populations. There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change.

The paper stressed that the specific wording on the responsibility to protect incorporated into the 2005 World Summit Outcome document had been the result 'of long and intense negotiations,' and that military force should only be authorised in 'exceptional circumstances' where all other measures had 'manifestly failed.'[171] It stated that this authorisation must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular, international humanitarian law and the international law of armed conflict.[172] Further, 'the Security Council must ensure the accountability of those to whom authority is granted to resort to force.'[173]

RwP received a fairly mixed reaction. It has not been endorsed by the BRICS – some of whom regard it 'as making too many concessions to the original R2P concept.'[174] Some supporters of the responsibility to protect regarded it as an attempt to 'undermine' the original concept,[175] although others see the two as complementary.[176] One particular criticism has been that by insisting on Security Council accountability over the use of force, RwP concept would lead to the micro-management of interventions.[177] However, as will be discussed further in subsequent chapters, this is in fact

171 Brazil letter to SG (n 169 above) 3 4.
172 Brazil letter to SG (n 169 above) 11(d).
173 Brazil letter to SG (n 169 above) 11(i).
174 This comment is based on a discussion at an invitation-only seminar, organised by the Brazilian Foreign Ministry, in Bahia in April 2013. The seminar was attended by Brazil's foreign Minister and senior diplomatic corps along with the UN Ambassadors of India, Germany, Japan, South Africa and Sierra Leone. The discussion was conducted under Chatham House rules.
175 T Wright 'Brazil hosts workshop on 'responsibility while protecting' Foreign Policy 29 August 2012, available at www.foreignpolicy.com/2012/08/29/brazil-hosts-workshop-on-responsibility-while-protecting/ (accessed 11 February 2017). He concluded that Brazil's main motivation for proposing the concept was that its officials had felt 'personal[ly] humiliate[ed]' by their treatment on the Security Council by the US, Britain and France during the Libya crisis. He argued that 'giving the UNSC operational control over a military intervention would place troops at great risk and make failure more likely' and charged that 'RWP would undermine R2P, not strengthen it; … that in practice RWP could result in greater harm to civilians because it incentivizes such behavior by the adversary; and that it does not offer answers to the very real dilemmas of R2P operations or explain what other alternatives might have been possible in R2P cases.'
176 G Evans 'Responsibility while Protecting' Project Syndicate 27 January 2012, available at http://www.project-syndicate.org/commentary/responsibility-while-protecting (accessed 11 February 2017). He also criticized the sneering reaction towards RWP of some western diplomats.
177 H J 'Our Friends in the South' *Economist* 7 April 2012 available at www.economist.com/blogs/ (accessed 19 February 2017). Democracyinamerica/2012/04/dilmar-rousseffs-visit-america (accessed 11 February 2017) ('Mr Obama will surely want to know, too, what exactly Brazil means by its big new foreign-policy idea. That is to complement the UN's justification for intervention in another country's

how UN peacekeeping missions with the protection of civilians-mandates are managed.

In July 2012 the UN Secretary-General published his fourth paper on the progress made since the 2005 World Summit in implementing the responsibility to protect.[178] This noted that

> in recent years the responsibility to protect has been invoked in more situations than ever before ... With expanded use has come a deeper and wider conversation about how to 'operationalize' the responsibility to protect in a manner that is responsible, sustainable and effective. In that context, the initiative on 'responsibility while protecting' that was introduced by the President of Brazil during the general debate in September 2011 is welcome.[179]

The report reviewed the debate about the intervention in Libya without offering any conclusions beyond observing that '[d]ecisions to use force or apply other coercive measure are never to be taken lightly' and may involve 'difficult choices'.[180] It concluded that there was a need for greater dialogue on this issue with the General Assembly since while there was wide acceptance that the 'fundamental principles of international law' should be drawn upon to prevent and respond to genocide, war crimes, ethnic cleansing and crimes against humanity, controversy still persisted on 'aspects of implementation, in particular with respect to the use of coercive measures to protect populations.'[181]

Conclusion

The UN Security Council is making increasing use of its powers enshrined in Chapter VII of the UN Charter to authorise peacekeeping missions to protect civilians against threats to their right to life or physical integrity. The increasing propensity of the UN Security Council to authorise the use of all means to protect civilians at risk of atrocities is of both normative and practical significance and is transforming 'traditional' notions of peacekeeping. For protection to be effective, there must be a common understanding as to who should be protected, from what, by whom and until when. However, the term 'protection' is also used in a number of other senses whose vagueness and elasticity diminishes its practical utility. While the concepts of the protection of civilians and the responsibility to

affairs under the rubric 'Responsibility to Protect' with 'Responsibility while Protecting' after it has gone in. Since Brazil tends not to support going in in the first place, when would it want to see this new responsibility kick in? Even some experienced and sympathetic diplomatic observers in Brasília say they have no idea what concrete difference this would make on the ground').

178 UN Secretary-General 'Responsibility to protect: Timely and decisive response' UN Doc A/66/874–S/2012/578 (25 July 2012).

179 UN Secretary-General (n 178 above) 50.

180 UN Secretary-General (n 178 above) 57-58.

181 UN Secretary-General (n 178 above) 59.

protect share some common elements, the two concepts have fundamental differences, given that PoC is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political commitment. Therefore, confusing the concept of the PoC with the notion of the responsibility to protect risks politicising protection, which ought to be characterised by neutrality and impartiality lest undermining the practical protection of civilians in peace support operations.

Humanitarian agencies have sought to develop a more accessible working definition of protection, which emphasises safety rather than rights. These working definitions distil a distinctive humanitarian element from the all-encompassing ICRC definition, in that they focus on the more acute forms of suffering. Put simply, protection is about seeking to assure the safety of civilians from acute harm. It has been challenging to develop truly practical programming that protects people from all forms of violation, exploitation, and abuse during war and disaster. The challenge may have arisen from the fact that the protection of civilians during periods of violent crisis in the sense of providing physical safety is not the job of humanitarian agencies but rather the military.[182]

A more authoritative approach was a rights-based definition, which looked at protection as recognising that individuals have rights and that the authorities exercising power over them have obligations to protect those rights. It means defending the legal existence of individuals, alongside their physical existence.[183] Thus, it is now generally accepted that protecting civilians in armed conflict and other situations of violence relates to violations of international humanitarian and human rights law, and is not limited to mere physical security but rather encompasses the broader spectrum of human security and human dignity. However, it can be noted that this definition fails to provide clear legal guidance about the circumstances in which missions should use physical force to protect civilians or to address the negative and positive legal obligations that this places on missions and the UN itself. Nonetheless, the ultra-elasticity of the 'rights-based definition' has also sometimes been used by UN peacekeeping missions with PoC mandates to define 'protection' as including those activities in distributing humanitarian assistance, monitoring for violations of international human rights law and IHL, and liaison and advocacy with the national authorities.[184]

182 Du Bois (n 98 above).
183 Bouchet-Saulnier (n 95 above).
184 See UN Secretary-General 'Report of the Secretary-General on the protection of civilians in armed conflict' S/2001/331 (30 March 2001); UN Secretary-General 'Report of the Secretary-General on the protection of civilians in armed conflict' S/2002/1300 (26 November 2002) (discussing the humanitarian rights-based concept of protection and failed to even mention the role of internationally-mandated forces in protecting civilians against violence).

CHAPTER 4

INTERPRETATION OF PROTECTION OF CIVILIANS MANDATES IN UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

Dire Tladi

Abstract: *This Chapter focuses on the interpretation of the United Nations Security Council mandates that are relevant to the protection of civilians in armed conflicts. In examining the different formulations of the protection of civilian mandates, first, the discussion considers the relevant rules for the interpretation of UN Security Council resolution with emphasis on those with a mandate for the protection of civilians in armed conflicts. In particular, the author assesses whether, and to what extent, the rules for the interpretation of international treaties can be applied to the interpretation of UN Security Council resolutions. The Chapter then discusses the interpretation of earlier resolutions containing more restricted mandates for the protection of civilians; and compares these to more robust protection of civilian mandates in recent resolutions, such as Security Council Resolution 2098 of 2013 (authorising the deployment of the Force Intervention Brigade in the Democratic Republic of the Congo) and Security Council Resolution 1973 of 2011 (authorising the use of force for the protection of civilians in Libya). The relationship between interpretation and implementation is not a linear one with interpretation influencing implementation. Rather, it is a dynamic process where interpretation influences implementation and implementation plays a role in interpretation.*

Introduction

The protection of civilians, and its close cousin, the responsibility to protect (R2P), have been the subject of much discussion and debate, recently.[1] Both concepts have also been given much attention, principally, by the United Nations (UN) Security Council. Most, if not all, peacekeeping operations that have been sanctioned by the UN Security Council have contained a protection of civilians-mandate. As Dan Kuwali explains in Chapter 2, the general understanding is that the responsibility to protect rests on three pillars. While the first two pillars of the

1 See B Simma 'NATO, the UN and the use of force: Legal aspects' (1999) 10 *European Journal of International Law* 1 5. B Jones *et al Power and responsibility* (2009) 9. See para 138 and 139 of the World Summit Outcome Document (2005).

responsibility to protect do not necessarily involve the UN Security Council,[2] it is the third pillar that is most controversial, most invasive and it is this pillar that involves the UN Security Council.[3]

These modern tools of the UN Security Council, designed to ensure effective protection of civilian populations, are not merely theoretical. What makes the protection of civilians (PoC) and the responsibility to protect more than just theoretical concepts is the implementation in real situation. Implementation, however, presupposes interpretation because it is only through interpretation that the content of the mandate is known and understood to the mandate holder or addressee. Implementation and interpretation are not the same thing but there is a conceptual relationship between implementation and interpretation: interpretation gives meaning to a mandate and it is this meaning that makes implementation possible. As a general rule, therefore, implementation requires interpretation. Sometimes, the meaning of a mandate is self-evident such that the interpretation appears relatively straight forward. Sometimes, however, determining the meaning can be complicated, which is to say, the meaning is obscure or at any rate complicated to decipher. It is important to underscore, however, that in both cases interpretation is required.

This Chapter concerns interpretation of UN Security Council mandates, in particular in relation to the protection of civilians. It aims to show how protection of civilians can be interpreted and how interpretation affects implementation. It does this by identifying the tools for interpretation available to the interpreter of Security Council mandates. It assesses how the 'robustness' of a mandate affects the application of the tools of interpretation and, therefore, its implementation. This Chapter does not, however, address issues of implementation (and difficulties associated with implementation), such as the resource constraints, which are adequately addressed in other chapters of this volume.[4] Implementation-related issues are referred to only to the extent that they affect or are affected by interpretation. In the next section, the rules that are applicable to the interpretation of resolutions are considered. The following section provides an analysis, in the light of the rules of interpretation, of traditional PoC mandates. This is followed by an analysis of more modern, innovative – sometimes called robust –

2 The elements of the responsibility to protect are (1) duty on the state to protect its population; (2) a duty on the international community to assist where the state is unable to protect its population; (3) a duty on the international community to intervene where the state is unwilling to protect its population (including where the state itself is responsible for harming its population).

3 To the extent that the third element requires the military intervention, a Security Council authorisation would be required. For the discussion of several reports of the Secretary-General of the United Nations, see for eg 'Implementing the responsibility to protect: Report of the Secretary' UN Document A/63/677.

4 See S Kjeksrud & JA Ravndal 'Emerging lessons from the United Nations Mission in the Democratic Republic of Congo: Military contributions to the protection of civilians' (2011) 20 *African Security Review* 3.

protection of civilians mandates. Finally, the discussion offers concluding remarks and recommendations.

Interpretation of UN Security Council resolutions

An important reason for the importance of rules of interpretation is to ensure proper implementation. However, this is only possible if there is an objective and correct meaning of the resolution and content of the mandate. As with treaties, there should, in principle, be one objective true interpretation or correct meaning of the legal instrument.[5] In the same way that treaty interpretation is about the search for an 'autonomous meaning'[6] of the text, so must the interpretation of resolutions.

If interpretation is about the search for autonomous, objective and correct meaning of a resolution, then it is important to identify a set of rules applicable to its interpretation. A set of common rules for the interpretation of resolution facilitates the search for an objective and correct interpretation. For treaties, the common set of rules are to be found in the 1969 Vienna Convention on the Law of Treaties (hereinafter the 'Vienna rules' or the 'Vienna Convention').[7] The Vienna rules are widely accepted as reflecting customary international law.[8] There are, however, no equivalent rules for the interpretation of UN Security Council resolutions. It, therefore, bears asking what the rules of interpretation of resolutions are. Are they the same as the rules for the interpretation of treaties? Are there different rules or are there no rules applicable to the interpretation of UN Security Council resolutions?

The first point to make is that resolutions of the Security Council are not treaties. However, Security Council resolutions are international law texts that make (or at the very least contribute to the making of) law. Thus, while Security Council resolutions are not treaties, there is no *a priori* reason why the rules of the interpretation applicable to treaties as contained in the Vienna Convention cannot be applied to them. The International Court of Justice (ICJ) has, albeit cautiously, endorsed the principle of applying the Vienna rules to Security Council resolutions.[9]

5 The idea of one true, objective and correct interpretation of any treaty was famously expressed by Lord Steyn in *R v Secretary of State for the Home Department, Ex Parte Adan* [2001] AC 477, 515-517 (Lord Steyn).

6 As above.

7 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

8 See, eg *Case Concerning the Gabčikovo-Nagymaros Project (Hungary / Slovenia)* (1997) 1997 ICJ Reports 7 (*Kosovo* opinion) para 46.

9 In 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' Advisory Opinion (2010) ICJ Reports 403 para 94, the Court stated that the Vienna rules 'may provide guidance' in the interpretation of Security Council resolutions.

Although the ICJ proceeded to apply the means of interpretation in the Vienna rules,[10] it cautioned that the peculiarities of the Security Council resolution ought to be considered and that, because of the peculiarities, other factors have to be considered in the interpretation of Security Council resolutions.[11]

The ICJ noted, in particular, that Security Council resolutions are 'issued by a single, collective body,' are drafted through a very different process than that for the drafting of treaties, the product of vote under procedures under the Charter of the United Nations (UN) and may be binding on all states.[12] In truth, these differences, to the extent that they reveal anything peculiar about Security Council resolutions,[13] do not necessitate a different approach to interpretation. These peculiarities may be true of *how* a text comes into being but that in itself does not make the elucidation of the text of a resolution any different from the elucidation of the text of a treaty. This is not to say that there are no differences between resolutions and treaties that affect the interpretation process. These differences, however, to the extent that they exist, should be identified on the basis of an assessment of the Vienna rules.

The primary rule of interpretation in the Vienna rules is, of course, contained in article 31(1) of the Vienna Convention which provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' This rule contains within it three main tools of interpretation, namely 'text,' 'context' and 'object and purpose.' However, article 31(1) is not the end of the interpretation process. Article 31(2) of the Vienna Convention describes what is meant by context. Article 31(3) adds that in addition to context, 'subsequent agreement *between the parties* regarding' the interpretation of the treaty [or resolution] and 'subsequent practice … which establishes the agreement *of the parties* regarding' the interpretation of the treaty [or the resolution] 'shall be taken into account.' Finally, article 31(1)(c) of the Vienna Convention requires that relevant and applicable rules of international law also be taken into

10 In the course of the interpretation of UN Security Council resolution 1244 (1999), the Court in the *Kosovo* opinion (n 8 above) relies on the means of interpretation in Vienna rules such as 'text' and 'object and purpose'. See eg at para 98 where the Court refers to 'the *text* of resolution 1244 (1999)' and para 100 where the Court refers to the 'object and purpose of the resolution'.

11 See *Kosovo* opinion (n 8 above) para 94.

12 As above.

13 The 'peculiarities' referred to by the Court could just easily apply to treaties. For example, treaties themselves may be adopted by a vote, treaties may be adopted by a body, such as the General Assembly, and treaties are the product of intense negotiations just as with resolutions.

account. The Vienna rules are to be applied as 'a single combined operation' designed to ensure an integrated approach to interpretation.[14]

There is nothing in the peculiarities of Security Council resolutions that should detract from the application of the general rule found in article 31(1) – good faith, ordinary meaning, context and object and purpose – in the interpretation of UN Security Council resolutions. However, the application of article 31(3) to the interpretation of UN Security Council resolutions is less straight forward. The idea of parties to a treaty being central to its interpretation and having the authority to give an authentic interpretation through subsequent practice and subsequent agreements, is unique to treaty interpretation. Application of article 31(3) could not, without some adjustments, be applied to the interpretation of resolutions since there are no parties to a resolution.

While it is difficult to identify the 'parties' to a resolution, the idea of an authentic interpretation remains valid for resolutions. In the *Kosovo Opinion,* the ICJ confirmed the idea of authentic interpretation by noting that 'the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, *the responsibility of the organ that took the decision*.'[15] This seems to suggest that the authentic interpretation for Security Council resolutions is the interpretation of the Council as a whole and must be *taken into account* in the search for the autonomous meaning of the resolution. The practice of those charged with implementing and applying the resolutions, *to the extent that this practice accords with the objectively discernible interpretation of the Security Council* as a body, must also be taken into account as authentic interpretation.

Protection of civilians: Interpretation of early mandates

Resolution 1270 (1999) (United Nations Mission in Sierra Leone)

The Security Council's history with protection of civilians is not a very long one. The Security Council first authorised the protection of civilians in its peacekeeping operations in 1999 in the United Nations Mission in Sierra Leone (UNAMSIL).[16] UNAMSIL created to take over from a previous UN Mission, United Observer Mission in Sierra Leone. In that

14 See para 8 of the Commentary to Draft Article 27 of the International Law Commission 1966 Draft Articles on the Law of Treaties (1966) *Yearbook of the International Law Commission: Volume II,* 187 219. See also D Tladi 'Interpretation of treaties in an international law-friendly framework: The case of South Africa' in G Nolte & H Aust (eds) *Interpretation of international law by domestic courts: Converging approaches?* (2016) 145.

15 *Kosovo* opinion (n 8 above) para 46.

16 UN S/RES/1270 (1999). See for discussion JA Boutellis 'From crisis to reform: Peacekeeping strategies for the protection of civilians in the Democratic Republic of the Congo' (2013) 48 *Stability: International Journal of Security and Development* available at http://www.stabilityjournal.org/articles/10.5334/sta.ci/ (accessed 16 June 2015).

Resolution, the Security Council, in what was to be a model for future protection of civilian mandates, determined as follows:[17]

> Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG.

From an interpretative perspective several points are worth mentioning about this protecting of civilians mandate. First, it is worth pointing out that it is the only in relation to this protection of civilians mandate that the Security Council declares itself to be acting under Chapter VII of the Charter of United Nations. Of course, this conscious decision by the Security Council relates to the old debate about whether peacekeeping operations are Chapter VI, Chapter VII or the non-existent Chapter VI and half mandates resolutions.[18] However, apart from the academic debate over whether peacekeeping measures are adopted, the express reference to Chapter VII in relation to the protection of civilians mandate serves an important interpretative purpose. First, it serves to remove any doubt that, in the context of that paragraph, the military component of the Mission is authorised to use force since it is only in the context of Chapter VII that force can be employed or authorised by the Security Council. Second, but paradoxically, it serves to place the protection of civilians mandate in its particular and exceptional context. It serves to indicate that, as an exceptional measure, at least in the context of the peacekeeping mission, the scope of the protection of civilians mandate is to be narrowly construed.

The narrow construction of the protection of civilians mandate implied by its exceptional character, appears to be consistent with the text of the mandate. The text of paragraph 14 of the Resolution (protection of civilians mandate) authorises, and does not oblige, the UN Mission in

17 UN S/RES/1270 (n 16 above) para 14.

18 See TG Weiss *et al The United Nations and Changing World Politics* (2010) 35 *et seq;* TF Weiss *The Oxford handbook on the United Nations* (2007) 324 *et seq;* and M Bothe 'Peacekeeping' in B Simma (ed) *The Charter of the United Nations: A commentary* (1995) 590, who states that peacekeeping can fall within either Chapter VII or VI. In the view of the author, peacekeeping missions fall squarely within the ambit of Chapter VII. All of them, without exception, occur in situations that the Security Council has deemed to constitute a threat to international peace and security – one of the bases for actions under Chapter VII. Peacekeeping measures are a tool (or to use the language of the Charter, a measure) that the Council has decided to restore or maintain international peace and security. The discomfort with referring to peacekeeping measures in general as Chapter VII actions appears mainly to be that peacekeeping mandates depend, by and large, on the consent of the state. However, there is nothing in arts 40, 41 or 42 that limits the range of measures that can be adopted under Chapter VII to non-consent based measures. As a corollary, there is nothing that prevents the Security Council from establishing a peacekeeping mandate without the consent of the state on whose territory the peacekeeping mission will operate.

Sierra Leone to 'take necessary action' in pursuit of two objectives, namely to ensure the security and freedom of movement of its personnel and to protect civilians. The authorisation is subject to four caveats. The first caveat, applicable to both objectives, is that the taking of necessary action must take into account the responsibilities of the government of Sierra Leone and the Military Observer Group of the Economic Community of West Africa (ECOMOG), that is to say, the primary responsibility for these objectives lies with the government of Sierra Leone and the Mission is there only to support the government.[19] Particular note should be taken of the caveats applicable to the protection of civilians but not, at least not expressly, to ensuring security and freedom of movement of its personnel.[20] The first of these is that the actions authorised are those 'within its capabilities' and the second, 'with its area of deployment.' The third caveat is that this applies to civilians under 'imminent threat.'

These caveats, which by and large have been reproduced in subsequent protection of civilians mandates, all emphasise in clear text, the limited nature of the protection of civilians mandate. Although the Hybrid African Union (AU)/UN Mission on Darfur (UNAMID) has its protection of civilians mandate from the report of the UN Secretary-General and the Chairperson of the African Union,[21] this mandate has been endorsed by the UN Security Council and includes similar caveats.[22] The relevant paragraphs of the report declare that the Mission is mandated, 'in the area of its deployment and within its capabilities' to, *inter alia*, 'protect civilians from imminent threat of physical violence' and 'to prevent attacks and threats against civilians.'[23] The restricted interpretation of protection of civilians mandates appears also consistent with the object and purpose of the Resolution, namely to maintain peace between parties to the conflict and to offer support to the government of Sierra Leone. Within this framework, the protection of civilians, important though it surely is, is additional. Moreover, the practice of the peacekeeping missions operating under the textual caveats confirms the restrictive interpretation to be given to the protection of civilian mandate.

19 The preamble of UNSC Res 1270, as do most Security Council resolutions, reaffirms 'the sovereignty, political independence and territorial integrity of Sierra Leone'. At para 7, UNSC 1270 reiterates its appreciation for the 'indispensable role that ECOMOG' plays in promoting stability and security in Sierra Leone. Similarly, in para 8 of UNSC Res 1270 establishing UNAMSIL, the Security Council establishes UNAMSIL to, *inter alia,* cooperate with and assist ECOMOG and the government of Sierra Leone in their efforts towards peace and stability.

20 In subsequent resolutions, the caveats have been textually applied to both objectives.

21 Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur (S/2007/307/Rev.1), paras 54 and 55.

22 UN S/RES/1769 (2007) para 1.

23 Report of the Secretary-General and AU Commission Chairperson (n 21 above) para 54(b).

Resolution 1291(2000) (The United Nations Mission in the Democratic Republic of the Congo)

In Chapter 23, Gilbert Mittawa recounts several circumstances in which civilians were killed in the vicinity of missions with the mandate of protection of civilians. In the context of the Democratic Republic of the Congo (DRC), for example, under Resolution 1291, which has similar caveats applicable to both the protection of civilians and the UN officials and equipment,[24] 80 persons were killed in an area where the UN Mission in the DRC (MONUC) troops were stationed.[25]

The caveats and the restricted interpretation given to the mandates also reflect an interesting interplay between interpretation and implementation. No doubt the caveats have provided the legal justification for non-action in certain instances when civilians were in harm's way, that is to say, interpretation resulted in restricted implementation. But there is also no doubt that the lack of resources or insufficient resources contributed to the lack of action.[26] In other words, it is possible that even with the caveats, an adequately resourced peacekeeping mission may have done more in the defence of civilians. This shows the limits, on the grounds, of the rules of interpretation. On the other hand, it also shows how the implementation issues such as resource constraints, can contribute to interpretation.

Robust protection of civilians mandates: Challenges of interpretation

Resolution 2098 (2013)(the United Nations Organisation Stabilisation Mission in the DRC)

With continuing victimisation of civilians in conflict areas, and the entrenchment of conflict, the Security Council has embraced more innovative, sometimes more robust approach, to peacekeeping. This new approach is perhaps best illustrated by the mandate given to the re-hatted DRC peacekeeping mission, the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO).[27] Resolution 2098, which is adopted wholly under Chapter VII, establishes a 'traditional,' defensive peacekeeping force to, *inter alia,* protect civilians and a more proactive interventionist brigade to neutralise armed groups.

24 UN S/RES/1291 (2000) para 8.
25 For a discussion, see Boutellis (n 16 above).
26 See also Ch 23 of this book.
27 See UN S/RES/2098 (2013). The mandate was renewed in UN S/RES/2147 (2014).

However, even the more traditional mandate to protect civilians appears more robust. The Resolution authorises the military component of MONUSCO (including the Force Intervention Brigade) to take 'all necessary measures' to protect civilians.[28] In particular, the mandate is to '[e]nsure within its area of operations, effective protection of civilians under imminent threat of physical violence.'[29] The first thing to note is that not only is the mandate to 'take' measures but also to 'ensure' protection, which almost suggests an obligation of result. This conclusion is buttressed by the addition of 'effective' to qualify the protection of civilians. Although the caveat 'under threat of physical violence' is retained, the Resolution is not, by its text, restricted by measures within 'its capabilities.' This does not mean that MONUSCO must now act beyond its capabilities – this would be an absurd interpretation. But, it does signify an expectation for greater action. Moreover, the mandate is explicitly extended to ensure the protection of 'civilians gathered in displaced and refugee camps.'[30] This raises an interpretational issue as to whether all displaced and refugee camps fall within 'its area of operations' wherever they may be geographically, that is to say, whether they are in the vicinity of the bases or not. The mandate also appears, at least in the text, to include more elements – 'from any of the parties engaged in the conflict' and to mitigate the risks to civilians 'before, during and after any military operation.'

Resolutions 2098(2013) and 2147(2014))(the United Nations Organisation Stabilisation Mission in the DRC)

The renewal resolution of the MONUSCO mandate, Resolution 2147, appears to further broaden the mandate, and includes proactive elements. In particular, the military component of MONUSCO, is authorised to undertake 'active patrolling.'[31] In addition, the 'humanitarian personnel and human rights defenders' are explicitly included beneficiaries of the protection of civilians. There appears, therefore, in both Resolutions 2098 and 2147, an intention to unshackle the protection of civilian mandate from the constraints characteristic of earlier PoC mandates.

The second, explicitly more robust mandate of MONUSCO concerned the establishment of the Force Intervention Brigade (FIB).[32] Under the Resolution, the FIB is authorised 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping.'[33] These principles, which are reiterated in Resolution 2098, are 'consent of the parties, impartiality, and non-use of force, except

28 Para 12 of UN S/RES/2098.
29 Para 12(a)(i) of UN S/RES/2098 (n 27 above).
30 As above.
31 Para 4(a)(i) of UN S/RES/2147.
32 Para 9 of UN S/RES/2098 (n 27 above).
33 As above.

in self-defence and defence of the mandate.'[34] The intention here is clearly to show the exceptional nature of the proactive, intervention brigade. The implication of this, from the interpretation perspective, may be to make the 'traditional' protection of civilians mandate less exceptional and thus contribute to a less restrictive interpretation of the traditional mandate. This is particularly the case since the traditional peacekeeping and protection of civilians mandates itself suggests a move away from restrictions.

The FIB, to the extent that it is aimed at contributing to the protection of civilians, may reflect the potential of the Security Council to authorise the proactive use of force for the protection of civilians. Resolution 2098 was, of course, not the first authorisation providing for the use of force, proactively to protect civilians.

Resolution 1973(2011) (on the situation in Libya)

While the use of force in Resolution 2098 was to be done in the context of a UN Mission, Resolution 1973 authorising the use of force in Libya in 2011 authorised a 'coalition of the willing and able' to use of force for the objective of the protecting civilians.[35] A further difference, also affecting the interpretation of the resolution, is that Resolution 2098, as with other peacekeeping resolutions, is time bound.[36] This means that the Security Council, in the event that the implementation of the mandate, is able to exert control over the implementation either through amendment of the resolutions at the time of renewal or a decision not to renew the mandate. Resolution 1973, however, is not time bound and as such, once adopted, the Council is unable to exert any direct control unless it can muster the majority necessary to adopt a new resolution.[37]

Resolution 1973 presents a number of interpretative and implementation challenges and has been the subject of an intense debate in both academic and popular literature.[38] While the interpretation issues are numerous and complex, they boil down to two questions. The first

34 See preamble of UN S/RES/2098 (n 27 above).

35 On reliance on 'coalitions of the willing and able' for the use of force in Security Council resolutions, see N Blokker 'Is the authorisation authorised? Powers and practice of the UN Security Council to authorise the use of force by 'coalitions of the able and willing' (2000) 11 *European Journal of International Law* 541.

36 Under Para 9 of UNSC Res 2098, MONUSCO is extended until 31 March 2014. UNSC Res 2147, in para 1, extends the mandate until 31 March 2015.

37 See D Tladi 'The Security Council, the use of force and regime change: Libya and Cote d'Ivoire' (2012) *South African Yearbook of International Law* 1 26-27.

38 See, for examples of academic literature, S Chesterman 'Leading from behind: The responsibility to protect, the Obama doctrine, and humanitarian intervention' (2011) 25 *Ethics and International Affairs* 279; J Welsh 'Civilian protection in Libya: Putting coercion and controversy back into RtoP' (2011) 25 *Ethics and International Affairs* 255; C Henderson 'International measures for the protection of civilians in Libya and Côte d'Ivoire' (2011) 60 *International and Comparative Law Quarterly* 767; M Payendeh 'The

(interpretative) question is whether the resolution foresees or provides for regime change as an outcome of the authorisation to use force for the protection of civilians. The second (implementation) question is whether the resolution was implemented with the view to regime change. The interpretative question and the implementation question are of course related. If the answer to the first is that indeed the resolution foresees regime change, then the second question becomes less significant since any conduct in the implementation of the resolution aimed at regime change would not be inconsistent with the resolution. Paradoxically, the second question is central to the first question since, as argued earlier, the implementation of the resolution is an element to be taken into account in the interpretation of Security Council resolutions. This, however, is true if the Security Council as a whole is supportive for the implementation.[39]

Time and place does not permit a full analysis of Resolution 1973 and its implementation.[40] Nonetheless, a few interpretation-related assertions can be made about the implementation of Resolution 1973. First, neither the text of the resolution, in context, nor the object and purpose of the resolution, precludes regime change as a necessary element of the protection of civilians.[41] Second, the implementers appeared to have, as an objective, regime change in Libya.[42] Third, the practice of the implementers, throughout the operation, had the support of the Security Council and was, therefore, attributable to the Security Council.[43] As a

United Nations, military intervention and regime change in Libya' (2011) 52 *Virginia Journal of International Law* 355. For the debate in popular and news media, see E Schmitt 'Daunting task for NATO in Libya as strikes intensify' available at http://www.nytimes.com/2011/05/25/world/africa/25nato.html?pagewanted=all (accessed 2 October 2014); CJ Chivers 'NATO says it is stepping attacks on Libya targets' available at http://www.nytimes.com/2011/04/27/world/middleeast/27strategy.html (accessed 29 October 2014); M Birnbaum 'France sent arms to Libyan rebels' available at http://www.washintonpost.com/world/france-sent-arms-to-Libyan-rebels/2011/06/29/AGcBxkqH_story.html (accessed 29 October 2014).

39 The literature suggests that implementation of UN Security Council resolution is valid if the Council retains overall control of the implementation. See eg A Orakhslashvili *Legal aspects of global and regioal international Security: The institutional background* (2000) at 41; Blokker (n 35 above) 551 *et seq;* N Blokker and S Muller 'NATO as the UN Security Council's instrument: Question marks from the perspective of International law?' (1996) 9 *Leiden Journal of International Law* 417 418. One of the elements identified for overall is that the implementation must retain the overall support for the Council. For discussion on indicators for when the implementation of a mandate retains the support of the Council as a whole see E de Wet *The Chapter VII powers of the United Nations Security Council* (2004) 270 *et seq.*

40 See, for a full analysis by the author, D Tladi 'Security Council, the use of force and regime change: Libya and Cote d'Ivoire' (2012) 37 *South African Yearbook of International Law* 22.

41 See Payandeh (n 38 above) 389. See also C Henderson 'International measures for the protection of civilians in Libya and Cote d'Ivoire' (2011) 60 *International and Comparative Law Quarterly* 767 771.

42 See B Obama, D Cameron & N Sarkozy 'Libya's pathway to peace' available at http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html (accessed 1 November 2014).

43 See for discussion Tladi (n 40 above).

matter of interpretation, therefore, the Security Council *as a whole*[44] could be seen as interpreting the resolution as permitting regime change.[45] This author has previously asserted that the 'the operation [was] attributable to the Council and the interpretation accorded to the resolutions *(sic)* by the implementers, *became* the interpretation of the Council and could legitimately be read into the resolution,' if not inconsistent with terms of the resolution, in their context, in the light of the object and purpose of the resolution.[46]

The experience with Resolution 1973 and its implementation raises fundamental questions about the nature of international law and the powers of the Security Council, which fall outside the scope of this Chapter.[47] From the perspective of interpretation of protection of civilians mandates, and Security Council resolutions in general, Resolution 1973 illustrates important principles. First, the text, context and object and purpose of the resolution remain the principal element for interpretation. Second, the implementation of the resolution, to the extent that it is supported by the Security Council, is a factor to be taken into account in the interpretation of the resolution.

Conclusion

The protection of civilians as an element of UN Security Council mandates is relatively recent. In its short lifespan, the protection of civilians has gone through several modifications, shifting from narrow, restrictive and passive mandates to encompassing more robust and sometimes offensive mandates. The nature of the mandate in the Security Council resolution should determine the implementation. Interpretation, relying on the general canons of interpretation such as text, context and object and purpose, is central to determining the nature of mandate and, therefore, implementation. However, implementation itself, as an expression of the practice of the Security Council, also affects interpretation. The relationship between interpretation and implementation is, therefore, not a linear one with interpretation influencing implementation. Rather, it is

44 It should be emphasised that not all members of the Security Council, during the operation, supported the implementation. Some members saw the implementation as going beyond the resolution. See, eg Foreign Minister of Russia, S Lavrov, quoted as saying 'The Security Council has never put a change of regime in Libya or any other country as its goal' and those 'who use the Security Council resolution to change regimes are violating the mandate of the United Nations'. See G Filipovic, 'UN Security Council not pushing regime change, Lavrov says' available at http://www.bloomberg.com/news/print/2011-04-19/un-security-council-not-pushing-libya-regime-change-lavrov-says.html (accessed 3 September 2011). See also the statement of the South African government on developments in Libya of 2 May 2011, which 'reiterates that Resolution 1973 must be implemented in letter and spirit, without giving and *(sic)* that there are other motives at play, including regime change'.

45 As above.

46 As above.

47 As above.

dynamic process, in which interpretation influences implementation and implementation plays a role in interpretation.

PART II: PROTECTION OF SPECIFIC POPULATIONS AND PROPERTY AT RISK

CHAPTER 5

PROTECTION OF CIVILIANS FROM WILFUL KILLING IN ARMED CONFLICTS

Thompson Chengeta

Abstract: *The law defines civilians as those who are not combatants and, for that reason, among others, prohibits them from taking active part in armed conflict and guarantees them protection to that effect. Nonetheless, in many cases, belligerents or fighters have wilfully killed civilians. Clearly, the wilful killing of civilians is deplorable, in law and in fact, and should be condemned in the strongest terms. This discussion notes that it is inaccurate to assume that the protections afforded by international human rights law are automatically greater than those afforded by international humanitarian law. Rather, the co-application of these regimes in armed conflicts, and the monitoring of the protection of civilians from both perspectives, enhances the chances for oversight, international pressure, and positive changes in the protection of the right to life. To this end, article 4(h) of the Constitutive Act of the African Union and the notion of responsibility to protect can bridge the gap that exists in the implementation and monitoring mechanisms to prevent wilful killing of civilians in armed conflicts. By understanding the reasons behind wilful killing and other forms of violence against the civilian population in armed conflicts, states can formulate effective preventative measures to protect civilians.*

'The revolution produced many skirmishes and casualties by combat, but many more people died without a gun in their hands, at their doors, in quarries or empty fields, shot in the back by masked men. Murder was more common than battle.'[1]

Introduction

It is an unfortunate fact that in most armed conflicts today, civilians – defined as those who are not combatants – are the ones who suffer the most.[2] Several of their rights are violated notwithstanding the existence of many laws providing for their protection. One of the most egregious violations of the rights of civilians takes place when belligerents or fighters choose to wilfully kill civilians. It is one thing that civilians may be deprived of their right to life through the disproportionate use of force; but

1 P Hart *The IRA and its enemies: Violence and community in Cork, 1916-1923* (1998) 18.
2 See art 50 of Additional Protocol I to the Geneva Conventions of 1949.

it is another that they are wilfully killed. This Chapter examines the rationale behind wilful killing, outlines the existing legal protection, discusses the lack of respect and implementation of the existing laws and examines how the doctrine of the responsibility to protect (R2P) can bridge the implementation gap.

The concept of wilful killing in armed conflict

Wilful killing in armed conflict is where the perpetrator, aware of the existence of an armed conflict and the protected status of the victim, as provided for 'under one or more of the Geneva Conventions of 1949' intentionally targets and kills that protected person.[3] While the term 'wilful killing' is used in international armed conflict (IAC), in non-international armed conflict (NIAC), it is called murder and is punishable under domestic penal laws. Article 3, common to the Geneva Conventions, provides that 'violence to life and person, in particular murder of all kinds' against 'persons taking no active part in the hostilities' shall remain prohibited at any time and in any place whatsoever'.[4] Wilful killing of civilians or other protected persons constitutes a grave breach of the Geneva Conventions.[5]

In IACs, 'civilians are persons who are not members of the armed forces'[6] while in NIACs civilians are those who are not part of 'organised armed groups' or armed forces of the state.[7] Case law from the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, defines civilians as those persons no longer part of the armed forces or groups.[8] Such civilians enjoy protection until they directly participate in hostilities.[9] If such civilians are captured, they may not be summarily executed; they must be tried in accordance with fair trial dictates for 'the mere participation in the conflict.'[10]

Wilful killing of civilians is one of the most serious violations of international humanitarian law (IHL). This is not a case where civilian deaths are collateral damage. It is a matter where the fighter makes civilians the object of attack. Not only is it against IHL but it is against the ethics of war. In just war theory, killing or wilfully targeting civilians is immoral because in an armed conflict, members of the parties to the conflict are licensed by law to hurt or kill the other as long as they are

3 See art 8(2)(a)(i) of ICC elements war crime of wilful killing and ICC elements of war crime of murder, art 8(2)(c)(i)-1.
4 Art 3 Common to the Geneva Conventions.
5 Art 50, art 51, art 131 and art 147 of the First, Second, Third and Fourth Geneva Conventions (GCs) respectively.
6 Art 50 of Additional Protocol (AP) I to the GCs.
7 See art 3 Common to the GCs.
8 See *Prosecutor v Blaškić* Case No IT-95-14-T, para 180.
9 See Rule 6 of the ICRC Customary Law Study.
10 See Rule 100 of the ICRC Customary Law Study.

fighting. The perceived basis of such a license is that they are acting in self-defense *a propos* to the other. There is a moral side to this formulation which creates and imposes a reciprocal moral duty not to injure the 'morally innocent' – that is, those who are not directly participating in hostilities.[11] Wilful killing of civilians upsets that 'reciprocal moral duty,' the very core of the moral basis for refraining from targeting the 'morally innocent.'[12] Wilful killing of civilians can never be considered to be part of war even if occurring in the context of war; it is just murder, propelling us 'well beyond the ethics of warfare,'[13] eroding the fundamental value of moral distinction between combatants and non-combatants.[14]

Before outlining the laws that proscribe such extreme actions in armed conflict, it is necessary to consider the rationale behind wilful killing. More than often, in order to find a solution, one needs to properly understand the problem.

Understanding the rationale behind the notion of wilful killing

Wilful killing in armed conflict can take many forms; state or armed group terror – where the state forces or armed group direct violence against civilians in order 'to shape individual behaviour by attaching a cost to particular actions'; genocide – where killing is motivated by identity and intention to wipe out a particular group in part or in whole; civil war violence or individual versus individual.[15]

One commentator has observed that 'the decision to kill civilians cannot be subsumed under the decision to resort to war.'[16] In other words, there is something different that goes into the decision to wilfully kill a civilian – something that cannot only be solved by considering the legal discourse but by approaching the problem in a multi-disciplinary way. States' responsibility to protect civilians in armed conflict should, therefore, not only focus on the legal tools available to protect civilians – but social policies that are aimed at shaping the psychology, behaviour, belief and understanding of citizens. As will be explained below, the social construct of a particular society is of fundamental importance in restraining or exacerbating their behaviour towards one another in times of armed conflict.

11 PW Khan 'The paradox of riskless warfare' (2002) 22 *Faculty Scholarship Series* 2 available at http://digitalcommons.law.yale.edu/fss_papers/326 (accessed 12 September 2014).
12 Khan (n 11 above) 2.
13 Khan (n 11 above) 3.
14 Khan (n 11 above) 6.
15 S Kalyvas 'The logic of violence in civil war' (2002) 2 available at http://portal.uam.es/portal/page/portal/UAM_ORGANIZATIVO/Departamentos/CienciaPoliticaRelacionesInternacionales/publicaciones%20en%20red/working_papers/archivos/1_2002.pdf (accessed 10 March 2017).
16 Kalyvas (n 15 above) 1.

There is no doubt that deliberate violence against civilians in armed conflict shocks the conscience of humanity.[17] Stathis has observed that 'the violence of civil wars often carries a puzzling intimate character, insofar that it is often exercised between neighbours.'[18] The question in these circumstances is how it becomes possible for the perpetrators to commit the heinous violence against a civilian population that poses no threat to them – at least in the sense of the objective of armed conflict.

As pointed out above, what causes armed conflict is not necessarily the same as what causes the actual perpetration of violence against the civilian population in that armed conflict.[19] Violence, in particular wilful killing of civilians, should be understood as a process rather than an act, it is deeply rooted in the social construct that characterise a particular society.[20] Thus, the wilful killing of civilians in armed conflict may be explained, for example, in terms of gross discrimination against a particular group, the debasing of certain categories of persons or dehumanisation of certain ethnic groups. In other words, where the perpetrator has been made to understand that he is so different from other humans to the extent that those who are different from him or her are lesser beings, it is easier for the perpetrator to commit the worst of acts against those particular individuals.

Thus, in as much as it can be understood that the immediate reason why a rebel group, for example, uses 'wilful killing' against civilians 'to weaken the support for the government and create war fatigue',[21] demonstrate the rebel group's 'power to hurt'[22] and 'cause enough damage to pressure the government into entering negotiations',[23] one of the major reasons behind the ability of that rebel group to hurt the civilians emanates from the social construct of the members of that particular rebel group. Such social construct may be shaped by religion, ethnicity, race or other forms of identification.

On the African continent, for example, where ethnicity or other forms of identity are involved, it is not surprising that war is associated with wilful killings.[24] The first form of protection of civilians in armed conflict therefore should be built and strengthened even before the existence of an

17 Kayvas (n 15 above) 1; see also Stockholm International Peace Research Institute, *SIPRI Yearbook 2005: Armaments, Disarmament, and International Security* (2005) 98.
18 Kalyvas (n 15 above) 1; see also E Simpson *War from the ground up: Twenty-first century combat as politics* (2013) 86; R Brett *The origins and dynamics of genocide: Political violence in Guatemala* (2016) 73.
19 n 15 above, 2; see also E Staub *Overcoming evil: Genocide, violent conflict, and terrorism* (2013) 125-126.
20 As above.
21 L Hultman 'The power to hurt in civil war: The strategic aim of RENAMO violence' (2009) 35 *Journal of Southern African Studies* 821.
22 As above.
23 As above.
24 B Valentino *et al* 'Draining the sea: Mass killing and guerrilla warfare' (2004) 54 *International Organization* 82.

armed conflict – states must eradicate all forms of discrimination, build their nations on the basis that everyone is an equal human being, that everyone is a human being before any form of natural or artificial identity. Until such time the spirit of Ubuntu has been woven into that society – the love for the fellow human being – it will always remain easy for the perpetrator to commit the worst of acts on civilians.

This discussion outlines the existing legal framework on the protection of civilians from wilful killing. The purpose is to show that there is enough legal foundation for the protection of civilians yet victimisation of civilians in on-going armed conflicts is rampant.[25]

International humanitarian law protecting civilians from wilful killing

The fourth Geneva Convention (GCIV) on the protection of civilians came out of an 'urgent need for a Convention for the protection of civilians', the absence of which had 'led to such grievous consequences' during the First World War (WWI).[26] The IHL rule of distinction applies both in NIACs and IACs, providing that parties to a conflict 'must at all times distinguish between civilians and combatants.'[27] This rule is *jus cogens,*[28] prohibiting belligerents from making civilians their object of attack at any given time.[29] Without doubt, the rule of distinction serves as 'the corner stone of contemporary concepts of civilian protection' in particular, against willful killing.[30] There are various provisions of the Geneva Conventions that proscribe wilful killing of civilians.[31]

International human rights law protecting civilians from wilful killing

International human rights law (IHRL), which continues to apply in situations of armed conflict, also protects the rights of civilians. In terms of human rights law, protection of civilians exists mainly in two forms: the right to life and the right to a remedy.

25 Human Rights Watch 'Nigeria: Boko Haram kills 2,053 civilians in 6 months: Apparent crimes against humanity' (2014) available at http://www.hrw.org/news/2014/07/15/nigeria-boko-haram-kills-2053-civilians-6-months (accessed 15 March 2017).
26 See Preliminary remarks to the Geneva Conventions 19.
27 See Rule 1 of the ICRC Customary Law Study; art 43(2) of AP I.
28 JM Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2005) 3.
29 H Kinsella *The image before the weapon: A critical history of the distinction between combatant and civilian* (2011) 244; N Quénivet & S Shah-Davis (eds) *International law and armed conflict: Challenges in the 21st century* (2010) 8.
30 S Gordon 'Civilian protection – what's left of the norm' in S Perrigo & JJ Whitman (eds) *The Geneva conventions under assault* (2010) 77.
31 Art 3 Common to the GCs; art 50, art 51, art 131 and art 147 of the First, Second, Third and Fourth GCs respectively.

The right to life

The right to life is protected at the international,[32] regional[33] and national level.[34] The right to life is one of the IHRL norms that enjoy the status of customary international law.[35] The International Covenant on Civil and Political Rights (ICCPR) provides that '[e]very human being has the inherent right to life' for which no one shall be arbitrarily deprived.[36] The right to life is, thus, a fundamental and deeply held right that is protected in times of both peace and war.

Arbitrary deprivation of the right to life is prohibited and wilful killing is the worst form of arbitrariness[37] because it is clearly against the law, inappropriate, unjust and immoral.[38] In most cases where wilful killing is committed by state agents, they violate due process rights associated with the right to life. It is in line with human rights norms that an individual be allowed due process before his or her right to life is interfered with.[39] As clearly stated by the United Nations (UN) Human Rights Committee, even war cannot justify arbitrary deprivation of life.[40] Killing is arbitrary where an individual is denied fair trial and the right to be presumed innocent until proven guilty.[41]

The right to a remedy

Protection of civilians from wilful killing in armed conflicts also exists in the form of the victim's right to a remedy.[42] The right to a remedy encompasses accountability of the perpetrator which is an important aspect of the right to life. Victims of grave violations of IHL and IHRL

32 Art 3 of the Universal Declaration of Human Rights; art 6 of the ICCPR.
33 Art 4 of the African Charter on Human and Peoples' Rights; art 4 of the American Convention on Human Rights; art 2 European Convention on Human Rights.
34 Almost all constitutions of civilised nations protect the right to life.
35 P Gormley 'The right to life and the rule of non-derogability: Peremptory norms of *jus cogens*' in B Ramcharan (ed) *The right to life in international law* (1985) 128.
36 Art 6(1) of ICCPR; Human Rights Committee General Comment 6, Right to Life (art 6) CCPR General Comment 30/04/82 No 6 (1982) 3.
37 D Stephens 'Human rights and armed conflict: The advisory opinion of the International Court of Justice in the Nuclear Weapons case' (2001) 4 *Yale Human Rights & Development Law Journal* 6-7; Human Rights Committee General Comment 29, States of Emergency UN Doc CCPR/C/21/Rev 1/Add 11 (2001) 15.
38 N Melzer *Targeted killing in international law* (2008) 147.
39 D Kretzmer 'Targeted killing of suspected terrorists' (2005) 16 *European Journal of International Law* 178.
40 Human Rights Committee General Comment 29, States of Emergency UN Doc CCPR/C/21/Rev 1/Add11 (2001) 15.
41 As above.
42 See M Lesh 'Accountability for targeted killing operations' in J Petrovic (ed) *Accountability for violations of international humanitarian law: Essays in honor of Tim MacCormick* (2015) 5; P Ambach *et al The protection of non-combatants during armed conflict and safeguarding the right of victims in post conflict society* (2015) 461; see also in general, C Evans *The right to reparation in international law for victims of armed conflict* (2012).

have the right to a remedy.[43] As mentioned above, willful killing of civilians is a grave violation of the 1949 Geneva Conventions. In the context of wilful killing, 'the immediate family or dependents of the victim' are entitled to a remedy.[44]

Under IHRL, victims of gross violations like wilful killing must be provided with an effective remedy[45] through access to justice, reparation, and access to information concerning the violation.[46] Investigation is an important aspect of access to justice and for such investigation to be effective, it must be prompt,[47] thorough,[48] impartial[49] and capable of leading to the identification and, if appropriate, the punishment of the authors of the crime.[50]

In that regard, states have a corresponding duty to ensure effective remedies in cases of wilful killing[51] through prosecution of offenders or provision of compensation to the relatives of the victim.[52] Other states have a responsibility to assist relatives of the victim of wilful killing to get an effective remedy through the prosecution of offenders who happen to be on their territories, for example. However, such responsibility is only complementary as the primary responsibility to provide a remedy for victims rests with the state on whose territory wilful killing occurred.[53] The state's duty to ensure that the victim has the right to a remedy is not only relevant in case of wilful killing by state agents, but also that of non-state

43 See Victims' guide to the International Criminal Court by Reporters without borders (2003) 56, available at https://issuu.com/raphaelbriner/docs/guide_cpi_a4_en (accessed 10 March 2017); see also art 2(3) of ICCPR and art 1 of its Optional Protocol; art 6 of CERD; art 2 of the Optional Protocol to CEDAW; art 13 of CAT; art 13 and art 34 of ECHR or Definition 31 of the Rules of Procedure of the Inter-American Court of Human Rights.

44 See Principle 1 and 2 of UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; *Almeida de Quinteros et al v Uruguay*, views of 15 October 1982, 21 July 1983, CCPR/C/OP/2 paras 14 and 16; *Velásquez Rodriguez v Honduras* (Compensatory damages) Judgment of 21 July 1989, Series C No 7 paras 50 - 52.

45 General Comment No 31 on the Nature of the General Legal Obligation imposed on state parties on the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 15.

46 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,' adopted by the UN GA in 2006.

47 UN Principles on the Investigation of Torture, principle 2; see also art 2 of CAT; Principle 9 of the UN Principles on Extra-Legal Executions; Human Rights Committee General Comment 31 on art 2 of the Covenant.

48 D Shelton *Remedies in international human rights law* (2015) 94.

49 n 45 above, para 15.

50 *Finucaney v the United Kingdom*, Judgment of 1 July 2003, para 69; see *McCann v United Kingdom*, Judgment of 27 September 1995, Series A No 324, para 161; Report of Special Rapporteur on Torture, 17 December 2002, E/CN.4/2003/68; see also Report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), E/CN.4/Sub.2/1997/20/Rev1, para 27; *Malawi African Association et al v Mauritania*, Communications 54/91 *et al* (27th Ordinary Session, May 2000).

51 Art 2(2) ICCPR; art 2(c) and (d) of CERD; art 2(a) CEDAW; art 4 CRC; art 2(1) CAT; art 1 ACHPR and art 2 ACHR; see also *Velásquez-Rodriguez v Honduras* para 166.

52 *Velásquez-Rodriguez v Honduras* para 166.

53 n 45 above. The nature of the General Legal Obligation imposed on state parties to the Covenant, 21 April 2004, CCPR/C/74/CRP.4.

actors.[54] It is the state's duty to take diligent steps to protect its citizens from actions of private parties[55] and as such, should investigate and prosecute private parties such as rebel groups.[56]

Where wilful killing occurs at the instance of the state – for example where state agents abduct civilians, have them killed and buried in secret mass graves – it is hard to know what transpired. In this regard, IHRL provides for the victims' right to truth. Victims in armed conflicts have the right to know the fate of their relatives,[57] locate the graves of their dead relatives and know under what circumstances their relatives were killed[58] and the motives thereof.[59] The right to truth has been held to be substantive,[60] inalienable[61] and non-derogable right[62] which entails knowledge as to how, when, why and by whom violations were committed.[63] To that end, states have a duty not only to the victims, but to society as a whole to make public the truth on gross human rights violations.[64] This helps the process of accountability, which is important in the protection of civilians.

International criminal law protecting civilians from wilful killing

International Criminal Law (ICL) provides for the prosecution of those who violate IHL and IHRL. This entails another layer of protection of civilians. There are many international criminal tribunals and courts providing for the prosecution of the crime of wilful killing. For example, article 8 of the International Criminal Court (ICC) Statute criminalises as a war crime, the wilful killing of protected persons like civilians.[65] The Statutes of the International Criminal Tribunal for the former Yugoslavia

54 M Ssenyonjo *International human rights law: Six decades after the UDHR and beyond* (2016) 410; United Nations *Ending violence against women: From words to action* (2006) 89.
55 As above.
56 S Baldo & L Magarrell 'Reparation and the Darfur peace process: Ensuring victims' rights' *International Center for Transitional Justice* (2007) 13
57 UN General Assembly, A/RES/57/202, 14 February 2003 para 2.
58 See art 32 of the First Additional Protocol to the Geneva Convention; see also the United Nations Working Group on Enforced or Involuntary Disappearances E/CN.4/1435, 22 January 1981 para 186.
59 Resolution E/CN,4/RES/2003/72 para 8; see also the *Almeida de Quinteros et al v Uruguay*, 21 July 1983, CCPR/C/19/D/107/1981.
60 See *Maria del Carmen Almeida de Quinteros v Uruguay* Communication No 107/1981, UN Doc CCPR/C/OP/2 (1990) para 14.
61 Principles 2-5 of the UN Principles on Impunity.
62 Report of the United Nations Special Rapporteur on the Question of human rights and states of emergency, 26 June 1995, E/CN.4/1995/20/Annex I, para 39.
63 Principle 8 of UN Principles on Impunity.
64 See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para 11(c) and 24; see also T Taraciuk *Uniform impunity: Mexico's misuse of military justice to prosecute abuses in counternarcotics and public security operations* (2009) 64-65.
65 Art 8(2)(i) of the ICC Statute.

(ICTY),[66] the International Criminal Tribunal for Rwanda (ICTR)[67] and the Special Court for Sierra Leone (SCSL)[68] also criminalise wilful killing of civilians.

If wilful killing is committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', it constitutes a crime against humanity and is criminalised in terms of article 7 of the ICC Statute.[69] The ICTY,[70] ICTR[71] and the SCSL[72] statutes have the same provisions. Some perpetrators have been tried and convicted for the crime of wilful killing.[73] Recently, on 7 March 2014, the ICC Trial Chamber found the Congolese warlord Bosco Katanga 'guilty of the crime against humanity of murder and the war crimes of wilful killing, intentional attack against the civilian population.'[74]

As mentioned above, prosecution of perpetrators reinforces the victims' rights to a remedy and to some extent, achieves deterrence and non-repetition.[75] Prosecution happens at both domestic and international levels.[76] However, prosecution at international level, especially through the ICC, only takes place when there is inability or unwillingness to act domestically.[77] It is the domestic jurisdictions that have primacy in the prosecution of crimes such as wilful killings committed within their jurisdiction.[78] The ICC can never be in a position to try all perpetrators of all crimes in all situations where international crimes have occurred.[79]

There are a number of states on the African continent that have prosecuted cases of wilful killing.[80] However, others have shown unwillingness to prosecute those who are responsible. Unwillingness to prosecute can be discerned, for example, from a state that carries 'sham' investigations that are incapable of bringing anyone to justice. Recent examples can be that of the Government of Kenya in the cases that were later taken over by the ICC.[81]

66 Art 2(a) of ICTY Statute.
67 Art 2(a) of the ICTR Statute.
68 Art 4(a).
69 Art 7(1)(a) of the ICC Statute and art 7(1)(a) on ICC elements of the crime against humanity of murder.
70 Art 5(a) of the ICTY Statute.
71 Art 3(a) of ICTR Statute.
72 Art 2(a) of the Statute of Sierra Leone.
73 See *Prosecutor v Zdravko Mucić et al.*
74 See *Prosecutor v Germain Katanga*.
75 See Principle 4 and the eighth preambular paragraph of the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims.
76 K Ambos & I Stegmiller 'Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy? (2012) 58 *Crime, Law and Social Change* 2012.
77 C Stahn 'Complementarity: A tale of two notions' (2008) *Criminal Law Forum* 88.
78 M Du Plessis 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' *Institute of Security Studies* (2012) 5.
79 Ambos & I Stegmiller (n 76 above) 4.
80 Du Plessis (n 78 above) 13.
81 See cases of *Prosecutor v Kenyatta*; and *Prosecutor v Ruto and Others.*

Exposing the implementation gap

Notwithstanding the existence of the above legal framework, there is wanton wilful killing of civilians in many armed conflicts across the globe. There are several reasons that can explain this. Chief among them is that the implementation of laws and protection of civilians is usually through the organs of the state. In armed conflicts, most of these organs are defunct. As a result, there is no one to ensure that the laws are respected and that those who violate them are prosecuted. Where the state organs are functional, the other major reason for the implementation gap is the lack of political will to implement laws. The implementation gap may also be a result of amnesties that are usually granted post conflict.[82] The African Commission has indicated that such practices are incompatible with the rights of victims.[83]

Thus, in on-going armed conflicts on the African continent, for example, in Mali,[84] Sudan,[85] Central African Republic,[86] cases of wilful killings of civilians are rampant. In the case of Mali, Amnesty International recently voiced its concerns in relation to 'the continued reports of wilful killings' reported in northern part of the country.[87] This is where the doctrine of responsibility to protect (R2P) and the right to intervene under article 4(h) of the Constitutive Act of the African Union (AU) can bridge the gap by ensuring that laws are respected.

Protecting civilians from wilful killings under the responsibility to protect and article 4(h)

As Dan Kuwali has elaborated in Chapter 2, the principle of the responsibility to protect asserts that states have the primary obligation to protect civilians within their borders from crimes such as genocide, war crimes, and crimes against humanity, including ethnic cleansing. At the

82 n 78 above, 17.

83 See *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR, Communication 245/2002, para 212; see also A Seibert-Fohr *Prosecuting serious human rights violations* (OUP, 2009) 39; J Ochoa *The rights of victims in criminal justice proceedings for serious human rights violations* (2013) 58-59; B Offord *Activating human rights* (2006) 99.

84 Amnesty International 'Mali: Children paying a high price in on-going conflict' (2014) available at http://www.amnesty.org/en/news/mali-children-still-paying-high-price-ongoing-conflict-2014-08-21 (accessed 10 March 2017).

85 Amnesty International 'We can't endure anymore: The impact of inter-communal violence on civilians in Central Darfur' (2014)18 available at http://www.amnesty.org.uk/sites/default/files/we_cant_endure_any_more__sudan_report_2014.pdf (accessed 10 March 2017).

86 See Amnesty International 'Central African Republic: Evidence of war crimes and crimes against humanity' (2013) available at http://www.amnesty.org.uk/press-releases/central-african-republic-evidence-war-crimes-and-crimes-against-humanity (accessed 10 March 2017).

87 Amnesty International 'Mali: All parties to the conflict must put an end to on-going human rights violations' (2014) 16 https://www.es.amnesty.org/uploads/media/MaliBriefing2014.pdf (accessed 10 March 2017).

same time, the AU has the right to intervene in a member state in the event of war crimes, genocide and crimes against humanity.[88] Thus, the AU and the international community only bear the responsibility to protect when the concerned state is unwilling or unable to fulfil that obligation. In many instances, wilful killing of civilians falls within the scope of some of the above-mentioned crimes depending on context and intention. In exercising the responsibility to protect and article 4(h)-intervention, both the concerned state and the international community 'must act within a continuum of actions ranging from prevention, reaction to rebuilding.'[89] These actions have the potential to act as a bridge between the laws that protect civilians from wilful killing and implementation.

The responsibility to prevent

The responsibility to prevent within the framework of the responsibility to protect is aimed at addressing the root and direct causes of conflicts that place civilians at risk. This norm is important in the case of preventing wilful killing. As mentioned above, it is important to understand the rationale behind wilful killings and to address its root causes. The relations among humans of different races and ethnicities, for example, play a fundamental role in the levels of violence they can cause to each other in conflict. This is not to say that there are no other contributing factors to violence in armed conflicts. However, as a preventative measure, states can go a long way by addressing the causes of divide, discrimination and excessive sense of being different from other humans.

The responsibility to react

The responsibility to react consists of a wide spectrum of measures, including economic, political and diplomatic tools, with the very last resort being military intervention, and only if such intervention meets a stringent set of criteria. In this vein, article 4(h) of the AU Constitutive Act is a very important tool especially to stop on-going violations. However, the effectiveness of 'reaction' as a tool seems to be limited on the African continent. To start with, there is not much economic dependence between or among African countries for effective economic sanctions.[90] As for military intervention, it appears that many African heads of states are not keen to intervene in the affairs of another state. Intervention in most cases is easier when dealing with failed states. Where the state is still functioning, no matter how it may appear that it is not effectively dealing with non-state actors, it is difficult, if not impossible, to intervene. Therefore, where violations are committed by non-state actors like rebel

88 Article 4(h) of the Constitutive Act of the African Union.
89 See Outcome Document of the 2005 World Summit paras 138 & 139.
90 See for example the African Union adds to sanctions in Mali (2012) available at http://edition.cnn.com/2012/04/03/world/africa/mali-unrest (accessed 10 March 2017).

groups in a functioning state, possibilities of military intervention by outside states are limited to where the host state invites other states as was the case of Democratic Republic of Congo with Rwanda and Central African Republic with South Africa.

The responsibility to rebuild

The responsibility to rebuild focuses on the recovery, reconstruction and reconciliation of a state; aimed at preventing potential recurrences of humanitarian crises. In this regard, the AU has the potential to play an important role. Within the AU, there is the Peace and Security Council, which is created by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. The Peace and Security Council of the African Union (AUPSC)'s main mandate is to secure peace in the region through conflict prevention, management and resolution.[91] As indicated above, peace is a better environment within which civilians are protected than armed conflict. In rebuilding a society, it is important that measures are put into place that there is no relapse into armed conflict.

One of the important measures in rebuilding comes with accountability of those responsible for commission of crimes such as wilful killing. On the African continent, the responsibility to protect norm has a potential to reinforce the complementarity principle of the ICC in the quest to end impunity. However, the relationship between the ICC and the AU has been strained in recent years to the extent that in some instances, the AU has passed resolutions asking African states not to cooperate with the ICC.[92] The question becomes whether such actions by the AU are compatible with the norms of the responsibility to protect.

However, as a gesture towards accountability for crimes such as wilful killing, the AU is in the process of expanding the jurisdiction of the African Court on Human and Peoples' Rights to include criminal jurisdiction to try those responsible for atrocities such as wilful killing of civilians on the continent.[93] From accountability perspective, this may be viewed as one of the tools working towards the responsibility to protect.

There are, however, scholars who suggest that this move by the AU is a form of 'protest treaty' or action in reaction to the recent activities of the ICC on the African continent.[94] The fact that all of the ICCs indictments are on the African continent whilst at the time of writing there are none

91 See art 2(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.
92 See Decision Assembly/AU/Dec.221 (XII) adopted by the Assembly of the AU at Sirte, Libya, 3 July 2009 para 10.
93 See Protocol on the Statute of the African Court of Justice and Human Rights.
94 M Du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2012) 235 *Institute of Security Studies* 4.

from other continents with similar situations is believed to have made the AU feel that 'international criminal justice is pursuing an African agenda,'[95] therefore, leading to the creation of an African criminal court to thwart the ICC.[96]

However, it is not clear how one can claim that the whole move is meant to sidestep the ICC rather than complement it. Of course, 'the decision of the AU to provide for the immunity of officials sends out wrong signals about its commitment to the fight against impunity'.[97] Nevertheless, the issue of immunity of heads of state is not a settled and straightforward matter in international law. If anything, it presents a conflict of laws in many jurisdictions with respect to what is provided for in the ICC statute and states' international obligations emanating from treaty law and custom.[98] Aside this however, a regional criminal court is not made redundant because heads of state have immunity since other high ranking commanders – those that the ICC may not prosecute for strategic reasons – can still be prosecuted in the regional court. Besides this, there are no serious arguments, besides speculation, as to why not to believe that the whole venture is a genuine move by African leaders meant to do best for Africans by ending impunity on crimes such as wilful killing. Instead of being overly criticised, the AU should be applauded for seeking to create a regional criminal court that may prove instrumental in ending impunity on the continent.

Conclusion

Wilful killing of civilians is deplorable and should be condemned in the strongest terms. There is no doubt that there are sufficient laws providing for the protection of civilians from such forms of violence. The only problem is with implementation and monitoring mechanisms. This is where the doctrine of the responsibility to protect and article 4(h)-intervention has the potential to bridge the gap. However, if the responsibility to protect is to be effective as far as prevention of wilful killing is concerned, it is recommended that: first, states should study and

95 ARC 'Endowing the African Court of Justice and human rights with jurisdiction over international crime; A more legitimate form of justice for Africa or a recipe for disaster'? ARC Project Paper Proposal for Conference on International Law in Africa 3 available at http://www.criminalinternationallaw.com/Endowing-the-African-Court-of-Justice-and-Human-Rights-with-Jurisdiction-over-International-Crimes--A-More-Legitimate-Form-of-Justice-for-Africa-or-a-Recipe-for-Disaster- (accessed 10 March 2017).

96 F Viljoen 'AU Assembly should consider human rights implications before adopting the amending Merged African Court Protocol' AfricLaw available at http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/ (accessed 10 March 2017).

97 D Tladi 'The immunity provision in the AU Amendment Protocol separating the (doctrinal) wheat from the (normative) chaff' (2015) 13 *Journal of International Criminal Justice* 5-6, 17.

98 As above.

understand the rationale behind wilful killing and other forms of violence against the civilian population. This will help in the formulation and taking of preventative measures. Second, the AU has been using the responsibility to protect tools like economic sanctions. In as much as this tool has potential, the AU must take into consideration the low levels of economic dependence among African countries that affect the effectiveness of economic sanctions.

More so, there is a need to take into account the limitations that exist as far as military intervention is concerned. In most cases, wilful killing and other worst forms of violence against the civilian population occur at the instance of non-state actors within a functioning state. No matter how bad the situation may be, it will always remain difficult for outside states to undertake any meaningful intervention as long as the concerned state continues to claim to be in control. States need to continuously disseminate international humanitarian law, not only to combatants but the general public. The general public must be aware of the prohibition of wilful killings. Dissemination of IHL to the general public is important because in most non-international armed conflicts, some of the civilians who have not received any formal military education relating to IHL find themselves participating in hostilities – in particular on the side of armed groups. For those states that are not doing it already, there is urgent need for integration of international humanitarian law into military doctrines, manuals and issues relating to rules of engagement.

CHAPTER 6

PREVENTION OF VIOLENT EXTREMISM IN AFRICA*

Dan Kuwali

Abstract: *Mostly, extremist groups have developed as a result of political instability that has created power vacuum and security lapses, discrimination, religious marginalisation, economic crises including social penury, and the proliferation of small arms and light weapons. Using force alone to curb extremism can exacerbate the problem hence the need for a multi-pronged approach, which includes methods to win hearts and minds. To counter violent extremism in Africa, this Chapter recommends that there should be dialogues across faiths, cultures, political groupings and countries. To this end, African leaders, clerics and scholars at all levels should devise effective strategies to tackle the root causes of extremism and terrorism. The idea is to cultivate a culture of peace, tolerance, and acceptance of unity in diversity using diverse African values. In doing so, governments should provide a forum conducive to debunking and correct misinterpreted political and religious ideologies as well as cutting access to funding by potentially violent extremist groups. States should confront socio-economic grievances by promoting broad-based economic growth and development, fighting corruption, job creation for the youth, including women and girls, without discrimination and devoting more resources to education, which is one of the most effective tools that can eradicate extremist attitudes.*

Introduction

The massacre of innocent university students in Kenya following a siege by operatives of the extremist group al-Shabaab in 2015 and the kidnapping of 200 girls in Nigeria's Borno State in 2014 have raised concerns whether eradicating extremism is possible. Extremism and radicalisation have fueled the violence and terrorism that afflict communities around the world today.[1] These scourges are borderless in

* This Chapter derives from a paper entitled 'Eradicating extremism: More law, less politics' presented at the Conference on 'Boko Haram and international law: Mapping the legal terrain for responding to insurgencies and armed conflicts in Africa', University of Johannesburg, 25-26 February 2015.

1 United Nations 'First report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes, Counter-Terrorism Implementation Task Force' para 1 available at http://www.un.org/en/terrorism/pdfs/radicalization.pdf (accessed 5 January 2015). See also TP Chimimba 'Defining terrorism under the United Nations system' (2013) *Zanzibar Yearbook of Law* 51.

their effects, and countering them is in the interest of all states. An extremist is emblematic of a person who advocates or resorts to measures beyond the norm, especially in politics, religion or culture. A related term, radicalism, denotes political principles focused on altering social structures through revolutionary means and changing value systems in fundamental ways. Extremism and radicalisation have fuelled violence and terrorism, which are some of the burning problems that affect communities around the world. On the African continent, from Somalia, al-Shabaab terrorists have launched attacks across East Africa. In Nigeria and neighboring countries, Boko Haram kills and kidnaps innocent men, women, and especially, girls and children. Today, the greatest terrorist threat in the world is not a meticulously plotted event like the attacks on 11 September 2001 in the United States (US), but rather homegrown citizens who become radicalised on their own or by a foreign terrorist organisation.[2]

Since the attacks of 11 September 2001, the international community has stepped up efforts on how to deal with radicalisation, violent extremism and terrorism. Countering these scourges is in the interest of all states, considering the borderless effects of such criminal acts. The proliferation of violent extremism in Africa has presented the continent with a geopolitical situation that calls for rethinking of security paradigms beyond the sole military or police based approach, to rather re-examine human security issues that span political and religious spaces, the clash of cultures and other socio-economic factors that lead to grievances and exclusion of some segments of the society.

The extent of the violence and the trans-national and multi-facetted nature of the actors have raised questions on the ability of states to counter extremist messages, which has a reach and agility in social media that far outstrips that of most governments. The relative ease with which extremists recruit and carry out their attacks seems to suggest that governments are being outdone both in terms of amplification strategies and the capability to lead in the battle of ideas. It is generally accepted that military might is only one dimension in tackling extremism and terrorism. Although military force can hypothetically annihilate the entire safe haven for extremists, the ideology and the threat of extremism cannot be eliminated given the massive propaganda they disseminate over social media.

The creation of the Working Group on 'Addressing Radicalisation and Extremism that Lead to Terrorism', by the United Nations (UN) was a response to member states' demand for help in furthering their

2 See also G Yoroms 'Defining and mapping threats of terrorism in Africa' in W Okumu & A Botha (eds) *Understanding terrorism in Africa: In search for an African voice* Institute for Security Studies (2007) 3-14.

understanding of what makes a terrorist to be a terrorist and in identifying effective policies and practices to prevent this from happening.[3] The UN Working Group has highlighted the importance of preventive and long-term measures in fighting terrorism, separate from, and additional to, suppressive and coercive action that may involve the use of force.[4] The main focus of the UN Working Group is on non-coercive approaches to violent extremism that rely on engagement with, and winning hearts and minds of, the segments of society that are normally targeted by extremist and radical groups for recruitment, support and funding.[5] Building on the strategies outlined by the UN Working Group, this Chapter seeks to interrogate the rationale behind radicalisation and examine how extremism can be eradicated from the African continent. The Chapter does so by assessing how an anthropological dimension can be integrated into the prevention of radicalisation in order to eradicate extremism by taking advantage of African cultural, religious and political diversity. To embrace dialogue, address grievances, prevent exclusion, and promote tolerance.

The causes of extremism in Africa

To eradicate extremism, it is key to find out the causes of extremism. Without addressing the causes, any strategy purporting to eradicate extremism may only combat or alleviate the symptoms and not the cause. There are various forms of extremism especially political, religious or cultural, with variety of causes ranging from political, religious or cultural marginalisation, a vacuum of governance and security as well as colonial influences. The diverging ideological influences from the colonial era (Arabic, English and French) in Africa and the clashes between religious models on the continent have resulted in socio-economic and religious imbalances in several countries. The issue of an ideological confrontation resonated following the appearance of radical ideological groups, terrorist activities and hostage taking in the Maghreb societies and the Horn of Africa. Given the porous borders on the continent, it was inevitable for the phenomenon of extremists to extend to the south of the Sahara. The instability on the continent has been exacerbated by the diverging interests and due to rivalries between both foreign powers and neighbouring countries on a strategic and an economic level, scrambling for the abundant oil, cocoa, minerals and energy resources on the continent.[6]

3 First Report of the Working Group on Radicalisation and Extremism that Lead to Terroris m: Inventory of State Programmes,Counter-Terrorism Implementation Task Force, (UNReport) http://www.un.org/en/terrorism/pdfs/radicalization.pdf (accessed 5 January 2015) para 1.

4 See also UN Working Group Report (n 1 above) para 2.

5 As above. See also K Schillinger 'The role of the international community' in Okumu & Botha (eds) (n 2 above) 3-14.

6 See also SM Makinda 'The history and root causes of terrorism in Africa' in Okumu & Botha (n 2 above) 15-21.

Political instability which creates power vacuum and security lapses, political marginalisation, discrimination on the basis of religious or such other status, economic crisis including social penury and the proliferation of small arms and light weapons are some of the key factors that have contributed to the breeding of extremist groups such as al-Shabaab, Boko Haram and Ansaru Dine, al-Qaeda in the Islamic Maghreb (AQIM), the Movement for the Oneness and Jihad in West Africa (MOJWA) in North and West Africa, the Lord's Resistance Army (LRA) and the *Movement pour l'Unification et le Jihad en Afrique de l'Ouest* (MUJAO) on the continent. The infiltration of the terrorist organisation, Islamic State of Iraq and al-Sham (ISIS) in North Africa has caused panic and brought to the fore the search for effective strategies to countering terrorism. Extremist groups are generally amorphous groups or figuratively speaking, – 'combatants without borders' who recruit terrorists who are willing to conduct attacks in their home countries and to travel abroad for this atrocious purpose. With steady funding from drug trafficking and hostage taking, the transnational nature of the actors, the porosity of borders along with the reduction of the area through modern means of communication tend to favour the propagation of the extremism on the continent.[7]

Article 4(o) of the Constitutive Act of the African Union (AU) calls for 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities', which is underscored in the preamble as the need to promote peace, security and stability as a prerequisite for the implementation of Africa`s development agenda.[8] The ninth recital of the preamble of the AU Convention on the Prevention and Combating Terrorism notes that 'terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of States'.[9] Further, the first recital of the preamble of the Protocol to the AU Convention on the Prevention and Combating Terrorism highlights 'the growing risks of linkages between terrorism and mercenarism, weapons of mass destruction, drug trafficking, corruption, transnational organised crimes, money laundering, and the illicit proliferation of small arms'.[10] While the AU has established an impressive legal framework to address

7 See generally A Botha 'Africa's vulnerability to terrorism and its ability to combat it in Africa' in Okumu & Botha (n 2 above) 23-41.

8 The Constitutive Act of the African Union (adopted in 2000 at the Lomé Summit (Togo), entered into force in 2001) available at http://www.au.int/en/about/constitutive_act (accessed 20 February 2015).

9 African Union (AU) Convention on the Prevention and Combating Terrorism (adopted at the 35th Ordinary Session of the OAU Ordinary Summit held in Algiers, Algeria, in July 1999 available at http://www.au.int/en/sites/default/files/OAU_CONVENTION_PREVENTION_COMBATING_TERRORISM.pdf (accessed 10 March 2015).

10 Protocol to the AU Convention on the Prevention and Combating of Terrorism available at http://www.au.int/en/sites/default/files/PROTOCOL_OAU_CONVENTION_ON_THE_PREVENTION_COMBATING_TERRORISM.pdf (accessed 20 February 2015).

radicalisation and extremism and to combat terrorism, what is needed is not only the political will to implement and enforce the law but also, as this Chapter outlines below, a strategy to eradicate the causes of extremism.

How to eradicate extremism in Africa

In an effort to facilitate information-sharing among member states, the UN Working Group embarked on a mapping exercise with the objective of creating an inventory of counter- radicalisation and de-radicalisation measures implemented by its member states. The Working Group identified eleven key strategic issues (or types of programmes), involving counter-radicalisation and de-radicalisation measures implemented by some states. These are: (1) engaging and working with civil society; (2) prison programmes; (3) education; (4) promoting alliance of civilisations and inter-cultural dialogue; (5) tackling economic and social inequalities; (6) global programmes to counter radicalisation; (7) the internet; (8) legislation reforms; (9) rehabilitation programmes; (10) developing and disseminating information; and (11) training and qualifying agencies involved in implementing counter-radicalisation policies.[11] Therefore, to address radicalisation and extremism that lead to terrorism on the continent, African states need to build on these strategies and integrate an anthropological dimension that capitalises on the diverse cultural, religious and political resources including dialogue, mediation and socialisation on the continent.

Conflict prevention through broad-based socioeconomic development

There is an implicit recognition among many states that economic and social inequalities (real or perceived) fuel discontent and encourage grievances that create conditions conducive to the spread of terrorism.[12] Although not all individuals who share the same fate of deprivation turn to terrorism, terrorism is always the action of a few within the larger group or community. When people – especially young people – feel entirely trapped in impoverished communities, where there is no order and no path for advancement, where there are no educational opportunities, where there are no ways to support families, and no escape from injustice and the humiliations of corruption – that feeds instability and disorder, and makes those communities ripe for extremist recruitment. Therefore, to counter violent extremism, states should confront these socio-economic grievances. Hence, governments should formulate policies that help young people to forge new collaborations in entrepreneurship and science and technology. In doing so, states should ensure broad-based development that creates growth and jobs, not just for the few at the top, but for the

11 UN Working Group Report (n 1 above) para 9.
12 UN Working Group Report (n 1 above) para 20.

many. Governments should ensure to promote economic growth and development, fighting corruption and encouraging other countries to devote more resources to education, including for girls and women.[13]

There is need to break the cycles of conflict that have become magnets for violent extremism by addressing underlying inequalities which fuel terrorist activity. Causal factors need to be delineated and measures implemented, which allow equal access to resources and sustainability for all people. Such activities empower citizens providing 'freedom from fear' and 'freedom from want'.[14] For example, the Netherlands authorities have undertaken several policies to address discrimination, including in the labour market, as well as to equip youth with the skills they require to find work. They have also provided financial resources for language training and to encourage young people to complete their schooling, and have increased support for parents to help them equip their children to participate in Dutch society.[15] To promote broad-based growth, the AU has encouraged its member states to ensure the successful implementation of their economic development and poverty alleviation policies and programs. In this respect, the AU Commission seeks to work with the African Development Bank and the United Nations Economic Commission for Africa, to provide the necessary support to member states.[16]

Countering extremism with respect for human rights and humanitarian law

Oftentimes, counterterrorism programs trample on human rights. Strategies such as gathering intelligence, using military force, and enforcing the law cannot by themselves solve – and, when misused, can exacerbate – the problem of violent extremism. Such measures should, therefore, be developed and implemented in full compliance with international law – in particular, with international human rights and

13 D Kuwali 'Just peace: Achieving peace, justice, and development in post conflict African countries' Policy Paper, Africa Peacebuilding Network, New York, Social Science Research Council (2014) 17-18. available at http://webarchive.ssrc.org/workingpapers/APN_WorkingPapers02_Kuwali.pdf (accessed 10 May 2015).

14 This can take many forms including the provision of clean drinking water, education, vaccination programs, provision of food and shelter and protection from violence, military or otherwise. Successful human security campaigns have been characterised by the participation of a diverse group of actors including governments, non-government organisations (NGOs), and citizens.

15 UN Working Group Report (n 1 above) para 21.

16 See African Union 'Statement delivered by the African Union Commissioner for Peace and Security, Ambassador Smäil Chergui, at the Ministerial Component of the White House Summit to Counter Terrorism' available at http://www.peaceau.org/uploads/auc.cps.statement.wh.summit.violent.extremism.19.02.2015.pdf (accessed 10 March 2015).

humanitarian law as well as with the principles and purposes of the UN Charter.[17] At the same time, states should be seen protecting the rights as well as the safety and security of individuals, not just monitoring their religious and political expression.[18]

At the same time, when governments oppress their people, deny human rights, stifle dissent or marginalise ethnic and religious groups, or favor certain religious groups over others, they create an environment that is ripe for terrorists to exploit. When peaceful, democratic change is impossible, it feeds into the terrorist propaganda that violence is the only answer available. Such violations make those communities more vulnerable to being recruited.[19] As violent extremists might seek to destabilise governments and sow internal frictions within societies, it is important that governments uphold and preserve democratic principles, and promote the rule of law to address these challenges. States should behave in a way so that victims of hate crimes and violent extremism know that government agencies are there to protect their rights, safety and security, not just monitor their religious and political expression.[20]

Capability of security agents to protect populations at risk

Firstly, there is need for security agents to train and attain capacity in countering radicalisation. Such training is crucial to improve the cultural competence of counter-radicalisation agencies, qualify them to do their jobs and equip them with essential knowledge and capability to protect populations at risk. Secondly, security and law enforcement agents should have a deterrent capability including show of decisive force to deter attacks against civilians. This is because deterrence is the best way to stop violent extremism at the lowest cost and risk. As such, the presence of troops (show of force) in areas infested by extremists can have a significant deterrent effect. The show of force should be accompanied by credible political statements. Thirdly, troops and law enforcement officers should have the capacity to execute arrest of armed extremists. This view arises from the fact that the failure to arrest and punish extremists compromises the protection of civilians and promotes the proliferation of violent extremism. Although the International Criminal Court (ICC) has the jurisdiction to prosecute perpetrators of such atrocities against humanity, the Hague-based court does not have its own police force to arrest suspects

17 See also G Kegoro 'The effects of counter-terrorism measures on human rights: The experiences of East African Countries' in Okumu & Botha (n 2 above) 51-57.

18 White House Office of the Press Secretary 'Statement from the Press Secretary on the White House Summit on Countering Violent Extremism' 11 January 2015 available at http://www.whitehouse.gov/the-press-office/2015/01/11/statement-press-secretary-white-house-summit-countering-violent-extremis (accessed 9 March 2015).

19 In Syria for example, Assad's war against his own people and deliberate stoking of sectarian tensions helped to fuel the rise of *Islamic State of Iraq and the Levant* (ISIL).

20 See also J Kollapen 'Human rights, terrorism and the interests of a secure society' in Okumu & Botha (n 2 above) 131-134.

for purposes of bringing them to justice.[21] Therefore, troops and law enforcement agents should have the capability to arrest armed extremists and bring them to justice.[22]

Community empowerment to deter extremist groups and control borders

Extremist groups may sometimes promise services and food supplies to communities in areas they control in order to win support of the locals. Thus, to prevent people from being susceptible to the false promises of extremism, the international community should offer better opportunities and access to social services. To this end, article 3(1)(a) of the Protocol to the AU Convention on the Prevention and Combating of Terrorism requires states to 'take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism'.[23] Countering Violent Extremism (CVE) efforts are effective where there are well-informed and resilient local communities. Investing in contacts with local communities not only facilitates and accelerates the process of information gathering, but can also act as an early observation or recognition system of any violent extremist tendencies, hence permitting an early and effective counter-strategy.[24] For this reason, states should empower communities to protect themselves from violent ideologies and recruitment through public awareness and provision of policing services. In the United States, for example, several states have embarked on building CVE frameworks integrating a range of social service providers, including education administrators, mental health professionals, and religious leaders, with law enforcement agencies to address violent extremism as part of the broader mandate of community safety and crime prevention.[25]

There is need to explore how development and other relevant foreign assistance could contribute to addressing populations at risk of recruitment by violent extremists and the conditions conducive to radicalisation to violence. More advanced and richer countries should help less advanced and poorer countries to build up their security forces so that they can prevent ungoverned spaces where terrorists find safe haven, and to deter

21 The International Criminal Court (ICC) depends upon the cooperation of states to arrest and surrender those indicted by the Court. Where such support or cooperation is not forthcoming, the perpetrators may go scot-free, thereby defeating the purpose of the establishment of the ICC.

22 D Kuwali 'Humanitarian rights: Enforcement of international humanitarian law by the African Court of Human Rights' (2011) *African Yearbook of International Humanitarian Law* 175-174.

23 Protocol to the AU Convention on the Prevention and Combating of Terrorism (n 10 above).

24 UN Working Group Report (n 1 above) para 10.

25 See generally C Mayson 'Engaging religious communities and building partnerships' in Okumu & Botha (n 2 above) 77-80. See also White House Press Statement on Countering Violent Extremism (n 18 above).

them from committing their atrocious acts. On its part, the UN Working Group Report has recommended the creation of 'Global Programmes to Counter Radicalisation and Build Capacity in Third Countries'.[26] More importantly, governments must take robust measures to monitor and regulate their borders to keep away terrorists and their weapons while welcoming all legitimate travellers and commerce.

Choking off extremists' financing

Securing and sustaining funding is at the heart of any extremist or insurgent organisation's success, but it is also its Achilles' heel. It has been observed that skilful financial management is at the heart of the success of any extremist or insurgent organisation. Securing and sustaining funding is the key to moving from fringe radical group to a more planned and organised terrorist organisation. Funding is clearly the lifeblood of such organisations but it is also their Achilles' heels.[27] Generally, terrorist groups can draw on financing in two primary ways: internally, through illegal taxation and trade, as well as proceeds from kidnap and ransom; and externally, from donors sympathetic to their causes.[28]

As observed across northern Syria and Iraq, however, starving extremists of financing is no easy task once they evolve from external reliance to internal self-sufficiency. This is why there is need for concerted efforts by countries and individuals to suffocate extremists from funding through legislative frameworks such as anti-money laundering and other anti-corruption strategies.

Reports that the US Central Intelligence Agency (CIA) paid Al-Qaeda ransom to free an Afghan diplomat are disturbing.[29] To suffocate terrorists groups, the AU Assembly has strongly condemned the payment of ransom to terrorist groups in exchange for the release of hostages, and suggested

26 See also A du Plessis 'The role of the United Nations in providing technical assistance in Africa' in Okumu & Botha (n 2 above) 85-92. See UN Working Group Report (n 1 above) para 22.

27 This explains why the United States (US)-led coalition against ISIS has directed a considerable portion of its air strike effort against the oil refineries and smuggling routes believed to be the mainstay of the group's financial survival in the belief that disrupting funding sources to precipitate its demise.

28 Often from Gulf state countries, sometimes referred to as the 'Golden Chain'. But not all groups control territory containing populations ripe for taxation and extortion. Based in the vast, sparsely inhabited regions across the Sahara and Sahel, AQIM raises its funding from two main sources: abduction of foreign tourists and workers for ransom in a trade which is believed to have earned the group close to $100m over five years; and control over smuggling routes for drugs which are flown in from Latin America along 'Highway 10' – referring to the 10th parallel – as the most direct route across the Atlantic en route to Europe.

29 G Korte 'Report: CIA paid Al-Qaeda ransom to free official' *USA Today* 16 March 2015 2A.

that the payment of ransom to terrorist groups be considered a crime.[30] Following the AU's suggestion, the UN Security Council adopted Resolution 2133 (2014), which reaffirms earlier Security Council decisions requesting member states to prevent and suppress the financing of terrorist acts and refrain from providing any form of support to entities or persons involved in terrorist acts, as well as to prohibit their nationals or any persons or entities within their territories from making any funds, financial assets or economic resources available for persons and entities involved in the commission of terrorist acts. Resolution 2133 calls upon UN member states to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.[31] Hence, states and individuals need to make concerted efforts to cut extremists off from funding by legislative means, such as outlawing money laundering, and the use of other anti-corruption strategies, such as condemning the payment of ransom to terrorist groups in exchange for the release of hostages.[32]

Combating corruption and promoting the rule of law and good governance

Lasting stability and real security require democracy. Countries that are emerging and developing should create structures of governance and transparency so that any assistance provided actually works and reaches people. This entails free and periodical elections where people can choose their own future, and independent judiciaries that uphold the rule of law, and police and security forces that respect human rights, and free speech and freedom for civil society groups. And it means freedom of religion – because when people are free to practice their faith as they choose, it helps to hold diverse societies together. Governments should step up efforts against corruption, so a person can go about their day and an entrepreneur can start a business without having to pay a bribe. Governments should expand education, including for girls. There is also need to expanding opportunity, including for women since there cannot be sustainable development without the contributions of their women.

On its part, the UN has central role to play in efforts to address violent extremism and the comprehensive framework that the UN Global

30 African Union'Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa at the Peace and Security Council 455th Meeting at the Level of Heads of State and Government, Nairobi, Kenya' available at http://cpauc.au.int/en/content/report-chairperson-commission-terrorism-and-violent-extremism-africa-peace-and-security-co-0 (accessed 10 March 2015) para 44.

31 UN Doc UNSC/RES/2133 (2014) adopted on 27 January 2014.

32 African Union 'Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa at the Peace and Security Council 455th Meeting at the Level of Heads of State and Government, Nairobi, Kenya' para 44, available at http://cpauc.au.int/en/content/report-chairperson-commission-terrorism-and-violent-extremism-africa-peace-and-security-co-0 (accessed 10 March 2015).

Counter-Terrorism Strategy offers for addressing the conditions conducive to the spread of terrorism. In line with the Strategy, the Working Group aims to help identify programmes and initiatives directed at furthering, *inter alia*, the dialogue, respect, tolerance and understanding among civilisations, cultures, peoples and religions; social inclusion of the marginalised; countering incitement to commit terrorist acts; and human rights and the rule of law.[33] In line with article 2(b) of the AU Convention on Prevention and Combating of Terrorism, states should, as a matter of priority, sign or ratify, or accede to, the international instruments condemning terrorism and other forms of extremist violence.

Curbing terrorist propaganda and recruitment through the internet

Nearly 70 per cent of the African population is under the age of 30. As the youth in Africa are becoming more tech-savvy, extremist groups are taking advantage of the poverty and high rate of unemployment among the youth by manipulating them with promises of quick gains. Violent extremists have also used the social media as a virtual training camp by establishing various forms of online, private, person-to-person or group communication to exchange experience and knowledge. Violent extremists have successfully turned the brighter side of the internet – low cost, ease of access, lack of regulation, vast potential audience, and fast communication and flow of information – to its darker side by using it as a means to achieve for propaganda and attract recruits.[34] Governments have toiled with the question of how to limit terrorist abuse of the social media. The debate centres around whether governments should intervene through censorship, monitoring and counter-propaganda programmes, or allow the free-flow of online traffic to avoid undermining democratic values such as freedom of expression.[35] As a way forward, mechanisms should be established, in collaboration with internet service providers, to monitor websites that facilitate and encourage violent extremism and recruitment. In this way, internet sites that incite hatred and violent extremism can either be shut down or systematically monitored and investigated in order to counter radicalisation and curb brainwashing and indoctrination.[36]

For example, Nigeria has organised several seminars on combating terrorism through the internet, including the organisation of capacity building and training on law enforcement and digital technologies for all agencies involved in countering radicalisation, as well as the initiation of

33 UN Working Group Report (n 1 above) para 3.
34 See B Wilson 'Detection and prevention of terrorist threats' in Okumu & Botha (n 1 above) 103-105. See also UN Working Group Report (n 1 above) para 24.
35 UN Working Group Report (n 1 above) para 25.
36 UN Working Group Report (n 1 above) para 26. See also S Lone 'Terrorism, media and the search for an African voice' in Okumu & Botha (eds) (n 2 above) 123-126.

online projects aimed at undermining the capacity of violent extremists to propagate violent ideologies through the internet.[37] Another example is in the United Kingdom where the government has been using the internet as an instrument to support mainstream voices to articulate a moderate understanding of various religions in the country.[38] In the same vein, the European Commission-sponsored 'Check the Web' project, proposes a common European approach to internet-monitoring based on strengthened cooperation and coordinated monitoring and evaluation of open internet sources.[39]

Counter-radicalisation and de-radicalisation programs

Extremists are made, not born, and are therefore receptive to de-radicalisation.[40] De-radicalisation involves programs directed at radicalised individuals to dissuade them from violence and reintegrate them into society through, for example, psychological counseling, vocational education, and employment, and by preventing incarceration facilities from becoming breeding grounds for extremists. Counter-radicalisation, on the other hand, aims to protect people from extremism by addressing conditions that may propel individuals to become extremists. It involves undermining leadership, challenging ideology, exposing hypocrisy, and providing incentives to withdraw from extremist groups.[41]

The political exclusion, religious alienation, and social isolation in a community can play a role in how someone becomes radicalised. Usually, extremists tend to brainwash their audiences that some countries, religions, policies or cultures are hostile to others. When people spew hatred towards others because of their faith, race, ethnicity, culture or such other status, it feeds into extremist narratives. If entire communities feel they can never become a full part of the society in which they reside, it breeds a cycle of fear and resentment and a sense of injustice upon which extremists prey. In this way, what propels individuals to join radical groups is the quest for personal significance. For example, when people feel alienated from society or they see the opportunity in gaining significant personal gain such as becoming a hero or martyr; then, they become attuned to those narratives that provide a means to achieve that very goal.

37 UN Working Group Report (n 1 above) para 24. See also Kollapen (n 20 above) 131-134.
38 UN Working Group Report (n 1 above) para 24.
39 See Lone 'Terrorism, media and the search for an African voice' (n 36 above) 123-126. UN Working Group Report (n 1 above) para 27.
40 Africa Defense Forum (ADF) 'Extremists are made, not born' *Countering Terrorist Recruitment* 45 (date of publication not known).
41 See Statement by the AU Commissioner for Peace and Security, Ambassador Smäil Chergui at the White House Summit to Counter Terrorism (n 16 above).

On the one hand, the term counter-radicalisation refers to policies and programmes aimed at addressing conditions that may propel individuals down the path of terrorism. In this sense, the term counter-radicalisation is used broadly to refer to a package of social, political, legal, educational and economic programmes, specifically designed to deter disaffected (and possibly already radicalised) individuals from crossing the line and becoming terrorists. In other words, counter-radicalisation is the process of preventing and protecting people from radicalisation. Counter-radicalisation includes a range of strategies such as undermining leadership, challenging ideology, exposing hypocrisy and incentivising withdrawal from terrorist groups.[42] The term de-radicalisation, on the other hand, is used to refer to programmes that are generally directed at individuals who have become radical with the aim of re-integrating them into society or at least dissuading them from violence.[43] That is to say, re-integration and resettlement of ex-extremists, which is akin to demobilisation, disarmament and reintegration (DDR) processes in post-conflict settings. Such initiatives seek to rehabilitate disengaged extremists and support their reintegration into their communities. Such initiatives are already underway in Somalia and will soon be expanded to other AU member states.[44] Another way to de-radicalise people is to provide psychological counseling and vocational education. Countries such as Germany and Denmark have implemented such programs, to fulfill the quest for personal significance in a positive way.[45] The programmes aim, for example, at ensuring that ex-extremists have employment and education in order re-integrate them into society.

Reforms in correctional facilities in several countries have developed special programmes aimed at preventing incarceration facilities from becoming breeding grounds for extremists and a pool for recruitment.[46] Initiatives that promote an alliance of civilisations and foster inter-cultural understanding to counter radicalisation have been launched in New Zealand through co-sponsorship of the 'Asia-Pacific Interfaith Dialogue,' which brings together 15 representatives of the major faith and community groups in the Southeast Asian and South Pacific regions.[47] The Swiss Federal Department of Foreign Affairs has made 'religio-political conflicts' a special priority and launched the 'Montreux Initiative' in cooperation with Islamic charities and the Graduate Institute of International and Development Studies in Geneva to improve trust and

42 Africa Defense Forum 'Exiting terror: How government can draw defectors' (n 40 above) 45.
43 UN Working Group Report (n 1 above) para 8.
44 See Statement by the AU Commissioner for Peace and Security, Ambassador Smäil Chergui at the White House Summit to Counter Terrorism (n 16 above).
45 UN Working Group Report (n 1 above) para 8.
46 UN Working Group Report (n 1 above) para 13
47 UN Working Group Report (n 1 above) para 18. See also Mayson 'Engaging religious communities and building partnerships' (n 25 above) 77-80.

understanding between the Swiss federal authorities and charitable organisations.[48]

Condemning violence and correcting misinterpretations

Usually desperate for legitimacy, extremists manipulate ideologies to justify their violence and recruitment. Categorically condemning all acts of violent extremism and correcting misinterpreted ideologies espoused by extremists is thus imperative. Since extremists brainwash young impressionable individuals, leaders and clerics at all levels should provide clear and correct understanding of cultural, religious, and political diversity, including the principle of unity in diversity, and promote tolerance and cooperation among youths from all quarters of the globe. [49]

It is generally accepted that no political ideology, religion or culture is responsible for violence and terrorism. This is where leaders and clerics at all levels have the duty to counter extremist ideologies by correcting misinterpreted and distorted notions espoused by extremists to incite people to violence. It is the responsibility of religious and community leaders to exclude from the community and report to the authorities those extremists who pose a danger to the community.

For example, where groups such as Boko Haram [a Kanuri dialect in Nigeria meaning 'Western education is forbidden'] and al-Shaabab are deliberately targeting their propaganda to Muslim communities, particularly Muslim youth, Imams, clerics and scholars should correct twisted interpretations of Islam and debunk theories of a 'clash of civilizations'.[50] Likewise, Christian clerics should clearly and explicitly reject narratives that Christianity is at war with Islam or that it seeks to suppress Muslims. On a positive note, it is encouraging to see that Muslim clerics have been working for peace with Christian pastors and priests in Nigeria and the Central African Republic (CAR) to put an end to the cycle of hate in those countries. The AU is also engaging the media through the AU created Network of African Journalists for Peace (NetPeace) for it to be an active partner in countering terrorist narratives and delegitimising violent ideologies.[51]

48 UN Working Group Report, para 19. See also Mayson 'Engaging religious communities and building partnerships' (n 25 above).
49 See Mayson (n 25 above).
50 See generally, SP Huntington 'Clash of civilizations' available at http://www.hks.harvard.edu/fs/pnorris/Acrobat/Huntington_Clash.pdf (accessed 3 April 2015).
51 Ambassador Smäil Chergui (n 16 above).

Communication through cross- and intra-cultural, faith and political dialogue

Promoting an alliance of civilisations and encouraging intercultural dialogue are important for cultivating a culture of peace and unity in diversity, as well as for bringing about understanding, respect, and tolerance among religious and cultural communities and combating stereotypes and dismantling prejudices on all sides. There is need for a concerted effort to counter extremism to cultivate a culture of peace, tolerance, inclusion, and acceptance of the concept of 'unity in diversity' by amplifying such positive African values, especially online. Promoting an alliance of civilisations and encouraging inter-cultural dialogue are important tools in promoting understanding, respect and tolerance among religious and cultural communities and combating stereotypes and dismantling prejudices on all sides. As such, there is need to build and bolster bridges of communication and trust to eradicate extremism through dialogue. Beginning and maintaining dialogue may not be easy, however, because extremists are not part of a centralised organisation but rather comprise factions that subscribe to varying degrees of extremism. In the words of King Abdallah:[52]

> [Dialogue] stems the flow of blood and rejects sectarianism, ignorance and extremism; it allows peace to prevail around our world … [Teachers] must prepare their students for living in a way that accepts the 'other,' to debate with them in the best way possible. The educational curriculum is a suitable environment for making the student familiar with dialogue, and that any disagreement can be solved with dialogue and debate.

Thus, schools and other educational establishments can play a crucial role in the development of a resilient community that upholds values of nonviolence, peaceful coexistence, and tolerance.

This is why education features highly in the counter-radicalisation programmes developed by most states.[53] To combat extremism, there is a need to find solution to the issue of the duality of education systems, which carry the seed of protest, marginalisation, and frustration of the disciples of radicalism that can be exploited by extremists. For instance, efforts to use education as a means to counter violent extremist ideology in the United States have included programmes designed specifically to reach out to youth, as well as to marginalised groups and racial and religious minorities.[54] On its part, the AU has facilitated open discussions and engagement between state authorities and civil society, including religious

52 A Al-Awsat 'King Abdullah: We will eradicate terrorism, religious extremism' 6 October 2014, available at http://www.aawsat.net/2014/10/article55337252/king-abdullah-we-will-eradicate-terrorism-religious-extremism (accessed 20 December 2014).
53 UN Working Group Report (n 1 above) para 15.
54 n 1 above, para 16.

authorities and women's organisations. The AU seeks to use the Nouakchott Process, to engage in outreach campaigns, open fora and consultations to allow communities to air their grievances and contribute actively to efforts to counter extremist ideologies.[55] As such, African states should build and bolster bridges of communication and trust to eradicate extremism through dialogue and amplify positive values, especially online.

Conclusion

When governments oppress the people and deny their human rights, particularly along sectarian lines or ethnic lines, they sow the seeds of extremism and violence. The horrendous events in the CAR, Egypt, Kenya, Libya, Nigeria and Somalia have brought to the fore the plight of innocent civilians as a result of proliferation of extremism and terrorism on the continent. These cycles of extremism should not be allowed to tear the fabric of African cultural, political and religious diversity. Leaders at all levels should encourage dialogues across and within faiths, cultures, political groupings and across countries. To this end, religious and community leaders should play their role in tackling the root causes of extremism and terrorism, by providing young people with the best examples of how to engage in dialogue with other people and cultures and how to treat them well. Ex-extremists also have the responsibility in debunking terrorist ideologies. Education is one of the most effective tools that can eradicate extremist attitudes.

Governments should formulate targeted policies that undistorted political and religious ideologies can be more widely heard, and thereby remedy the clear lack of alternatives to the radical discourse that is fuelled by social injustice and the lack of socialisation frameworks. By working with the civil society and local communities, governments can help counter extremist ideologies and promote peaceful dialogue. As such, there is need for a concerted effort to counter extremism to cultivate a culture of peace, tolerance, inclusion, and acceptance of unity in diversity by amplifying such positive African values, especially online.

Violent extremism and terrorism should not be associated with any religion, nationality, civilisation, or ethnic group. Some people become extremists, but it is not because of the religion – it is because of themselves as individuals. Instead of being entangled in terminology, dealing with extremism is, in fact, dealing with criminality. Obviously, military might cannot eradicate extremist ideology. At best, military force can

55 Ambassador Smäil Chergui (n 16 above).

temporarily limit the ability of extremists to perpetrate mindless acts of terror.[56] Using strategies such as intelligence gathering, military force, and law-enforcement alone to curb extremism can exacerbate extremism when misused. What is required is a holistic and multi-pronged counter-terrorism policy, which includes soft power mechanisms to win hearts and minds and addresses the core issues that result in the breeding, enablement and enactment of extremism.[57]

There is need for a multi-pronged approach to understand the end-to-end process of extremism, that is to say: the underlying ideology, the agents and locations of radicalisation, the people who are radicalised, the logistics of radicalisation, the people that fight radicals, and the capability of state institutions to handle extremism.[58] Most extremists are the youth who find themselves unemployed and face social and political exclusion, and it is no wonder that they resort to extremist violence. Hence, governments should formulate policies that ensure broad-based social and economic growth and development, including creating decent jobs, especially for the youth without discrimination, fighting corruption and equalisation of opportunities and access to social services such as education, especially for girls and women.

Countries and individuals have a responsibility to cut off funding that fuels hatred and corrupts young minds and endangers communities. Poverty, illiteracy and high rate of unemployment among the youth and the general population render them vulnerable to the manipulative messages of terrorist groups and their promises of quick gain.[59] As such, states should also focus more on human security, including prevention of conflicts and political instability as well as combating drug trafficking and other organised crime, which tend to finance terrorists and other extremist organisations.[60] The 'ten Cs' approach advanced here provides a roadmap for tackling these tasks and eradicating extremism in Africa by way of: (1) conflict prevention through broad-based socioeconomic development;

56 Military action will come to an end – war cannot be perpetual – and when it does, those who ceased to operate will return with their ideology intact, those who were killed will leave behind loved ones ripe for recruiting, and those already in the pipeline being brainwashed will be cited the death and destruction caused by this military action in order to further ingrain them with extremist ideology.

57 See generally, White House Summit Statement on Countering Violent Extremism (n 18 above).

58 H Bokhari 'Eradicating extremist ideology' 30 December 2014 available at http://pakteahouse.net/2014/12/30/eradicating-extremist-ideology/ (accessed 9 January 2015).

59 African Union 'Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa' (n 32 above).

60 On 8 September 2006, the General Assembly unanimously adopted the United Nations Global Counter-Terrorism Strategy. Member states embarked upon a new phase in their counter-terrorism efforts by agreeing on a global strategy to counter terrorism. The Strategy marks the first time that all member states of the United Nations have agreed to a common strategic and operational framework to fight terrorism. The Strategy forms a basis for a concrete plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to

(2) countering extremism with respect for human rights and humanitarian law; (3) capability of security agents to protect populations at risk; (4) community empowerment to deter extremist groups and control borders; (5) choking off extremists' financing; (6) combating corruption and promoting the rule of law and good governance; (7) curbing terrorist propaganda and recruitment through the internet; (8) counter-radicalisation and de-radicalisation programs; (9) condemning violence and correcting misinterpretations; and (10) communication through cross- and intra-cultural, faith and political dialogue.

take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism. The Strategy builds on the unique consensus achieved by world leaders at their September 2005 Summit to condemn terrorism in all its forms and manifestations.

CHAPTER 7

PROTECTION OF CHILDREN IN ARMED CONFLICTS

Cephas Lumina

Abstract: *The recruitment and use of children in armed conflicts has become a pervasive feature of modern conflicts. Despite an extensive array of laws prohibiting the recruitment and use of children in armed conflicts, armed forces and armed groups continue to enlist or conscript children and to deploy them in armed conflicts, exposing them to risk and depriving them of basic rights. This Chapter discusses the international legal framework for the protection of children in armed conflicts, highlighting the challenges of implementing commitments contained in this framework and holding those who violate the prohibitions on the recruitment and use of children in hostilities accountable. The Chapter also discusses the obligations to demobilise children associated with armed forces or armed groups and to reintegrate them into society, as well as the difficulties in implementing these obligations. The most effective way of protecting children from associating with armed forces or armed groups is by preventing their recruitment in the first place. Nevertheless, in the event that parties to hostilities flout the prohibition on the recruitment and use of children in armed conflicts, it is important to ensure that the perpetrators are held accountable, particularly through their prosecution and punishment for their crimes.*

Introduction

The recruitment and use of children in armed conflicts has become a pervasive feature of modern conflicts.[1] Despite the existence of an extensive legal framework prohibiting the recruitment and use of children in armed conflict and other global efforts to end recruitment of children and to prevent their participation in hostilities, armed forces and armed groups continue to enlist or conscript children and to use them to participate in armed conflict, exposing them to significant risk and

1 It should be noted, however, that the involvement of children in armed conflict is not a new phenomenon. Throughout history, children have participated in armed conflicts as combatants and in a variety of related roles. See, eg O Kucherenko *Little soldiers: How Soviet children went to war 1941-1945* (2011) 3; PW Singer *Children at war* (2005) 13; DM Rosen *Armies of the young: Child soldiers in war and terrorism* (2005) 54-55; N Davis *Rising '44: The battle for Warsaw* (2004) 603; S Pope *Dictionary of the Napoleonic Wars* (1999) 318; and MG Wessells 'Child soldiers' (1997) 53(6) *Bulletin of the Atomic Scientists* 32-39.

depriving them of some of their most basic rights.[2] Hundreds of thousands of children – boys and girls under the age of 18 years[3] – are currently involved in more than thirty armed conflicts in various regions around the world.[4]

Children are used in a wide variety of roles – as combatants, spies, guards, messengers, porters and cooks, and for sexual services.[5] Increasingly, children are being used as suicide bombers[6] or human shields.[7] This use of children violates their rights and occasions them physical, psychological, emotional and developmental harm.

Children have been subjected to armed conflicts for a variety of reasons. While many are abducted or forcibly recruited, others are constrained to join by poverty, abuse and discrimination, or to seek revenge for violence that they or their families have been subjected to.[8]

In this context, the present Chapter discusses the international legal framework for the protection of children in armed conflict, highlighting the

2 International Committee of the Red Cross (ICRC) *Children associated with armed forces or armed groups* (2013) 2.

3 Article 1 of the Convention on the Rights of the Child defines a child as '[e]very human being below the age of eighteen years unless under the law applicable to the child, the majority is attained earlier.' See also the African Charter on the Rights and Welfare of the Child (art 2) and International Labour Organisation (ILO) Convention No 182 on the Worst Forms of Child Labour (art 2).

4 Reports indicate that, in recent years, children have been involved in armed conflicts in Afghanistan, the Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq, Mali, Myanmar, Nigeria, the Philippines, Somalia, South Sudan, Sudan, Syria and Yemen. See A/HRC/28/54, Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui, 29 December 2014; Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (2012); ILO 'Child labour and armed conflict' available at http://www.ilo.org/ipec/areas/Armedconflict/lang--en/index.htm (accessed 8 February 2016).

5 ICRC *Children associated with armed forces or armed groups* (n 2 above) 4. There are a number of reasons why children are used as soldiers. They are easier to condition or brainwash, they do not need to be paid much by way of wages and they have an underdeveloped sense of danger and so are easier to send into the line of fire. In many countries affected by conflict, children constitute the majority of the population. Thus, they represent a ready source of potential recruits. Due to their size and perceived expendability, children are often deployed into hostilities as scouts or decoys, or sent in the first wave to draw enemy fire.

6 Children have been used as suicide bombers in Afghanistan, Pakistan, Somalia and Yemen. See S/2015/336, Report of the Secretary-General on Children and Armed Conflict in Afghanistan 15 May 2015 para 20. See also K Lakhani 'Indoctrinating children: The making of Pakistan's suicide bombers' 3 June 2010 available at https://www.ctc.usma.edu/posts/indoctrinating-children-the-making-of-pakistan%E2%80%99s-suicide-bombers (accessed 8 February 2016); IRIN 'Child suicide bombers 'victims of the most brutal exploitation' 12 February 2008 http://www.irinnews.org/report/76701/pakistan-child-suicide-bombers-victims-of-the-most-brutal-exploitation (accessed 8 February 2016).

7 Children have been used as human shields in Israel, Mali and Syria. See A/67/845-S/2013/245 Report of the Secretary-General on children and armed conflict 15 May 2013.

8 See C Lumina 'Child soldiers: War criminals or pawns in a deadly game?' (2007) *African Yearbook on International Humanitarian Law* 78-80.

challenges of implementing commitments contained in this framework and holding those who violate the prohibitions on the recruitment and use of children in hostilities accountable. The Chapter also briefly discusses the obligations to demobilise children associated with armed forces or armed groups and to reintegrate them into society, as well as the difficulties associated with putting these obligations into practice.

The impact of armed conflict on children

The impact of armed conflict on children is well-documented.[9] In her seminal report in 1996, for example, Graca Machel noted:[10]

> The physical, sexual and emotional violence to which they [children] are exposed shatters their world. War undermines the very foundations of children's lives, destroying their homes, splintering their communities and breaking down their trust in adults.

Children have been killed, severely injured or permanently disabled, orphaned or separated from their parents and families, uprooted from their homes and communities, subjected to sexual abuse and exploitation, and have suffered severe long-term psychological trauma as a consequence of being exposed to situations of extreme violence in armed conflict.[11] In many conflicts, children have been forced to participate in atrocities, including against their own families and communities (as a way to destroy family and communal ties) and often under the influence of drugs or alcohol. Studies show that their exposure to the brutality of war leaves children emotionally traumatised. Many experience nightmares, hallucinations and delusions long after the conflict has ended or they have been demobilised. Girls are frequently subjected to sexual and gender based violence and many contract sexually transmitted diseases including HIV/AIDS. Girls may also become pregnant or give birth during their time with armed forces or groups and, as a consequence, their families and communities often ostracise them upon their return.

9 See, eg, A/51/306 The impact of armed conflict on children: Report of the expert of the Secretary-General, Ms Graca Machel submitted pursuant to General Assembly Resolution 48/157, 26 August 1996; A/HRC/28/54 Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict paras 3-6, 31, 35; A/69/926-S/2015/409 Report of the Secretary-General on Children and Armed Conflict, 5 June 2015; S/2015/336 Report of the Secretary-General on Children and Armed Conflict in Afghanistan; Irish Forum for Global Health 'Enduring scars: Child soldiers and mental health' 13 December 2012 available at http://www.globalhealth.ie/enduring-scars-child-soldiers-and-mental-health (accessed 18 January 2016); JS Barbara 'Impact of war on children and imperative to end war' (2006) 47 *Croatian Medical Journal* 891-894.

10 A/51/306 *The impact of armed conflict on children* (n 9 above).

11 It has been reported that over the period 1998-2008, two million children were killed in conflict, over one million were orphaned, over six million were seriously injured or permanently disabled and more than 10 million were left with serious psychological trauma. See SOS Children's Villages International *'Children in conflict: Child soldiers*' http://www.child-soldiers.org/ (accessed 28 January 2016).

In addition, armed conflict deprives children of their basic economic, social and cultural rights, such as the rights to education and health (both physical and mental).[12] In a number of conflict situations, there have been indiscriminate attacks by the parties on educational and health infrastructure resulting in severely limited access to education and health services, particularly for children. According to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), an estimated 28 million children of primary school age in conflict-affected poor countries are not in school.[13] Studies also indicate that armed conflict increases children's vulnerability to infectious diseases and malnutrition because of reduced access to clean water and sanitation, inadequate food and shelter, and a lack of access to basic healthcare.[14]

In sum, war affects every aspect of children's lives and development. All of these impacts underscore the need for more robust measures to protect children from the threats that their involvement in armed conflict poses to their well-being and to hold those who recruit and use children in armed conflicts criminally responsible.

The international legal framework for protection

There is a wide range of international legal standards that seek to protect children from involvement in armed conflicts, or from the effects of armed conflict. Based on norms from the fields of international human rights law, international humanitarian law, international criminal law and international labour law, this legal framework broadly focuses on two core issues: (1) prohibiting or restricting the recruitment and use of children in armed conflicts; and (2) criminalising the recruitment and use of children in armed conflicts. These are briefly discussed below.

The prohibition and restriction of the recruitment and use of children in armed conflict

In the event of armed conflict, both international and non-international,[15] children benefit from the general protections provided to all civilians not

12 A/HRC/24/CRP.1 Oral update of the Special Representative for Children and Armed Conflict 4 September 2013 para 3; UNESCO Education for All Global Monitoring Report 2011, The hidden crisis: Armed conflict and education.

13 UNESCO (n 12 above).

14 See, eg, T Tamashiro 'The impact of conflict on children's health and disability' Paper Commissioned for the EFA Global Monitoring Report 2011 The hidden crisis: Armed conflict and education http://unesdoc.unesco.org/images/0019/001907/190712e.pdf (accessed 10 February 2016); BA O'Hara & DP Southall 'First do no harm: The impact of recent armed conflict on maternal and child health in Sub-Saharan Africa' (2007) 100 *Journal of the Royal Society of Medicine* 564-570; M Rieder & I Choonara 'Armed conflict and child health' available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3237260 (accessed 10 February 2016).

15 According to the International Criminal Tribunal for the former Yugoslavia (ICTY), a

participating in hostilities.[16] Because of their particular vulnerability and needs in the context of armed conflict,[17] however, the Third and Fourth Geneva Conventions of 1949 and their two Additional Protocols of 1977 provide for the special protection of children, including those who take a direct part in the hostilities.[18] While the Conventions do not explicitly address the participation of children in armed conflicts, the Additional Protocols specifically forbid the recruitment and use of children under the age of 15 by government forces and armed groups in both international and non-international armed conflicts. Article 77(2) of Additional Protocol I (AP I), applicable to international armed conflicts, states:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

It is notable, however, that the above provision does not impose an absolute ban on the use of children in armed conflict.[19] Furthermore, the phrase 'take a direct part in hostilities' suggests that children under the age of 15 years could be involved indirectly in hostilities (for example, as messengers, porters, etc). In its Decision on the Confirmation of Charges in *Prosecutor v Thomas Lubanga Dyilo*,[20] the Pre-Trial Chamber of the International Criminal Court (ICC) found that the phrase 'active participation' in hostilities as used in article 8(2)(e)(vii) of the Rome Statute of the International Criminal Court (the Rome Statute) means not only

non-international armed conflict 'exists whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' *Prosecutor v Dusko Tadic* Case No IT-94-1-AR72, para 70. See also *Prosecutor v Jean Paul Akayesu* Case No ICTR-96-4-T, para 619.

16 See the Fourth Geneva Convention (GC IV), arts 27-34; AP I, arts 48, 51 and 75; AP II, arts 4 and 13; and Common art 3 to the Geneva Conventions.

17 See J Crowe & K Weston-Scheuber *Principles of international humanitarian law* (2013) 91.

18 In summary, the relevant provisions are: evacuation and special zones – GC IV, arts 14, 17, 24(2), 49(3) and 132(2); AP I, art 78; AP II, art 4(3e); assistance and care – GC IV, arts 23, 24(1), 38(5), 50 and 89(5); AP I, arts 70(1) and 77(1); AP II, art 4(3); identification, family reunification and unaccompanied children – GC IV, arts 24-26, 49(3), 50 82; AP I, arts 74, 75(5), 76(3) and 78; AP II, arts 4(3b) and 6(4); education and cultural environment – GC IV, arts 24(1), 50 and 94; AP I, art 78(2); AP II, art 4(3a); arrested, detained or interned children – GC IV, arts 51(2), 76(5), 82, 85(2), 89, 94, 119(2) and 132; AP I, art 77(3) and (4); AP II, art 4(3d); exemption from the death penalty – GC IV, art 68(4); AP I, art 77(5); AP II, article 6(4). Children who take a direct part in international armed conflict are recognised as combatants and, in the event of their capture, are entitled to prisoner-of-war status under the Third Geneva Convention.

19 S Junod 'Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)' in Y Sandoz, C Swinarski & B Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1380, para 4557.

20 Case No ICC-01/04-01/06 (*Lubanga* case).

direct participation in hostilities (that is, combat), but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.[21] In the Conviction Decision in the same case, the majority of the Trial Chamber found that 'active' and 'direct' participation in hostilities were distinct concepts and that 'active' denoted a broader range of activities than 'direct.' The Trial Chamber held that

> [t]he use of the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation' (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence.[22]

In determining the range of activities that may fall within the crime of use 'to participate actively in hostilities,' the Trial Chamber found that

> [t]he decisive factor […] in deciding if an 'indirect' role is to be treated as active participation is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.[23]

On appeal, the Appeals Chamber, while upholding Lubanga's conviction as a co-perpetrator of the crimes of conscripting and enlisting children into an armed group and using them to participate actively in hostilities, rejected the Trial Chamber's interpretation of 'active participation.'[24] The Appeals Chamber noted that in the context of Common Article 3 of the Geneva Conventions, 'active' and 'direct' participation in hostilities are used interchangeably. Nevertheless, it found that the term 'participate actively in hostilities' in article 8(2)(e)(vii) of the Rome Statute does not have to be accorded the same interpretation as the terms 'active' or 'direct' participation in the context of the principle of distinction between combatants and civilians, as set out, in particular, in Common Article 3 of

21 *Lubanga* case, Conviction Decision, 14 March 2012, para 261.

22 *Lubanga* case, Conviction Decision, para 627. See also *Prosecutor v Bosco Ntaganda*, Case No ICC-01/04-02/06.

23 *Lubanga* case, Conviction Decision, para 628. The Trial Chamber's interpretation has come under severe criticism, with some commentators arguing that it may have unintended, negative consequences, including children not participating in armed conflict being excluded from the protection accorded to them under international law. These commentators have contended that for the purpose of the principle of distinction under international humanitarian law the terms 'active participation' and 'direct participation' in hostilities are considered as synonymous. As such, extending the definition of what constitutes active participation might have the unintended result that civilian children would lose their protection under international humanitarian law. See, eg, N Urban, *Direct and active participation in hostilities: The unintended consequences of the ICC's decision in Lubanga*, 11 April 2012, available at http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccs-decision-in-lubanga/ (accessed 28 January 2016); C Aptel 'Lubanga decision roundtable: The participation of children in hostilities' 18 March 2012, available at http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities (accessed 28 January 2016).

24 *The Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06 A 5 (Appeal Decision).

the Geneva Conventions and that the interpretation given to Common Article 3 in the context of the principle of distinction cannot simply be transposed to that of article 8(2)(e)(vii) of the Statute. Rather, the term 'participate actively in hostilities' must be given an interpretation that takes into account the purpose of that provision.[25] In the Appeals Chamber's view, this approach was supported by article 77(2) of AP I and 4(3)(c) of Additional Protocol (AP II). In this regard, the Appeals Chamber noted that article 77(2) of AP I refers to children taking a *'direct* part in hostilities' (emphasis in original) while article 38(2) of the Convention on the Rights of the Child (CRC) employed similar language. The Appeals Chamber found that the provisions of international humanitarian law do not establish that the phrase 'participate actively in armed hostilities' should be construed so as to only refer to forms of direct participation in armed conflict as understood in the context of the principle of distinction and Common Article 3 of the Geneva Conventions. Furthermore, it was evident from rule 137 of the ICRC Study on Customary International Humanitarian Law that '[c]hildren must not be allowed to take part in hostilities,' both international and non-international. The Appeals Chamber concluded that the Trial Chamber had erred insofar as it held that 'use to participate actively in hostilities' entails that the child provides support to the combatants which exposes him or her to real danger as a potential target.[26] Thus, as opposed to the Trial Chamber, the Appeals Chamber adopted an expansive interpretation of the term 'active participation in hostilities' in order to ensure justice and protection for all children in armed conflict.

In the event that, notwithstanding the prohibitions contained in paragraphs 1 and 2 of article 77, children below the age of 15 years 'take a direct part in hostilities and fall into the power of an adverse party,' the special protections that international humanitarian law affords children by virtue of their age remain applicable, whether or not they are prisoners of war.[27] This special protection includes: special respect, protection against indecent assault, 'the care and aid they require' (article 77(1)), and quarters that are in principle 'separate from the quarters of adults' (article 77(4)).[28]

Article 78 of AP I is designed to prevent the arbitrary evacuation of children to a foreign country. The provision prohibits the evacuation of children in principle but recognises that exception may be made where such evacuation is in their interest, namely, 'where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require.' For these exceptional cases, there are

25 *Lubanga* case, Appeal Decision, para 325.
26 *Lubanga* case, Conviction Decision, para 628; Appeal Decision, para 332.
27 AP I, art 77(3).
28 See F Kalshoven & L Zegveld *Constraints on the waging of war: An introduction to international humanitarian law* (2001) 130.

several rules that must be observed in arranging and carrying out the evacuation.

AP II, applicable to non-international armed conflicts, contains protective provisions similar to those in AP I. Notably, article 4(3)(c) of AP II broadens the prohibition on recruitment and deployment of children in hostilities to cover armed groups but does not make a distinction between direct or indirect participation. It states that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.' This prohibition also covers accepting voluntary enlistment.[29] In other words, not only can a child not be recruited, or enlist himself or herself, he or she will not be allowed 'to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.'[30]

It should be noted that, as regards the conduct of parties to the conflict, the provisions of AP II are less restrictive than those contained in AP I and its application is confined to conflicts which meet the benchmarks laid out in article 1. In terms of this article, AP II applies to all conflicts which are not covered by AP I, that take place in the territory of a state that is a party to the Protocol, between its armed forces and rebel armed groups or other organised armed groups. Non-state armed groups must be under responsible command and exercise sufficient control over part of the state's territory as to enable them to, firstly, carry out repeated and concerted military operations, and secondly, to implement the Protocol. Therefore, there are non-international armed conflicts in which both Common Article 3 and AP II apply and those in which only Common Article 3 applies. Unlike AP II, however, Common Article 3 does not require state armed forces to be involved in the conflict and it is applicable at a much lower level of intensity.

The CRC, which has achieved near-universal ratification,[31] bolsters many of the protections for children provided by international humanitarian law. Article 38(1) of the CRC, which derives from article 77(2) of AP I, imposes an obligation on state parties 'to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child'. Under article 38(2), state parties are obliged to take 'all feasible measures to ensure that' persons under the age of 15 years do not take a direct part in hostilities. Under article 38(3), state parties are prohibited from recruiting children under 15 into their armed forces and are required, in recruiting children who have

29 In the *Lubanga* case, the ICC accepted that the line between voluntary and involuntary recruitment is legally irrelevant in the context of children's association with armed forces or armed groups.
30 Junod (n 19 above).
31 As of February 2017, there were 196 state parties to the Convention.

attained the age of 15 years but are under the age of 18, to endeavour to give priority to those who are oldest.

Additionally, the CRC stipulates obligations of states in a number of areas which are directly relevant to children associated with armed forces or groups, or at risk of being involved with armed forces or groups. These include the protection of separated and unaccompanied children; treatment under the juvenile justice system; the prohibition of torture and the unlawful or arbitrary deprivation of liberty; and the recovery and social reintegration of children victims of neglect, exploitation or abuse, torture, ill treatment or punishment, as well as of armed conflicts.[32]

It is worth mentioning that the CRC contains no derogation provision and it is generally considered to be non-derogable during armed conflicts. It has been asserted, however, that the CRC is 'not suited to the realities of conflict' and, in particular, that the body responsible for monitoring the CRC, the Committee on the Rights of the Child, is unable to respond in situations of emergency, and cannot make *ad hoc* recommendations concerning, or comment on, situations in countries outside its concluding observations on state party reports and cannot impose sanctions on offenders.[33]

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CAC) provides the most comprehensive framework relating to involvement of children in armed conflict.[34] Primarily aimed at ensuring that children are protected from the possibility of involvement in armed conflict, the OP-CAC strengthens the protection of children, by raising to 18 years, the minimum age of 15 years (set by the CRC and the 1949 Geneva Conventions and their Additional Protocols) for direct participation in hostilities. It also prohibits all recruitment – forced or voluntary – of children under 18 by armed groups that are distinct from the armed forces of a state (article 4(1)).

It should be noted that while the OP-CAC sets the minimum age for conscription or compulsory recruitment at no lower than 18 years by state armed forces (article 2), it does not prohibit the voluntary recruitment of children: it merely calls upon states to 'raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38(3), of the Convention on the Rights of the Child'[35]

32 Art 39.
33 R Harvey *Children and armed conflict: A guide to international humanitarian and human rights law*, International Bureau for Children's Rights/Children and Armed Conflict Unit, University of Essex, available at https://www.essex.ac.uk/armedcon/story_id/000044.pdf (accessed 10 February 2016).
34 As of January 2016, there were 162 state parties to the OP-CAC.
35 Art 3(1). The minimum age for recruitment into the national armed forces set out in the CRC is 15 years.

and to introduce stringent safeguards for any voluntary military recruitment of persons under 18. Thus, the minimum age for voluntary recruitment should be at least 16 years.[36]

It is also notable that in terms of article 3(5) of the OP-CAC, the requirement to raise the age of voluntary recruitment to a minimum of 16 years does not apply to schools operated by or under the control of the armed forces of the state parties. Nonetheless, this provision was not meant to be interpreted in such a manner as to allow states to get around the voluntary recruitment age applicable to ordinary recruitment avenues.[37] Thus, the Committee on the Rights of the Child recommends that children in military schools should be classified as civilians and not as members of the armed forces.[38]

Furthermore, under article 4(1) and (2), states parties are required to 'take all feasible measures to prevent such recruitment and use, including the adoption of legal measures to prohibit and criminalize such practices.' The OP-CAC also enjoins state parties to implement its provisions beyond their own borders through international assistance and cooperation (article 7(1)).

The International Labour Organisation (ILO) Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour defines children as persons under the age of 18, and refers to 'forced or compulsory recruitment of children for use in armed conflict' as among the worst forms of child labour from which children must be protected.[39] The Convention obliges all state parties to take 'immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.' In terms of ILO Recommendation No 190 accompanying Convention No 182,[40] ratifying states are under an obligation to ensure that they criminalise forced or compulsory recruitment of children for use in armed conflict.

The prohibition on recruitment and use of children in armed conflict is also found in the African Charter on the Rights and Welfare of the Child – the only regional treaty in the world which addresses the issue of child

36 Child Soldiers International (n 4 above) 16.
37 n 4 above, 55.
38 See, eg, CRC/C/OPAC/BRL/CO/1, *Committee on the Rights of the Child, Consideration of report submitted by Belarus, Concluding observations,* 28 April 2011, para 11(c). See also CRC/C/OPAC/BRA/CO/1, *Concluding observations on the report submitted by Brazil under article 8(1) of the Optional Protocol on the involvement of children in armed conflict*, 28 October 2015, para 21(a).
39 International Labour Organisation (ILO) Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art (3)(a).
40 ILO 'Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' (1999).

involvement in armed conflict. Setting standards that are higher than other international instruments, the Charter defines a child as '[a]ny human being below the age of 18 years.'[41] Under article 22(2), state parties are obliged to 'take all necessary measures' to ensure that no child takes a direct part in hostilities and to refrain, in particular, from recruiting any child. Nevertheless, it appears that a number of state parties are not adhering to these standards.[42]

Lastly, the recruitment and use of children under the age of 15 years in hostilities is prohibited under customary international humanitarian law.[43] The prohibition applies in both international and non-international armed conflicts, as well as to any party to the conflict, whether state armed forces or non-state armed groups. It also extends to voluntary enlistment and participation in military operations such as gathering information, transporting ammunition and foodstuffs, or acts of sabotage.

The criminalisation of the recruitment and use of children in armed conflict

International criminal law defines certain 'international crimes' and provides for the criminal responsibility of individuals who commit these crimes.[44] For example, article 5 of the Rome Statute sets out the crimes over which the ICC has jurisdiction. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

The Rome Statute includes in its definition of war crimes grave breaches of the Geneva Conventions of 1949 and 'conscripting or enlisting children' under the age of 15 years into national armed forces or armed groups or using them to participate actively in hostilities, in both international and non-international armed conflicts.[45] The Statute also defines sexual slavery – a practice that is common in many armed conflicts

41 Art 2.

42 African Union *Press statement of the 434th Peace and Security Council meeting on 8 May 2014* available at http://peaceau.org/uploads/434-press-statement-8-may-2014-en.pdf (accessed 10 February 2016).

43 See, eg *The Prosecutor v Sam Hinga Norman*, Case No SCSL-2004-14-AR (E) paras 18-20; *Lubanga* case, Appeal Decision, para 332. See also JM Henckaerts & L Doswald-Beck *Customary international humanitarian law* 1: Rules (2005) 842-848 (rules 136 and 137); M Happold *Child soldiers in international law* (2005) 90-91. Customary international law is universally binding while international treaties bind only those states that are party to them.

44 According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the commission of a crime under international law is the 'physical perpetration of a crime by the offender himself, or the culpable omission of an act.' See *The Prosecutor v Dusko Tadic* Case No IT-94-1-A, para 188. See also *The Prosecutor v Juvenal Kajelijeli* Case No ICTR-98-44A-T, para 764. For a discussion of the criminal responsibility of children who have been unlawfully recruited and who are accused of having committed crimes during armed conflicts, see Lumina (n 8 above) 76-104.

45 Arts 8(2)(xxvi) and 8(2)(e)(vii). This war crime is also included in the Statute of the Special Court for Sierra Leone (SCSL) (art 4). It is notable that whereas art 77(2) AP I employs the term 'recruiting,' art 8(2)(b)(xxvi) of the Rome Statute uses the terms 'conscripting or enlisting.' The terms cover every act – formal or *de facto* – of including

– as a war crime[46] and a crime against humanity.[47] It should be noted that war crimes can be committed in non-international armed conflicts by civilians as well as by the military.[48]

Under article 25(2) of the Rome Statute, a person who commits a crime within the jurisdiction of the Court is individually responsible and liable for punishment in accordance with the Statute. As a general rule, a person is only criminally responsible for an act if he or she has intent or knowledge at the time of carrying out the act in question.[49] Accordingly, for an alleged perpetrator to be guilty of the war crime of conscripting, enlisting or using children under the Statute, it must be shown that: (a) he or she conscripted or enlisted one or more persons into an armed force or group, or used one or more persons to participate actively in hostilities; (b) he or she knew or should have known that such person or persons were under the age of 15 years; (c) the conduct took place in the context of and was associated with an armed conflict (whether international or non-international); and (d) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.[50]

In addition, military commanders and civilian superiors can be held criminally responsible for crimes within the jurisdiction of the Court committed by their subordinates, even though they did not directly order such acts.[51] This is a well-established norm of customary and conventional international law.[52] In the case of commanders, responsibility attaches, in relation to forces under the commander's effective command and control, or effective authority and control, if he or she knew or should have known that the subordinates were committing or going to commit such crimes and failed to take 'the necessary and reasonable measures within his or her power' to prevent or punish such acts or submit the matter for investigation and prosecution.[53] In the case of civilian superiors, in relation to subordinates under the superior's effective authority and control, responsibility attaches if the superior 'knew, or consciously disregarded

persons in the armed forces. K Dormann *Elements of war crimes under the Rome Statute of the International Criminal Court: Sources and commentary* (2003) 377. In the *Lubanga* case, the ICC Trial Chamber found that the three prohibited acts – conscripting, enlisting, or using children to participate actively in hostilities – are each a separate offence under international criminal law.

46 Arts 8(2)(b)(xxii) and 8(2)(e)(vii).

47 Art 7(1)(g).

48 See *The Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-A, paras 443-5.

49 Rome Statute, art 30.

50 Dormann (n 45 above) 375-380, 470-471.

51 See *The Prosecutor v Delalic et al*, Case No IT-96-21-T, judgment of 16 November 1998, paras 333, 356-363; *The Prosecutor v Delalic et al,* Case No IT-96-21-A, judgment of 20 February 2001, para 195. See also art 28 of the Rome Statute. Art 86(2) of AP I states that a breach of the obligations under the Geneva Conventions by a subordinate does not absolve the superiors from their own responsibility of supervision and control.

52 See Henckaerts & Doswald-Beck (n 43 above) rule 152; ICTY Statute, art 7(1); ICTR Statute, art 6(1); SCSL Statute, art 6.

53 Rome Statute, art 28(1)(a).

information which clearly indicated, that the subordinates were committing or about to commit such crimes' and failed to take 'all necessary and reasonable measures within his or her power' to prevent or punish such acts or submit the matter for investigation and prosecution.[54]

Other protective standards and mechanisms

The UN Security Council framework on children and armed conflict

Since 1999, the United Nations (UN) Security Council has deemed the situation of children affected by armed conflict as a question of international peace and security. In particular, it has characterised crimes against children during armed conflict as a potential threat to international peace and security, thereby leaving the possibility of imposing sanctions or even taking action under Chapter VII of the UN Charter in response to violations. To that end, it has passed numerous resolutions condemning the recruitment and use of children in hostilities. These include resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011), 2068 (2012), 2143 (2014), 2225 (2015) and 2250 (2015).

In an attempt to advance the goal of protecting children during armed conflict and ending the impunity of perpetrators, the Security Council has identified six categories of violations – the so-called six grave violations – affecting children in armed conflict: killing and maiming of children, recruitment and use of children as soldiers, sexual violence against children, attacks against schools or hospitals, denial of humanitarian access for children, and abduction of children.[55] These categories provide a basis to collect evidence on violations.

In 2005, the Security Council, through its Resolution 1612, established bodies and mechanisms, namely, the Security Council Working Group on Children and Armed Conflict and the Monitoring and Reporting Mechanism on Children and Armed Conflict and its operational country – level Task Forces, which monitor, document and report on the six grave violations in situations of concern around the world. The Working Group, which consists of all the 15 member states of the Security Council, reviews the reports of the UN Secretary-General on children in armed conflict in specific country situations and makes recommendations to parties to conflict, governments and UN agencies on measures to promote the protection of children affected by hostilities.

54 Rome Statute, art 28(1)(b).

55 See United Nations 'The six grave violations against children during armed conflict: The legal foundation' Working Paper No 1 November 2013, available at https://childrenandarmedconflict.un.org/publications/WorkingPaper-1_SixGraveViolationsLegalFoundations.pdf (accessed 10 February 2016).

'Soft law' instruments

Apart from the foregoing, there are two key instruments of 'soft law' that complement the legal and political frameworks already established: the Paris Commitments to Protect Children from unlawful recruitment or use by armed forces or armed groups (Paris Commitments) and the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles), both adopted in 2007.[56] The Paris Commitments and Paris Principles build on the seminal Cape Town principles and best practices on the recruitment of children into the armed forces and on demobilisation and social integration of child soldiers in Africa. The Paris Commitments constitute a policy document aiming to strengthen political action to prevent association of children with armed forces or armed groups and to ensure their successful social reintegration. The Paris Principles set out comprehensive operational guidelines for preventing the unlawful recruitment and use of children by armed forces or armed groups, for facilitating the release and reintegration of children associated with such forces or groups, and for ensuring the most effective protection for all children. They are intended to ensure greater programmatic coherence and promote good practices among states and international organisations.

The Special Representative of the Secretary-General for Children and Armed Conflict

The mandate of the Special Representative of the Secretary-General for Children and Armed Conflict (the Special Representative) was established by UN General Assembly Resolution 51/77 of 12 December 1996, following the publication of the Machel report on the 'Impact of Armed Conflict on Children,'[57] which highlighted the disproportionate impact of armed conflict on children and identified them as the primary victims of armed conflict.[58] The Special Representative serves as an independent advocate for the protection and well-being of children affected by armed conflict, working with partners to strengthen their protection and facilitating through diplomatic and humanitarian initiatives the work of operational actors on the ground. The Special Representative reports yearly to the General Assembly and Human Rights Council. She also

56 As of November 2014, a total of 105 UN member states had endorsed the Paris Commitments and the accompanying Principles and Guidelines. The Paris Principles and Guidelines define a child associated with an armed force or armed group as 'any person below 18 years of age who is or who has been recruited or used by an armed force or group in any capacity, including but not limited to children used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken an active part in hostilities' (art 2(1)).

57 A/51/306, *Impact of armed conflict on children* (n 9 above).

58 See Office of the Special Representative of the Secretary-General for Children and Armed Conflict http://childrenandarmedconflict.un.org/mandate (accessed 22 January 2016).

raises challenges faced by children involved in armed conflict with bodies such as the Security Council, as well as relevant governments in order to secure political and diplomatic commitment.

In March 2014, the Special Representative launched the advocacy campaign, 'Children, Not Soldiers' jointly with the UN Children's Fund (UNICEF), which was designed to prevent the recruitment and use of children by government forces by the end of 2016, through the mobilisation of political support, provision of technical assistance and assistance to listed governments which are committed to implementing an action plan and taking the necessary measures to ensure that their armed forces do not recruit or use children.[59]

Enforcement of the protective standards

States bear the primary responsibility for ensuring the protection of all children under their jurisdiction. As noted above, international legal instruments relating to children in armed conflict contain a number of obligations for state parties. In particular, states are obliged to give effect to the undertakings that follow from ratification of treaties by ensuring that their national legal frameworks are aligned with their international legal commitments and by ensuring accountability for those who transgress the prohibition on recruitment and use of children in armed conflict. Thus, they should take all the necessary measures to prevent the recruitment of children into armed forces or armed groups; facilitate the release of those children already involved; and support their social reintegration.

States that are party to the OP-CAC are required to 'take all necessary legal, administrative and other measures' to ensure 'the effective implementation and enforcement of the provisions' of the Protocol within their jurisdiction. Among the measures envisaged under this provision are dissemination and awareness raising about the OP-CAC,[60] training, the establishment of an independent mechanism[61] and monitoring the implementation of the OP-CAC.

State responsibility to punish perpetrators of war crimes

Under international law, states not only have obligations to enact national legislation criminalising the war crime of conscripting or enlisting children

59 A/HRC/28/54 *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict* paras 14-18.

60 See also GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144; AP I, art 83; AP II, art 19.

61 Such as a national human rights institution with a constitutional and/or legislative mandate to protect and promote human rights (eg, a national human rights commission, children's rights commission, commissioner for human rights or ombudsperson).

under the prescribed age or using them to participate actively in hostilities and providing effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and Additional Protocols as defined in these instruments,[62] they also have the duty to investigate violations and, where there is ample evidence, the duty to prosecute (or extradite) those alleged to have committed the crimes in question, not to offer amnesty to certain perpetrators, and to provide remedies and reparations to victims or their families.[63] This obligation includes a duty for states to cooperate with one another and render assistance to international judicial organs that have the competence to investigate and prosecute these violations. Furthermore, states have undertaken to take measures necessary for the suppression of all acts contrary to the provisions of the Geneva Conventions and the Additional Protocols other than grave breaches.

States are also accountable for the actions of non-state armed groups allied to them, including irregular paramilitaries, as well as 'self-defence' militias and armed groups operating in other countries to which they provide support. In practice, however, states have, in general, failed to take measures either to prevent children being recruited and used by armed groups linked to them or to investigate allegations of the involvement of state officials in supporting such practices.[64] It is accepted that when an armed group is acting under the instruction, direction or control of a state, even if the state does not officially recognise such group, members of the group are considered *de facto* agents of the state. As a consequence, the state may be held directly responsible for their acts if it fails to prevent or punish violations that they have committed.[65]

62 It should be noted that while, in general, the exercise of the capacity to, *inter alia,* try cases (civil or criminal) is limited to national territory, international law recognises that in certain instances a state may enact laws relating to, or adjudicate on, events occurring outside its territory. See, eg, the *Lotus* case, (1927) PCIJ, Ser. A, No 10, 18-19.

63 See arts 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute; arts 49, 50, 129 and 146 of Geneva Conventions I, II, III and IV, respectively. Under customary international humanitarian law all states are under a duty to investigate war crimes and prosecute the perpetrators. See Henkaerts & Doswald-Beck (n 43 above) rule 158. See also OHCHR *International legal protection of human rights in armed conflict* 81.

64 Child Soldiers International (n 4 above) 90.

65 See art 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts; Henkaerts & Doswald-Beck (n 43 above) rule 149; OHCHR, *International legal Protection of human rights in armed Conflict* 72. It should be noted further that non-State armed groups are obliged to respect, as a minimum, certain rules of international humanitarian law (see Common art 3 of the Geneva Conventions). In this context, the ICRC has argued that armed groups incur responsibility for acts committed by their members, but concedes that the consequences of such responsibility are uncertain. See Henkaerts & Doswald-Beck (n 43 above) 536.

An increasing number of states have criminalised the recruitment and use of children in armed conflict.[66] Nevertheless, there are still many that have yet to enact legislation explicitly criminalising such acts. According to Child Soldiers International, while the principle of prohibiting the use of children in armed conflict is 'widely accepted' and there 'is some evidence that the adoption of a ban on recruitment of under-18s has led to tangible progress towards ending child soldier use,' especially in state armed forces, 'there is a disappointing gap between commitments made to end the use of child soldiers and actual practice.'[67] For example, during the period from January 2010 to June 2012, at least twenty states used children in hostilities, in one type of force or another or in one capacity or another.[68] Moreover, for those states that already have legislation, 'these commitments often do not translate into effective protection for children.'[69]

Additionally, even where such legislation has been adopted, weak criminal justice systems and lack of political will often mean that criminal investigations and prosecutions generally do not take place. The enactment and enforcement of national laws to prohibit and penalise the recruitment and use of children in armed conflict is an indispensable part of any strategy to create and maintain a protective environment for children in armed conflict. It is therefore important that states enact such legislation and strengthen their criminal justice systems to enable them to

66 This has been done in a variety of ways, including through legislation implementing the Rome Statute (eg Argentina, Australia, Belgium, Bosnia & Herzegovina, Burkina Faso, Canada, Chile, Costa Rica, Denmark, France, Georgia, Germany, Ireland, Kenya, Korea [Republic of], Malta, Netherlands, New Zealand, Norway, Philippines, Portugal, Rwanda, Samoa, Slovenia, South Africa, Trinidad & Tobago, Uganda, United Kingdom and Uruguay); legislation on child protection (eg, in Botswana, the Democratic Republic of the Congo (DRC), Liberia and Kenya); in criminal codes (eg, in Burundi, Colombia, Croatia, Ecuador, Ethiopia, Finland, Lithuania, Mali, Nicaragua, Panama, Senegal, Serbia, Sri Lanka and the USA); or in military codes (eg, Sudan).

67 Child Soldiers International (n 4 above) 17.

68 Between January 2010 and June 2012, children were reported to have been used by the national armies of nine States (Chad, Côte d'Ivoire, the DRC, Libya, Myanmar, Somalia, Republic of South Sudan, Sudan and Yemen); official paramilitaries, civil defence forces, police and other branches of the security forces in nine states (Afghanistan, the DRC, Iraq, Libya, the Philippines, Myanmar, Sudan, Thailand and Yemen); irregular paramilitaries, 'self-defence' militias and other armed groups that are not part of official State security forces but which are supported by or otherwise allied to governments in five States (the Central African Republic (CAR), Côte d'Ivoire, Somalia, Sudan and Yemen); armed opposition groups operating in other countries with the support of or as proxy forces of governments of four states (Chad (Sudan armed opposition groups], Eritrea [Somali armed opposition groups], Rwanda (DRC armed opposition groups] and Sudan [Chad armed opposition groups]); and informally (eg, as guides, porters, spies or as human shields) by state armed forces in situations of conflict in six states (Afghanistan, Colombia, Israel, Libya, the Philippines and Syria). See Child Soldiers International (n 4 above) 18, 20-21.

69 According to Child Soldiers International, '[e]xperience shows that where states recruit individuals below the age of 18 years, prohibitions on participation in hostilities, even when supported by systems to screen troops prior to deployment, do not constitute an effective guarantee against children's involvement in hostilities.' See Child Soldiers International (n 4 above) 44.

effectively investigate and prosecute such crimes so as to ensure accountability of the perpetrators of the crime.

Individual responsibility for international crimes

Individual criminal responsibility is essential to ensuring accountability for violations of international humanitarian and human rights law, including the recruitment and use of children in hostilities.[70] Thus, international law (both customary[71] and conventional) assigns criminal responsibility to those who have committed, or ordered to be committed, war crimes and grave breaches of humanitarian law, in both international and non-international armed conflicts.[72] Under article 25(3) of the Rome Statute, for example, 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court.'[73] The types of criminal conduct listed in this article include planning, committing the crime, ordering, instigating or otherwise aiding and abetting it.

In general, individuals are criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge. In certain cases, however, a failure to act may amount to a grave breach attracting criminal responsibility. This is evident from article 86(1) of AP I, which enjoins state parties to repress grave breaches, and take measures to suppress all other breaches of the Geneva Conventions and AP I which are a consequence of a failure to act when under a duty to do.[74]

As noted earlier, military commanders and other superiors (including civilians) are criminally responsible for international crimes committed pursuant to their orders.

Challenges in ensuring the accountability of perpetrators

The arrest, indictment and prosecution of individuals who have recruited and used children in armed conflict indicates that the international

70 Indeed, it has been contended that the prospect of being held personally responsible for a violation of humanitarian norms is 'a powerful incentive to observe these rules in practice.' See J Crowe & K Weston-Scheuber *Principles of international humanitarian law* (2013) 165.

71 Henckaerts & Doswald-Beck (n 43 above) rule 151. Individual criminal responsibility for war crimes committed in international armed conflict provided the basis for prosecutions under the Charters of the International Military Tribunals at Nuremberg and Tokyo.

72 Individual criminal responsibility for war crimes committed in non-international armed conflict has been explicitly included in the ICTR Statute (arts 4 and 5) and the Statute of the Special Court for Sierra Leone (SCSL) (art 1). It is implicitly recognised in art 4 of the OP-CAC.

73 See also ICTY Statute, art 7(1); ICTR Statute, art 6(1); and SCSL Statute, art 6.

74 A Segall *Punishing violations of international humanitarian law at the national level: A guide for Common Law states* (2001) 51.

community is prepared to hold those who recruit and use children in armed conflict in violation of the relevant legal standards[75] or those who aid and abet such violations,[76] accountable for their acts. However, there are a number of difficulties associated with the prosecution of war crimes (including the crime of recruiting and using children in armed conflict) at both international and domestic levels. Notable challenges at the international level include: the difficulty of gathering evidence and the accused person's right to test that evidence; the nonexistence of any enforcement mechanism that would allow prosecutors to undertake investigations in a territory of an interested state without its assistance and the absence of a general power to carry out arrests of suspects; the hybrid character of the procedures of international criminal tribunals (containing elements of the accusatorial and inquisitorial systems); lack of cooperation from some governments, particularly in relation to the arrest and extradition of alleged perpetrators; lengthy delays due to procedural issues; the nature and extent of victim involvement in the proceedings; and the operation of the confidentiality regime protecting some of the sources of evidence for the prosecution.[77]

The *Lubanga* case – the first to be tried by the ICC – illustrates some of the difficulties attending the prosecution of crimes at the international level. Lubanga was surrendered to the ICC in March 2006, but due to a procedural challenge, his trial only commenced in January 2009.[78]

75 For example, on 10 July 2012, TL Dyilo, leader of a Congolese armed group – the *Forces patriotiques pour la libération du Congo*, was sentenced to 14 years imprisonment after having been found guilty of the war crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities in the Ituri region of the DRC between 2002-2003. On 1 December 2014, the Appeals Chamber of the ICC confirmed his conviction and sentence. There are several other cases pending before the Court concerning the crime of recruiting and using children in armed conflict: *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15; *The Prosecutor v Joseph Kony et al*, Case No ICC-02/04-01/05 (Kony and Vincent Otti are still at large, although there are unconfirmed reports of Otti's death; proceedings against Kony's other co-accused, Okot Odhiambo and Raska Lukwiya were terminated following confirmation of their deaths); *Prosecutor v Bosco Ntaganda*, Case No ICC-01/04-02/06.

76 On 26 April 2012, the Special Court for Sierra Leone found former President of Liberia, Charles Taylor, guilty of aiding and abetting war crimes committed by the Revolutionary United Front (RUF) during the 1991-2002 civil war in Sierra Leone and sentenced him to 50 years imprisonment. Although the RUF was not under his direct command or control, he had provided his practical assistance, encouragement and moral support to it. See *Prosecutor v Charles Ghankay Taylor*, Case No SCSL-03-01-T and SCSL-03-01-A. See also *Prosecutor v Perisic*, Case No IT-04-81-A, Judgment, 28 February 2013.

77 See C Del Ponte 'Investigation and prosecution of large-scale crimes at the international level: The experience of the ICTY' (2006) 4 *Journal of International Criminal Justice*, 539-558; O Oko 'The challenges of international criminal prosecutions in Africa' (2007) 31 *Fordham International Law Journal* 343; R Varga *Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees* (2014), available at http://ssrn.com/abstract=2499495 (accessed 2 February 2016); Segall (n 74 above) 128-132.

78 The Trial Chamber twice ordered a stay of the proceedings. In June 2008, it stayed the proceedings because the Prosecutor failed to disclose certain documents obtained through confidentiality agreements which contained evidence that was potentially

Similarly, the case of former President of Liberia, Charles Taylor, took almost four years to complete.

The case of *Prosecutor v Germain Katanga*[79] offers an insight into the difficulty of proving, beyond reasonable doubt, crimes under international law. On 7 March 2014, the ICC found Katanga – a commander of the *Force de Resistance Patriotique en Ituri,* an armed group and political party in the Ituri Province of the Democratic Republic of the Congo – guilty of the crime against humanity of murder and the war crimes of wilful killing, intentional attacks against the civilian population, pillaging and destruction of property committed during the armed conflict in that country. While noting that the crimes of sexual slavery and rape as well as using children to participate actively in hostilities were proven to have occurred, the Court found that there was insufficient evidence to establish beyond a reasonable doubt that Katanga was criminally responsible.[80] In a similar vein, commentators have questioned whether the evidence presented in the *Taylor* case was sufficient to prove the charges against Taylor.[81] Remarkably, in the Taylor case, the alternate judge, El Hadji Malik Sow, publicly declared that 'the guilt of the accused from the evidence provided in the trial is not proved beyond a reasonable doubt.'

The perceived politicisation of indictments and selective prosecution of alleged perpetrators, particularly Africans, by the ICC poses an additional challenge, which threatens to undermine the Court's legitimacy.[82] Furthermore, the discretion enjoyed by ICC prosecutors under article 53 of the Rome Statute not to investigate or prosecute crimes where doing so would not be 'in the interests of justice' has generated much debate, particularly in view of the legal and political interests at

favourable to Lubanga's defence. The Trial Chamber again stayed proceedings in July 2010 due to the Prosecutor's refusal to disclose the identity of an external person assisting the Prosecutor's investigations out of a concern for that person's safety. The Chamber found the Prosecutor's failure to disclose rendered it difficult to have a fair trial.

79 Case No ICC-01/04-01/07. See also *Prosecutor v Mathieu Ngudjolo Chui*, Case No ICC-01/04-02/12.

80 On 13 November 2015, a three-judge panel of the Appeals Chamber decided to reduce Katanga's sentence with the result that he was due to complete his sentence on 18 January 2016.

81 See, eg, K Ambos & O Njikam 'Charles Taylor's criminal responsibility' (2013) 11 *Journal of International Criminal Justice* 789-812.

82 See BC Olugbuo 'The African Union, the United Nations Security Council and the politicisation of international justice in Africa' (2014) 7 *African Journal of Legal Studies* 351-379; A Tiemessen 'The International Criminal Court and the politics of prosecutions' (2014) 18 *International Journal of Human Rights* (4-5) 444-461; R Wafawarova 'ICC: Racial stereotyping, politicisation of justice' *The Herald* 5 June 2013 available at http://www.herald.co.zw/icc-racial-stereotyping-politicisation-of-justice (accessed 29 January 2016); A Hirsch 'Ten years of the ICC: politicised puppet or legal pioneer?' 1 October 2012, available at http://www.gga.org/stories/editions/aif-5-law-and-lawlessness-in-africa/ten-years-of-the-icc-politicized-puppet-or-legal-pioneer (accessed 29 January 2016). All cases currently before the ICC involve Africans only. See https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases /Pages/cases%20index.aspx (accessed 9 February 2016).

stake.[83] It can be argued that these situations pose a potential obstacle to efforts to ensure the accountability of those who recruit and use children in armed conflict.

Challenges at the domestic level include the complexity of war crimes (as opposed to ordinary crimes), judges and prosecutors lacking the required knowledge of international law and non-availability of human and financial resources. There are also particular difficulties relating to the gathering of evidence in instances where the crime was committed abroad.[84]

Lastly, while the testimony of child victims is critical in securing the conviction of perpetrators of crimes against children in armed conflict, difficulties may arise in relation to their testimony since during the course of giving evidence, children tend to be particularly susceptible to 'renewed or secondary stigmatization, to manipulation and intimidation, and fear in the face of their former oppressors.'[85] Moreover, children are vulnerable to stigmatisation as a result of public exposure, particularly in the case of those who are victims of sexual violence or who were recruited into armed groups.[86] Testifying may also exacerbate the problems that these children face in reintegrating into their communities.[87] To an extent, this problem may be addressed through procedural safeguards applicable before the relevant tribunal.[88]

Demobilisation and reintegration of children

Undoubtedly, preventing children from being recruited and used in armed conflict in the first place is the most important and effective way of protecting them.[89] This requires, *inter alia*, that efforts must be made to address the social and economic factors that lead to the recruitment of children in the first place – whether forcible recruitment or joining armed forces and groups to escape poverty or hunger, or enlisting to actively support a cause. Without addressing these factors, it will be very difficult, if not impossible, to prevent the recruitment and use of children in armed conflicts. Nevertheless, it is often the case that, for one reason or another, children are already involved in armed conflicts. In such event, the

83 See M Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 521-522.
84 Segall (n 74 above) 132.
85 Harvey (n 33 above) 73.
86 As above.
87 As above.
88 For example, art 68(1) of the Rome Statute and the ICC's Rules of Procedure and Evidence enjoin the Court to protect the safety, physical and psychological well-being, dignity and privacy of child victims and witnesses during investigation and prosecution. The laws of many States contain similar safeguards.
89 B Verthey 'Child soldiers: Preventing, demobilizing and reintegrating' Africa Region Working Paper Series, ARWPS (23 November 2001), available at http://www.worldbank.org/afr/wps/index.htm (accessed 28 January 2016).

effective protection of children in armed conflict may require other important initiatives including the demobilisation and social reintegration of children associated with armed forces or armed groups.[90]

Under article 39 of the CRC, state parties have the duty to take appropriate measures 'to promote the physical and psychological recovery and social reintegration of a child victim of any form of exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflict.' Such recovery and reintegration must take place in an environment that is conducive to 'the health, self-respect and dignity of the child.' In relation to armed conflict, article 6(3) of the OP-CAC enjoins state parties to 'take all feasible measures' to ensure that children who have been unlawfully recruited or used in armed conflict are 'demobilized or otherwise released from service' and, when necessary, to accord to them 'all appropriate assistance for their physical and psychological recovery and their social reintegration.'[91] The Paris Principles and Commitments also promote reintegration programmes regardless of whether there is a formal process for disarmament, demobilisation and reintegration.

In practice, however, demobilisation and reintegration processes tend to be challenging. For example, the ICRC has noted the challenges of reintegrating children associated with armed forces or armed groups, including existing cultural and social attitudes as well as the projection of 'an image of violence and fear that can make it difficult for families and communities to accept them when they return.'[92] In a similar vein, the UN Secretary-General has observed that '[t]he reintegration of children recruited and used in extreme violence raises new challenges … the impact of exposure to the severity of violence causes serious and long-term distress. Thus, comprehensive programmes are needed to address the reintegration needs of these children.'[93]

In many situations where children are actively involved in hostilities, there are no formal programmes to ensure their release or support their social reintegration. Nevertheless, where such programmes exist, children associated with armed forces or groups are not always able to access them or the assistance provided to them is insufficient for the complex process of reintegration. Girls, including girl mothers, face particular hurdles in

90 Demobilisation refers to the release or discharge of children involved in armed conflict, their reception and the initial assistance provided to them to enable them return to their home communities or other place of settlement. Reintegration refers to the transition to civilian roles through training and assistance programmes. See Verthey (n 89 above).

91 As stated earlier in this Chapter, exposure to the brutality of war often leaves child participants physically and emotionally traumatised. Consequently, international law recognises that children affected by conflict may require special care after the conflict.

92 See ICRC *Children associated with armed forces or armed groups* (2013) 11.

93 See A/69/926-S/2015/409 *Children and armed conflict: Report of the Secretary-General* para 15.

securing release and accessing appropriate support for their recovery and reintegration, including support from their families and communities. A further issue that is worthy of mention is that governments and funders often commit to demobilisation processes for children only after peace agreements have been signed.[94] The implication of this is that children continue to be exposed to the risks associated with armed conflict.

Despite the foregoing challenges, there has been some notable progress in translating the international legal commitments concerning demobilisation and reintegration into practice. In recent years, thousands of children have been released from state armed forces and non-state armed groups both during on-going conflicts and following cease-fires and peace agreements, mainly through official disarmament, demobilisation and reintegration programmes facilitated by international organisations.[95] In the Central African Republic, for example, UNICEF has facilitated the release of hundreds of children from armed groups involved in that country's conflict.[96] UNICEF has also played a role in the release of children from armed forces and armed groups in Angola, Chad, Sierra Leone, Sri Lanka and South Sudan, among others.

The participation of children is critical to the success of demobilisation and reintegration programmes. In relation to demobilisation, children formerly associated with armed forces or armed groups can play an important role in helping those implementing the programmes understand how best to contact and persuade other children still with armed forces or armed groups to demobilise. In relation to reintegration, children who have left armed forces or armed groups through both formal and informal processes, as well as other vulnerable children affected by conflict and in need of protection, such as girl mothers, must be included in the reintegration programmes. Put differently, in order to be effective and, in particular, to enhance its prospects of addressing the risks of recruitment and re-recruitment, reintegration must be 'inclusive'.[97]

94 See E Visman *Reaching all: Core principles for working with children associated with armed groups and forces* (2005).

95 More than 115 000 children have been released from armed forces and armed groups as a result of 27 action plans that the UN has signed with parties to conflict. See Statement by Ms Leila Zerrougui, Special Representative of the Secretary-General for Children and Armed Conflict, Informal Meeting of the General Assembly on Children and Armed Conflict 8 February 2017 available at https://childrenand armed conflict.un.org/statement/statement-by-leila-zerrougui-informal-meeting-of-the-gene ral-assembly-on-children-and-armed-conflict/ (accessed 27 February 2017).

96 See UNICEF 'Hundreds of children released by armed groups in Central African Republic' News note, 14 May 2015, available at http://www.unicef.org/media/ media_81890.html (accessed 28 January 2016); UN News Centre 'Central African Republic: Armed groups agree to release child soldiers, says UNICEF' 5 May 2015 available at http://www.un.org/apps/news/story.asp?NewsID=50771 (accessed 28 January 2016).

97 Visman (n 94 above).

Conclusion

The continuing recruitment and use of children in armed conflict by both state armed forces and non-state armed groups raises important questions concerning the extent to which the numerous international commitments reflected in an extensive international legal framework prohibiting or criminalising the recruitment and use of children in armed conflict, have been translated into effective strategies to protect children against involvement in armed conflict and from the effects of conflict. This scenario also underlines the need to enhance efforts to protect children in armed conflict and to more aggressively pursue those who recruit and use children in armed conflict.

This Chapter has argued that the most effective way of protecting children from associating with armed forces or armed groups is by preventing their recruitment in the first place. Nevertheless, in the event that parties to hostilities flout the prohibition on the recruitment and use of children in armed conflict, it is important to ensure that the perpetrators are held accountable, particularly through their prosecution and punishment for their crimes.

CHAPTER 8

PROTECTION OF REFUGEES AND INTERNALLY DISPLACED PERSONS DURING ARMED CONFLICTS

Cristiano d'Orsi

Abstract: *This Chapter analyses the legal framework for the protection of refugees and internally displaced persons (IDPs) in armed conflicts in Africa. The discussion seeks to provide recommendations on how to find holistic solutions to protect the lives of refugees and IDPs – individuals 'on the move'. By incorporating article 4(h) in the Constitutive Act of the African Union (AU), African states have contracted away their sovereignty in cases where refugees and IDPs face challenges of the proportions envisaged in article 4(h). To this end, the AU Peace and Security Council has established a mechanism to assist member states adversely affected by violent conflicts, to undertake resettlement and reintegration of refugees and IDPs, and to support and facilitate humanitarian action in such situations. The discussion also focuses on the proliferation of small arms and light weapons (SALW) on the continent, which usually constitutes an impediment to the return of displaced persons. Finally, as armed conflicts represent the central reason at the origin of the forced movement of populations, the discussion recommends how best to curb the illicit flow of SALW and ammunition on the continent within the framework of conflict prevention, in order to offer better protection to civilian populations.*

Introduction

Historically, armed conflicts represent the central reason for the forced movement of populations.[1] That is why an analysis of the progressive and systematic development of international humanitarian law (IHL)[2] and

1 N Arenas-Hidalgo 'Combatants and armed elements as refugees: The interplay between international humanitarian law and international refugee law' in PA Fernandez-Sanchez (ed) *The new challenges of humanitarian law in armed conflicts (in honour of Professor Juan Antonio Carrillo-Salcedo)* (2005) 207. W Kalin explained in this regard: 'To the extent that enemy nationals or nationals of a neutral State are refugees in the sense of the 1951 [Refugee] Convention, international humanitarian law and refugee law complement each other, as refugees benefit from the guarantees of the Refuge Convention even in times of war.' (W Kalin 'Flight in times of war' (2001) 843 *International Review of the Red Cross* 632).

2 In this regard, see UN/OHCHR 'International legal protection of human rights in armed conflict' New York/Geneva (2011) 5 available at http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf (accessed 5 September 2014) 'International Humanitarian Law is a set of rules which seek, for humanitarian

international refugee law (IRL)[3] should be undertaken, in order to offer better contemporary protection to victims.[4] Although the laws for the protection of refugees and internally displaced persons (IDPs) in armed conflicts are widely codified, their application is problematic. They are often restricted to clashes having an international character, involving conflicts between sovereign states and in circumstances leading to foreign occupation.[5] However, Africa is also a continent where internal conflicts occur frequently.

During conflicts, civilians are often killed deliberately by combatants, or indirectly, as collateral damage.[6] For instance, when the civil war broke out in Congo-Brazzaville in 1998, around 290 000 civilians fled from the country. According to a survey, 65 per cent of the families trying to return home one year later declared that they had been attacked by insurgents when they fled, and again by pro-government forces when they returned.[7] In general, the flow of persons in a country can amplify the awareness of insecurity in that country in a number of ways. The displaced persons may for example be perceived as a burden on local resources, particularly in those countries already struggling to provide for some well-being to their own citizens. This was the case in Kenya in the 1990s, when the country was faced with internal conflict caused by a lack of resources due to the

reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare. Its scope is, therefore, limited *ratione materiae* to situations of armed conflict.'

3 In this regard, see Geneva Academy of International and Humanitarian Law, Geneva, RULAC: 'International refugee law is a set of rules and procedures that aims to protect, first, persons seeking asylum from persecution, and second those recognized as refugees under the relevant instruments. Its legal framework provides a distinct set of guarantees for these specific groups of persons, although, inevitably, this legal protection overlaps to a certain extent with international human rights law as well as the legal regime applicable to armed conflicts under international humanitarian law.' Definition available at http://www.adh-geneve.ch/RULAC/international_refugee_law.php (accessed 8 February 2017). See para 51 'Armed violence is both a domestic and international security concern and can have regional and transnational dimensions. It can spread across territorial borders and trigger the large-scale displacement of people, as has been seen during clashes between rival pastoralist groups or among criminal groups that traffic arms from country to country.' UNGA, Report of the Secretary General, Promoting development through the reduction and prevention of armed violence, 5 August 2009, A/64/228, para 20.

4 However, as Jacques observed: '[w]hile international humanitarian law is mainly concerned with the protection of enemy nationals in the hands of a party to an armed conflict; international refugee law seeks to protect individuals who have sought refuge from persecution on the territory of a third country.' (M Jacques *Armed conflict and displacement: The protection of refugees and displaced persons under international humanitarian law* (2012) 156).

5 HP Gasser & K Dormann 'Protection of the civilian population' in D Fleck (eds) *The handbook of international humanitarian law* (2013) 231.

6 T Farrell & O Schmitt 'The causes, character and conduct of armed conflict, and the effects on civilian populations 1990-2010' (2012) *Legal and Protection Policy Research Series* PPLA/2012/03 7, available at http://www.unhcr.org/4f8d606d9.pdf (accessed 9 February 2017). As the authors clarified: 'Far more civilians die as an indirect consequence of armed conflict, than directly in armed conflict itself. War causes famine, disease, poverty, and population displacement. Indeed there is a strong correlation between armed conflict, underdevelopment and State failure' (10).

7 H Slim *Killing civilians: Method, madness and morality in war* (2007) 37-38.

overwhelming inflow of Somali refugees. As a consequence of this conflict, the inflow of Somali refugees in the country was drastically reduced. In addition, refugees can be perceived as a threat to the ethnic balance of a country, as exemplified by the flow of Isaaq refugees from Somalia in the 1980s,[8] who sought sanctuary in Ethiopia's eastern province, Harerge Kifle Hager.[9]

This Chapter has a simple structure. First, it analyses the international rules of IHL and IRL and their relevance to the African context, viewing whether the attempts by the African organs have and could be successful in protecting forcibly displaced persons. Therefore, the discussion analyses the legal framework for the protection of refugees and IDPs in armed conflicts in Africa in order to provide recommendations on how to find holistic solutions to protect the lives of individuals 'on the move'. The discussion also focuses on the proliferation of small arms and light weapons (SALW) on the continent, which usually constitutes an impediment to the return of displaced persons, and it recommends how best to curb the illicit flow of arms and ammunition on the continent.[10]

The protection from forced displacement under international humanitarian law

In IHL, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 1949, ratified by all the 54 African sovereign states,[11] and the 1977 Additional Protocol One (Protocol I),[12] ratified by 52 African countries (all UN member states with the exceptions of Eritrea and Somalia),[13] contains provisions dealing with the situation of refugees in armed conflicts.[14] According to the Fourth Geneva Convention, the citizens of a belligerent

8 G Loescher *Beyond charity: International cooperation and the global refugee crisis* (1993) 25-26.

9 'Refugees' available at http://countrystudies.us/somalia/54.htm (accessed 5 February 2017).

10 UNSC, Small arms: Report of the Secretary-General 5 April 2011, S/2011/255, para 50, 11, available at http://www.refworld.org/docid/4db6961a2.html (accessed 24 September 2014).

11 The last African country to have ratified the Fourth Convention has been South Sudan on January 25, 2013. For the list of ratifications, see http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380 (accessed 25 August 2014).

12 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at http://www.refworld.org/docid/3ae6b36b4.html (accessed 20 August 2014).

13 To date, 25 August 2014, the last country to have ratified Protocol I has been South Sudan on 25 January 2013. For the list of ratifications, see http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (accessed 25 August 2014).

14 ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 12 August 1949, 75 UNTS 287 available at http://www.refworld.org/docid/3ae6b36d2.html (accessed 20 August 2014).

state who try to find a safe haven in a region of an enemy state will be protected as aliens on the territory of a party to the armed conflicts outlined in articles 35 to 46.[15] As stipulated in article 44, if these individuals do not enjoy the protection of the country of origin anymore, they cannot be treated as enemies exclusively because of their loss of protection by their country of origin.[16] In any event, and as a general rule, the Fourth Geneva Convention, in article 49(1), stipulates as follows:[17]

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

The principle of *non-refoulement*, which has been codified in article 2(3) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention),[18] is also contained in article 45(4) of the Fourth Geneva Convention, which states that '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.'[19]

15 JP Lavoyer 'Refugees and internally displaced persons: International humanitarian law and the role of the ICRC' (1995) 305 *International Review of the Red Cross* seen as an html document available at http://www.icrc.org/eng/resources/documents/misc/57jmf3.htm (accessed 26 August 2014). As the author clarified: 'This convention requests favourable treatment for refugees on the part of the host country.'

16 In full, art 44 stipulates as follows: 'In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government'. In this regard, see also: art 73 of Protocol I.

17 See however J Willms 'Without order, anything goes? The prohibition of forced displacement in non-international armed conflict' (2009) 875 *International Review of the Red Cross* 547 549 (n 10): 'Traditionally "forcible transfer" is a displacement within the territory of a state, and "deportation" takes place beyond internationally recognized state borders […]'.

18 OAU, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45, available at http://www.refworld.org/docid/3ae6b36018.html (accessed 20 August 2014). To date, 25 June 2015, this Convention has been ratified by 45 countries members of the African Union. Djibouti, Madagascar, Mauritius and Somalia have signed but not ratified the Convention, yet. Eritrea, Namibia, the Sahrawi Arab Democratic Republic, São Tomé and Príncipe as well as the South Sudan have not even signed the Convention, at the moment. For the list of ratifications, see http://www.achpr.org/instruments/refugee-convention/ratification/ (accessed 25 August 2014). The last country to have ratified the convention has been Comoros on April 2, 2004.

19 However, Jacques pointed out that: 'It should […] be reminded that an asylum State's duties towards its refugees, as well as its general obligations under international humanitarian law, do not cease in time of armed conflict, whether international or non-international. Consequently, the principle of *non-refoulment* remains applicable in situations of armed conflict. However, for refugees caught up in an internal armed conflict, particularly if they find themselves in rebel-controlled territory, international humanitarian law clearly constitutes the first line of protection against abuse, not only due to its *lex specialis* character, but also because, unlike human rights and refugee law, it is widely regarded as binding upon states and non-State actors alike' (Jacques (n 4 above) 184).

In addition, according to article 4(2) of the Fourth Geneva Convention, refugees who are nationals of a neutral state and who are on the territory of a belligerent state that has no diplomatic relations with the first state are protected persons as defined in the Fourth Geneva Convention. Moreover, Protocol I extends such protection to refugees also when diplomatic relations are in place.[20] Lastly, according to article 70(2) of the Fourth Geneva Convention, refugees who fall into the power of their country of origin during an occupation of enemy territories should not be '[a]rrested, prosecuted, convicted or deported from the occupied territory.'[21]

The forced displacement of civilians for unlawful reasons is prohibited and constitutes a war crime.[22] The only exceptions to this prohibition are stipulated in article 17(1) of the 1977 Additional Protocol II to the Geneva Conventions (APII),[23] which allow displacement if '[t]he security of the civilians involved or imperative military reasons so demand.'[24] The problem arises as to what criteria to adopt in assessing whether the displacement of the civilian population is forced or not. In this regard, one principle for forced displacement is that the displacement must be 'ordered' as can be inferred from the literal meaning of article 17(1) of APII.[25] Unfortunately, the preparatory works of APII do not help to understand if any displacement that has not been 'ordered' can be

20 In full, art 4(2) stipulates as follows: 'Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are'.

21 In full, art 70(2) stipulates as follows: 'Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace'.

22 Willms (n 17 above) 548.

23 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, 1125 UNTS 609 available at http://www.refworld.org/docid/3ae6b37f40.html (accessed 21 August 2014). To date, 25 August 2014, Protocol II has been ratified by 51 African countries with the notable exceptions, because they are countries that went, or still are going through, civil conflicts of Angola, Eritrea and Somalia. The list of ratifications is available at http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475 (accessed 25 August 2014).

24 In this regard, Willms pointed out: 'The present article [17] will only deal with 'forced displacement', defined as the forced movement of civilians within a territory during non-international armed conflict'. See Willms (n 17 above) 550. In the words of Gan, art 17 is particularly significant because it codifies a '[r]ecognized principle of customary international law on the protection due the civilian population' (PT Gan 'Caught in the crossfire: Strengthening international protection for internally displaced persons due to internal armed conflict' (1994) 39 *Ateneo Law Journal* 25).

25 The first part of art 17(1) reads as follows: 'The displacement of the civilian population shall not be ordered for reasons related to the conflict […]'. And art 17(2) affirms that '(2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict'.

considered as 'lawful',[26] although state practice seems to suggest that article 17(1) of APII forbids forced displacement irrespective of whether it has been commanded or not.[27]

In Resolution 55/116, adopted in 2000, the United Nations (UN) General Assembly expressed its concern for the violations of human rights and IHL and particularly 'within the framework of the conflict in southern Sudan, of cases of […] forced displacement of populations'.[28] Sudan acceded to Additional Protocol II only some six years later, on 13 July 2006. Thus, the totality of the denunciations of forced displacement in non-international armed conflicts in that country prior to July 2006 is grounded on the customary proscription of forced displacement.[29] It should be recalled that the conflict between Khartoum and South Sudan was an armed conflict of non-international character and Resolution 55/116 does not make a reference to any order of forced displacement. Therefore, Willms contended that the states supporting the Resolution were all of the opinion that there was no need for any order to apply the customary rule that makes illegal the forced-displacement of civilians in a non-international conflict.[30] In addition, none of the states that voted against or abstained from voting, objected to the implied understanding of the customary ban of forced displacement in it, although they had the chance to do so.[31]

26 Willms (n 17 above) 548 and 550. However, Willms, explains that the preparatory works seem to support '[t]he view that displacement caused by indiscriminate military operation is prohibited too.' See Willms (n 17 above) 551.

27 Willms (n 17 above) 556-558.

28 UNGA Resolution 55/116 (2000) on the situation of human rights in the Sudan 12 March 2001, A/RES/55/116 (2000) para 2 a) iii) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/116&referer=http://www.un.org/depts/dhl/resguide/r55_en.shtml&Lang=E (accessed 25 August 2014).

29 Willms (n 17 above) 559. In this regard, see JM Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2005) 1. Rule 129: 'A) Parties to an international armed conflict may not deport or forcible transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative reasons so demand. B) Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.'

30 Willms (n 17 above) 559.

31 As above, citing a similar case about Somalia, the author also clarified as follows: 'In 2004, the UN Human Rights Commission condemned without a vote the 'widespread violations and abuses of human rights and humanitarian law [including] the forced displacement of civilians'. The armed conflict in Somalia was of non-international nature at that point. As Somalia is not a party to Additional Protocol II, the Commission must have pronounced itself on the basis of the customary prohibition of forced displacement in non-international armed conflict. The UN Human Rights Commission never addressed the question of whether or not the forced displacements had been ordered, and was unlikely to have known whether each of these forced displacements had in fact been carried out pursuant to an order. This suggests that it did not consider an order necessary for a finding of forced displacement.' And, at 561, the author concluded: 'State practice and *opinion juris* of States not party to Additional Protocol II, and in relation to armed conflicts on the territory of such States, shows that the customary prohibition on forcible displacement also covered displacement which was not the result of an order.'

A similar situation has occurred regarding the armed conflict in Darfur, where in Resolution 1556 of 2004, the UN Security Council condemned 'all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the *Janjaweed,* including […] forced displacements.' Resolution 1556 also expressed 'its utmost concern at the consequences of the conflict in Darfur on the civilian population, including […] internally displaced persons, and refugees.'[32]

Of particular relevance for refugees being nationals of an enemy state is also article 8 of the 1951 UN Convention Relating to the Status of Refugees (UN Refugee Convention),[33] which clearly reflects article 44 of the Fourth Geneva Convention.[34] In effect, the first part of article 8 (Exemption from Exceptional Measures) stipulates as follows:

> With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality.

However, the UN Refugee Convention lacks explicit mention of any substantial protection for asylum-seekers, including the right of admission, the right to receive asylum and the right of temporary refuge for non-conventional refugees fleeing internal troubles or armed conflicts.[35] It is of

32 UNSC, Resolution 1556 (2004) on measures to prevent the sale or supply of arms and related materiel, 30 July 2004, S/RES/1556 (2004) preamble, available at http://www.refworld.org/docid/411355bc4.html (accessed 25 August 2014).

33 UNGA, Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol 189, 137, available at http://www.refworld.org/docid/3be01b964.html (accessed 20 August 2014). To date, 25 August 2014, this Convention has been ratified by 48 African countries with the exception of Cape Verde, Comoros, Eritrea, Libya, Mauritius and South Sudan. For the list of ratifications, see https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en (accessed 25 August 2014). The last African country to have ratified this Convention has been Swaziland on February 14, 2000. In this regard, Gan (n 24 above) 14 noted: 'The drafters of the 1951 Convention worked under the assumption that the refugee movement was a temporary one phenomenon endemic to the recently-concluded world war. However, the events after 1951 proved them wrong.'

34 For the full text of art 44 (n 33 above) 15.

35 J Fitzpatrick 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harvard Human Rights Journal* 245. In this regard, see also J Hyndman & BV Nylund 'UNHCR and the status of prima facie refugees in Kenya'(1998) 10 *International Journal of Refugee Law* 34-35. For a different position see P Mathew 'First do no harm: Refugee law as a response to armed conflict' in DW Lovell & I Primoratz (eds) *Protecting civilians during violent conflict* (2012) 161: 'strict as it is, the Refugee Convention definition is capable of being applied during times of armed conflict. The term "persecution" is widely accepted as encompassing violation of human rights'. Finally, JF Durieux affirmed: '[The 1951 Geneva] Convention refugee claim is hardly a matter of armed conflict- it is a matter of fear of persecution. The decision-maker's mind must remain focused on persecution, under its many forms. Refugee law precepts […] warn against the assessment taking a different 'starting point' or colouring – dispensing, as it were, with a full assessment of the Convention grounds – "just" because the claimant left a country plagued by armed conflict'. See JF Durieux 'Of war, flows, laws and flaws: A reply to Hugo Storey' (2012) 31 *Refugee Survey Quarterly* 166.

course recommendable that, perhaps through the adoption of an additional protocol (after the one adopted in New York in 1967), the world community of states would fill, in a conventional way, these present *lacunae* contained in the UN Refugee Convention.

The legal framework for the protection of refugees and IDPs in Africa

IHL does not apply to individuals fleeing a belligerent state to a state that is not party to the conflict, nor does it apply to IDPs, *per se*.[36] In Africa, these two aspects have been legally covered by the OAU Refugee Convention, which represents a 'complement' to the UN Refugee Convention,[37] and, more recently, by the adoption of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[38] The Kampala Convention is based on the principle that the problems linked to the internal displacement in Africa mainly remain a question for the jurisdiction of the state.[39]

36 Kalin (n 1 above) 633.

37 Art 8(2) of the OAU Refugee Convention reads: 'The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees'. I remind here that, according to art 1(A) (2) of the Refugee Convention: 'For the purposes of the present Convention, the term "refugee" shall apply to any person who: […] 2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

38 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009, available at http://www.refworld.org/docid/4ae572d82.html, accessed 21 August 2014. To date, 25 August 2014, 22 countries have ratified the convention that entered into force on 6 December 2012. The last country to have ratified the convention has been the Ivory Coast on 20 December 2013. For the list of ratifications, see http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf (accessed 25 August 2014).

39 In this regard, the preamble of the Convention affirms: ('We, the Heads of State and Government of the Member States of the African Union… [reaffirming] the principle of the respect of the sovereign equality of states parties, their territorial integrity and political independence as stipulated in the Constitutive Act of the African Union and the United Nations Charter').

Article 3,[40] common to the four 1949 Geneva Conventions,[41] and now considered as a source of customary international law, to be applied to international armed conflicts, as well as article 4 of APII,[42] are relevant to the protection of IDPs.[43] Further, the Kampala Convention also considers IHL in its provisions[44] and it explicitly provides for the protection of

40 'Under common article 3, an armed conflict could potentially exist between two armed groups, without any involvement of State forces. Common article 3 is, thus, seen as defining the lowest threshold of armed conflict, below which there is no armed conflict and international humanitarian law is not applicable. Finally, it is important to recall, as indicated above, that in non-international armed conflicts the intensity of hostilities plays a fundamental role in triggering the application of international humanitarian law and, thus, the concurrent applicability regime. So to distinguish an armed conflict from other forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation'. See UN/OHCHR (n 2 above) 39.

41 In this regard Lavoyer noted: 'Civilians fleeing from an internal armed conflict enjoy protection very similar to that during international armed conflicts. Although the fundamental principles of this protection have been clearly spelt out, it must be admitted that the rules are less specific. Owing to the predominance nowadays of internal armed conflicts, a fairly detailed description will be given here of the relevant rules. Article 3 common to the four Geneva Conventions is the cornerstone of this protection. Although very short, it contains essential principles. After pointing out that persons taking no active part in the hostilities must be treated humanely in all circumstances, it prohibits the following acts: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the [fundamental] judicial guarantees. The Article also states that the wounded and sick are to be collected and cared for.' See Lavoyer (n 15 above).

42 The first two paragraphs of art 4 read as follows: '(1) All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. (2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Slavery and the slave trade in all their forms; (g) Pillage; (h) Threats to commit any of the foregoing acts […].'

43 In this regard, Kalin added that also '[t]he more specific provisions of Articles 13-18 of Additional Protocol II are fully applicable to internally displaced persons.' see Kalin (n 1 above) 636.

44 In this regard, see C d'Orsi 'Strengths and weaknesses in the protection of the internally displaced persons in Sub-Saharan Africa' (2012) 28 *Connecticut Journal of International Law* 102-103: 'The Kampala Convention reveals its importance also by taking into consideration IHL in its provisions, binding both non-State actors and states. In addition, this Convention goes even further than IHL in several aspects, enhancing the protection of IDPs in the continent and giving inspiration to a possible normative development of IHL norms governing internal displacement as a result of armed conflict.' JP Lavoyer explained: 'The protection to which displaced persons, as civilians, are entitled in the event of displacements due to international armed conflict is set forth in considerable detail (Protocol I, for example, dedicates a major section to it – Articles 48 ff). The civilian population is also entitled to receive items essential to its survival (art 23 of the Fourth Convention; art 70 of Protocol I). The same holds true for the population of occupied territories (arts 55 and 59 ff. of the Fourth Convention; Art 69 of Protocol I). In addition, the civilian population cannot be deported from

displaced persons during armed conflicts in its article 4(4)(b) and (c).[45] In contrast, the 'expanded' definition of a refugee provided in the OAU Refugee Convention is considered as a unique and progressive contribution to refugee jurisprudence.[46] Through the interpretation of article 2 on 'asylum' and article 5 on 'voluntary repatriation,' the comprehensive definition in the OAU Refugee Convention facilitates the refugee status determination on a group basis, allowing at least temporary protection to people fleeing conflicts and protection from possible persecutions.[47] In this regard, the Executive Committee of United Nations High Commissioner for Refugees (UNHCR) (ExCom) observed in 1994:[48]

> [The ExCom] recognizes that in Africa […], regional instruments provide for the protection of refugees fleeing armed conflict and civil strife, as well as those fearing persecution, and that in other regions, persons who require international protection, but who either are not considered refugees within the scope of the 1951 Convention and 1967 Protocol or are in countries that

occupied territory. Generally speaking, the civilian population enjoys the fundamental guarantees stipulated in art 75 of Protocol I.'

45 In full, the article in question stipulates: 'All persons have a right to be protected against arbitrary displacement. The prohibited categories of arbitrary displacement include but are not limited to […] (b) Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law; (c) Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict […]'. I would like to recall that art 2 d) and e) of the Convention stipulates as follows: 'The objectives of this Convention are to: […] (d) Provide for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons; (e) Provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons […]'.

46 Fitzpatrick observed that: 'The definition of refugee (under the OAU Refugee Convention) […] was expanded […] without any suggestion that the quality or durability of their protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention.' See J Fitzpatrick 'Temporary protection of refugees: Elements of a formalized regime' (2000) 94 *American Journal of International Law* 293. In its art I(1), the OAU Refugee Convention 'copies' the Refugee Convention's definition -with the 1967 New York Protocol's addition, which removed the geographical and temporal limitations from the same. Moreover, it includes this additional definition of a refugee in para I(2): '[T]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his/her or her country of origin or nationality, is compelled to leave his/her place of habitual residence in order to seek refuge in another place outside his/her country of origin or nationality [emphasis added].'

47 Lawyers' Committee for Human Rights *African exodus: Refugee crisis, human rights and the 1969 OAU Convention* (1995) New York: Lawyers' Committee for Human Rights Editions 30.

48 ExCom conclusion No 74 (XVL) 'General conclusion on international protection' 1994, para n) available at http://www.refworld.org/pdfid/4f50cfbb2.pdf (accessed 25 August 2014). But, on the other hand, as UNHCR pointed out: '[T]here are persons who flee the indiscriminate effects of violence associated with conflict with no element of persecution. Such persons might not meet the Convention definition, but may still require international protection on other grounds.' See UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, Geneva, 1 April 2001, para 22.7.

have not acceded to these instruments, have generally been provided protection and humanitarian assistance through specific measures adopted by States and in full cooperation with UNHCR.

Article 12 of the 1981 African Charter on Human and Peoples' Rights (African Charter)[49] accords every individual in a member state the right to freedom of movement and residence and the right to leave any country and return to it, with possible restrictions by laws for protection of national security, law and order, public health or morality.[50] In addition, article 12(3) proclaims the right to seek and obtain asylum in other countries, in accordance with the domestic laws of those countries and international conventions.[51] The right to seek and obtain asylum proclaimed by article 12 of the African Charter is unique in the African human rights' panorama, and it has been considered to have incorporated into the African Charter the OAU Refugee Convention prohibiting the return of an individual where his or her liberty, physical integrity and life may be threatened.[52] On the other hand, in proclaiming the attainment of asylum as a 'right', article 12 of the 1981 Banjul Charter accomplishes a huge step forward compared to the former OAU Refugee Convention, which dedicates its entire article 3 to asylum without ever mentioning it as a 'right' for the individual.

Also, the African Commission on Human and Peoples' Rights (African Commission) has, on several occasions, dealt with the rights of refugees through individual communications, provided for in article 55 and 56 of the African Charter.[53] In effect, the African Charter should be

49 African Charter on Human and Peoples' Rights (Banjul Charter) 27 June 1981.

50 In this regard see, more generally, art 12 of the 1966 International Covenant on Civil and Political Rights (ICCPR), from which the Banjul Charter seems to draw, for the formulation of its art 12: '(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public),* public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. (4) No one shall be arbitrarily deprived of the right to enter his own country.'

51 Art 12 of the Banjul Charter stipulates as follows: '(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he/she abides by the law. (2) Every individual shall have the right to leave any country including his/her own, and to return to his/her country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. (4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. (5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

52 O Amao 'Civil and political rights in the African Charter' in M Ssenyonjo (eds) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 46.

53 In detail, articles 55 and 56 of the 1981 Banjul Charter read as follows: '55(1) Before each session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the

interpreted with an approach that protects the rights and freedoms of refugees, and thus, should refer to the main refugee conventions.[54] However, the African Commission's engagement with refugee protection has been considered to have truly started exclusively when it came to collaborate with UNHCR, as it happened in 1998 with the workshop jointly held in Dakar.[55] In 2012, the African Commission was concerned by the humanitarian consequences of the forced displacement of civilian populations of Mali to neighbouring countries as a result of the rising menace of terrorism in the North of the country, and further called on regional and international organisations to support the people of Mali in their attempt to preserve democracy and national security.[56]

In addition, also the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union '[t]o assist Member States that have been adversely affected by violent conflicts, [it] shall undertake the […] activit[y] of resettlement and reintegration of refugees and internally displaced persons'[57] at the same time, and in conjunction with the Chairperson of the African Commission, 'support[ing] and facilitate[ing] humanitarian action in situations of armed conflicts'.[58] Through this instrument, African governments have contracted away, in a conscious manner, their sovereignty in order to aspire to greater security and stability.[59]

members of the Commission, who shall indicate which communications should be considered by the Commission. (2) A communication shall be considered by the Commission if a simple majority of its members so decide'; '56) Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they: (1) Indicate their authors even if the latter request anonymity, (2) Are compatible with the Charter of the Organization of African Unity or with the present Charter, (3) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, (4) Are not based exclusively on news discriminated through the mass media, (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, (6) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and (7) Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.'

54 JD Mujuzi 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 *African Human Rights Law Journal* 174.

55 R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 194.

56 ACHPR Resolution No. 217 on the Situation of the North of the Republic Mali, 2 May 2012, preamble and paragraph ix, available at http://www.achpr.org/sessions/51st/resolutions/217/ (accessed 25 August 2014).

57 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002. Adopted at the 1st Ordinary Session of the Assembly of the African Union in Durban, 9 July 2002, and entered into force on 26 December 2003. Available at http://www.refworld.org/docid/3f4b1d374.html (accessed 25 August 2014).

58 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (n 57 above) art 7.

59 JI Levitt 'The Peace and Security Council of the African Union: The known unknows' (2003) 13 *Transnational Law & Contemporary Problems* 123.

The effect of proliferation of small arms and light weapons on the protection of refugees and internally displaced persons in Africa

The proliferation of small arms and light weapons (SALW) on the continent usually constitutes an impediment to the return of displaced persons. Therefore, to be able to protect refugees and IDPs effectively, the threat emanating from the illicit flow of arms and ammunition on the continent should be curbed.

Unfortunately, the 2005 World Summit Outcome, in which the principle of the 'responsibility to protect' is enunciated, barely touches upon the plight of refugees and IDPs.[60] Although the World Summit Outcome proclaims that it aims at the 'safe and sustainable return' of refugees, and mentions the principles of solidarity and burden-sharing that are typical of the refugee-protection in Africa,[61] it does not provide any additional indication on the means and strategies to embrace, in order to assure the protection of refugees and IDPs. As a consequence, in Africa, for instance, the calls for disarmament came recently also from the refugees themselves, in a particular case as a precondition in order to repatriate to Côte d'Ivoire.[62]

Over the years, however, the AU has accomplished some significant progress in addressing the menace of SALW on the continent, a plight affecting also the wellbeing – and frequently the life - of refugees and IDPs. For example, the 2000 African Common Position on the Illicit Proliferation, Circulation and Trafficking of SALW (Bamako Declaration), adopted by the Council of Ministers of the OAU (AU since 2001), possibly remains the main policy document followed by the AU Commission for its activities in this domain.[63] In the Bamako Declaration, where it is clearly affirmed that African countries have the task to detect,

60 UNGA, Resolution 60/1 (2005) World Summit Outcome, 24 October 2005, A/RES/60/1, paras 132-133 available at http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30 (accessed 10 October 2014).

61 In this regard, see art 2(4) of the OAU Refugee Convention.

62 See the news: 'Ivorian refugees call for disarmament, reconciliation and increased grant before return' 10 February 2014 available at http://www.unhcr.org/52f8ce549.html (accessed 10 October 2014).

63 Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (Bamako Declaration) 1 December 2000 available at http://www.peaceau.org/uploads/bamako-declaration.pdf accessed 20 October 2014. About the role and the tasks fulfilled by the AU Commission see http://www.au.int/en/commission (accessed 20 October 2014):
'The Commission is the Secretariat of the Union entrusted with executive functions. […] The structure represents the Union and protects its interest under the auspices of the Assembly of Heads of State and Government as well as the Executive Committee. […] The mission of the Commission is to become "An efficient and value-adding institution driving the African integration and development process in close collaboration with African Union Member States, the Regional Economic Communities and African citizens"'.

take hold of and dismantle all the warehouses of illegal weapons,[64] the Council of Ministers of the OAU communicated its concern about the illegal spread and trading of SALW, whose propagation could destabilise the entire continent, affecting the security of refugees.[65]

In addition, in 2011, the AU Commission established a draft on the AU Strategy on the Control of Illicit Proliferation, Circulation and Trafficking of SALW, accomplishing what was agreed in the AU Decision No 369 of 2011.[66] The AU Strategy document was adopted by a Meeting of Member States Experts, held in September of the same year in Lomé. This Strategy has as an objective to 'promote a culture of peace' (that is the same kind of culture which, if adopted, could avoid additional refugee flows on the continent) developing programmes of public consciousness inherent in the problems pertinent to the proliferation of SALW.[67] The Commission is normally working through the AU-Regions Steering Committee on SALW and Disarmament, Demobilisation and Reintegration (DDR).[68] The Steering Committee met from 20 to

64 Bamako Declaration (n 63 above) sec 2, para vi.

65 Bamako Declaration (n 63 above) para iii.

66 AU Assembly, Decision on the Report of the Peace and Security Council on its activities and the State of peace and security in Africa, Doc. Assembly/AU/4(xvii), 30 June-1 July 2011, section 32: '[The Assembly] welcomes the finalization by the Commission of a draft 'African Union Strategy on Small Arms and Light Weapons, Ammunition, Explosives and Related Materials', together with its Implementation Plan, and looks forward to the meeting of Member States experts planned for the third quarter of 2011 to review and adopt both documents. Furthermore, the Assembly encourages the Commission to facilitate the elaboration of an African Common Position on the Arms Trade Treaty, including the convening of a meeting of Member States experts, ahead of the UN-sponsored Conference on the issue, to be held in New York, in July 2012, in pursuance of the General Assembly resolution 61/89 on developing a comprehensive, legally-binding instrument establishing common international standards for the import, export and transfer of conventional arms.' This document is available at http://au.int/en/sites/default/files/Assembly_AU_Dec_363-390_%28XVII%29__E.pdf (accessed 10 October 2014).

67 African Union Strategy on the Control of Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons, Lome, 26-29 September 2011, sec 1.1. The other objectives of this strategy are: '(1.2) Address comprehensively the problem of the illicit proliferation, circulation and trafficking of small arms and light weapons through mainstreaming SALW control as a cross-cutting and multidimensional issue in achieving peace, security, development, and stability in the Continent; (1.3) Strengthen the capacity of AU Member States, RECs and Regional Bodies, and the African Union Commission, to implement measures against the illicit proliferation, circulation and trafficking of SALW; (1.4) Promote cooperation, coordination and exchange of information between relevant stakeholders at national, regional, trans-regional and continental levels; (1.5) Enhance international cooperation and assistance in the fight against proliferation of small arms and light weapons at the national, regional and continental levels.' This document is available at http://unrec.org/docs/Strategy%20Final.pdf (accessed 10 October 2014).

68 In this regard: 'In February 2012, the African Union Commission, through the Peace and Security Department (PSD), initiated the Disarmament, Demobilisation and Reintegration Capacity Program (DDRCP) by holding a Consultation Seminar on DDR with the Regional Economic Communities (RECs) and Regional Mechanisms for Conflict Prevention, Management and Resolution (RMs). The purpose of the DDRCP is to strengthen capacities within the AU, its member states and regional partners, namely the RECs and RMs, to support national and regional DDR initiatives on the continent.' See http://www.peaceau.org/en/page/68-disarmament-demobilization-and-reintegration-ddr (accessed 9 October 2014).

21 February 2013, this meeting being the first with the Committee having an expanded mandate including SALW and DDR. The meeting offered to the members of the committee the opportunity to provide updates on the actions undertaken in order to fight against the proliferation of SALW and to promote DDR.[69] These efforts undertaken by the AU have also been corroborated by regional initiatives, the most important of which seems to be represented by the adoption of the 2006 ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials which, however, in article 4, presents conditions of exemption to the 'ban, without exception,' of the transfers of SALW provided in article 3.[70]

In 1998, thus before the adoption of the 2006 Convention, recognising that the proliferation of illicit SALW created danger to the security of human-beings, ECOWAS adopted a Moratorium on the Importation, Exportation and Manufacture of Small Arms and Light Weapons in West Africa,[71] the world's first regional moratorium of this kind. In principle adopted for three years, but renewable, this moratorium constituted an important precedent in limiting the diffusion of these mortal weapons, having as a foundation the general disarmament and the socio-economic development of the region,[72] as in fact, the preamble of the moratorium also recognises that '[t]he proliferation of light weapons constitutes a destabilising factor for ECOWAS Member States and a threat to the peace and security of our people.'[73] However, article 9 of the moratorium also provided for exemptions '[in] order to meet legitimate national security

69 AU-Regions Steering Committee meeting on Small Arms and Light Weapons, and Disarmament, Demobilization and Reintegration ends in Addis Ababa, Press Release, Addis Ababa, 21 February 2013. This document is available at http://www.peaceau.org/uploads/au-regions-steering-committee-meeting-on-small-arms-and-light-weapons-and-disarmament-demobilization-and-reintegration-ends-in-addis-ababa.pdf (accessed 10 October 2014).

70 ECOWAS, Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, Done at Abuja, on 14 June 2006, available at http://www.poa-iss.org/RegionalOrganizations/ECOWAS/ECOWAS%20Convention%202006.pdf (accessed 10 October 2014). Article 4 of the convention stipulates as follows: '(1) A member state can request exemption from the provisions of art 3(b) in order to meet legitimate national defence and security needs, or to participation peace support or other operations in accordance with the decisions of the United Nations, African Union, ECOWAS, or other regional or sub-regional body of which it is a member. (2) For the purpose of paragraph 1 of this article, member states shall establish and maintain an effective system of export and import licensing or authorisation, as well as of measures on international transit, for the transfer of small arms and light weapons. (4) Each member state shall take such measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation of the documents can be verified and validated.'

71 ECOWAS, Twenty-first Ordinary Session of the Authority of Heads of State and Government Abuja, 30-31 October, 1998 Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons In West Africa (ECOWAS Moratorium).

72 A Bah 'Micro-disarmament in West Africa: The ECOWAS Moratorium on Small Arms and Light Weapons' (2004) 13 *Africa Security Review* 34

73 ECOWAS Moratorium (n 71 above), preamble, para 2.

needs or international peace operations requirements.'[74] This moratorium constituted the precedent that gave rise to the birth of the 2006 Convention, the Moratorium's transformation into a legally-binding convention resulting from a process that saw involved Canada, European Union and Switzerland.[75]

The 2006 ECOWAS Convention does not stand alone in the panorama of regional initiatives to prevent the diffusion of SALW on the continent. Another typical example is constituted by the 2010 Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair or Assembly (Kinshasa Convention),[76] where article 3 contains an exception to the general rule of the non-transfer of the SALW,[77] the definition of SALW being contained in the first three paragraphs of article 2.[78]

In the cases of both the 2006 ECOWAS Convention and of the 2010 Kinshasa Convention, the main exception made to the ban on the transfer of SALW is given by reasons of national security. In considering the diffusion of SALW as a danger for Africa, the Nigerian Government, which holds 70 per cent of the total amount of the SALW circulating in Western Africa,[79] has contended:

74 ECOWAS Moratorium (n 71 above), art 9, para 1.

75 I Berkol 'Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan' 1 April 2007, 2, available at http://archive.grip.org/en/siteweb/images/NOTES_ANALYSE/2007/NA_2007-04-01_EN_I-BERKOL.PDF (accessed 28 June 2015).

76 As of 20 November 2014, only four states (out of 11) at the moment adopted the Convention while, according to art 36(1), the Convention needs six ratifications to enter into force.

77 UN, Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly, 30 April 2010, available at http://www.poa-iss.org/revcon2/Documents/PrepCom-Background/Regional/ECCAS_Kinshasa%20Convention.pdf (accessed 13 November 2014).

78 Art 2 stipulates as follows: 'For the purposes of this Convention: (a) Small arms and light weapons: any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas shall be defined in accordance with domestic law. In no case shall antique small arms and light weapons include those manufactured after 1899; (b) Small arms: broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub machine guns, assault rifles and light machine guns; (c) Light weapons: broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; and mortars of a calibre of less than 100 millimetres.'

79 'Porous borders and Boko Haram's arms smuggling operations in Nigeria' *Al Jazeera* 8 September 2013 available at http://studies.aljazeera.net/en/reports/2013/09/201398104245877469.htm (accessed 2 November 2014).

> The Nigerian Government has decried the lack of universally acceptable legally binding instrument to regulate the transfer of arms and ammunition, saying existing legislations are either regionally or nationally based and have no universal application, thereby making it difficult to track the end users and end use of weapons.[80]

Another interesting regional document which clearly recognises the connection between the movement of armed refugees and the proliferation of SALW is the 2000 Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa.[81] In effect, in 2003, MB Mkapa, President of Tanzania, one of the countries that had signed the 2000 Nairobi Declaration, clearly declared as follows: 'The truth is that the proliferation of small arms is a result of refugees entering our country, a problem which is beyond our capacity to solve.'[82]

To act more concretely in order to limit the proliferation of SALW in the region, also in relation with the movement of refugees among international borders, and as a 'binding continuation' to the 2000 Nairobi Declaration, the ministers of foreign affairs of eleven countries adopted in 2004 the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa. It entered into force in 2006 and having as parties the same countries (with the addition of Seychelles) which adopted the 2000 Nairobi Declaration.[83]

Following the adoption of these formal acts, in 2005 the Regional Centre on Small Arms in the Great Lakes Region, the Horn of Africa and Bordering States (RECSA) has been established. Its vision is the achievement of 'a safe and secure sub-region in a peaceful continent free

80 Government of Nigeria: 'ECOWAS: Nigeria seeks binding laws on arms transfer, puts illicit weapons in circulation at 8 Million' 2013, available at http://www.nigeria.gov.ng/2012-10-29-11-09-25/news/1004-ecowas-nigeria-seeks-binding-laws-on-arms-transfer-puts-illicit-weapons-in-circulation-at-8-million (accessed 10 October 2014).

81 The Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 15 March 2000, Preamble, para 4, available at http://www.recsasec.org/pdf/Nairobi%20Declaration.pdf (accessed 10 October 2014). The countries signing this declaration were: Burundi, DRC, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, Sudan, Tanzania, and Uganda.

82 IRIN 'Tanzania: President ties rise in small arms to refugee inflows' 1 September 2003, available at http://www.irinnews.org/report/45867/tanzania-president-ties-rise-in-small-arms-to-refugee-inflows (accessed 8 September 2014).

83 The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 21 April 2004, Preamble, paragraph 6, available at http://www.recsasec.org/pdf/Nairobi%20Protocol.pdf (accessed 10 October 2014). The countries that adopted the protocol are: Republic of Burundi, Democratic Republic of Congo Republic of Djibouti Federal Democratic Republic of Ethiopia, State of Eritrea, Republic of Kenya, Republic of Rwanda, Republic of Seychelles, Republic of the Sudan, United Republic of Tanzania, Republic of Uganda.

from arms proliferation'.[84] All these efforts have not, however, been always corroborated by a clear implementation of the norms. In Kenya, we are currently spectators of a 'rising tide' of the proliferation of SALW, also in the refugee camps of Kakuma and Dadaab.[85] Although a judgment of the High Court in Nairobi already in 2017 declared the closure of the Dabaab refugee camp null and void,[86] the Kenyan authorities remained committed to finally closing it down by May 2017.[87]

Considering another geographic area, also the Southern African Development Community (SADC) has undertaken several initiatives to try to limit the proliferation of SALW in the region. That is why it adopted in 2001 (entered into force in 2004), the Protocol on the Control of Firearms, Ammunition and Other Related Materials,[88] that saw the participation of fourteen countries and, among them, also two countries – DRC and Tanzania – which have already signed the 2000 Nairobi Declaration and which simply wanted to expand their security as much as they could. In this Protocol, article 13 is dedicated to a concept common to many documents relating the proliferation of SALW and that we have seen constituting a pillar of the 2011 AU Strategy: the capacity by the states parties to develop awareness programs in the public opinion in order to tackle the diffusion of arms.[89] The entering into force of this Protocol did not stop, however, the flow of SALW in Zambia with Angolan refugees representing the main cause of the country's criminality.[90]

84 See the RECSA available at http://www.recsa.int/index.php/en/about-us/mission-and-vision (accessed 8 October 2014).

85 MM Mutwiri, 'The role of refugees in proliferation of small arms and light weapons: The case of Kakuma, Kenya' MA thesis, Moi University, 2014 available at http://ir.mu.ac.ke:8080/xmlui/bitstream/handle/123456789/421/MOSES%20MUGAMBI%20MUTWIRI%202014.pdf?sequence=1 (accessed 1 February 2017) and IRIN 'Kenya: Rising tide of small arms' 3 July 2012, available at http://www. irinnews.org/report/95793/kenya-rising-tide-of-small-arms (accessed 8 September 2014).

86 High Court of Kenya (Constitutional and Human Rights Division*), Kenya National Commission on Human Rights and Kituo Cha Sheria v The Hon Attorney General and al., Constitutional Petition No. 227 of 2016,* 9 February 2017, 32-34, para i.

87 M Mutiga & E Graham-Harrison, 'Kenya says it will shut world's biggest refugee camp at Dadaab', The Guardian, 11 May 2016, available at https://www.theguardian.com/world/2016/may/11/kenya-close-worlds-biggest-refugee-camp-dadaab (accessed 20 April 2017).

88 SADC, Protocol on the Control of Firearms, Ammunition and Other Related Materials, 14 August 2001, available at http://www.sadc.int/files/8613/5292/8361/Protocol_on_the_Control_of_Firearms_Ammunition2001.pdf (accessed 8 October 2014).

89 In full, article 13 reads as follows: 'States Parties undertake to develop national and regional public education and awareness programmes to enhance public involvement in support for efforts to tackle firearms proliferation and illicit trafficking and to encourage responsible ownership and management of firearms, ammunition and other related materials.'

90 G Mthembu-Salter 'Trading life, trading death: The flow of small arms from Mozambique to Malawi' A working paper of the small arms survey in cooperation with the Institute for Security Studies No 6, 2009, 31 available at http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP6-Trading-Life-Trading-Death.pdf (accessed 10 June 2014).

One of the first UN General Assembly resolutions (in 1994: UNGA Resolution 49/75 of 9 January 1995) dedicated to the assistance to countries to curb the illicit traffic in small arms, openly praised the initiative of Mali, in its efforts 'concerning the question of the illicit circulation of small arms and their collection in the affected States' in Sub-Sahara Africa.[91] The UN General Assembly draft resolution of October 2014, sponsored by Mali, recalls the 1994 UN General Assembly resolution 49/75, as well as the 2006 ECOWAS Convention and the 2000 Bamako Declaration.[92]

Also at the national level, African countries have launched plans to curb the proliferation of SALW. Examples of this kind are represented by Ghana,[93] Kenya,[94] and South Africa.[95] To date, however, the results of these national campaigns against the proliferation of SALW have been contradictory. Africa is undoubtedly playing a crucial role in this particular situation even if, in spite of its efforts, much work still needs to be done, especially in implementing the norms adopted.

91 UNGA, Resolution 49/75 (1994) General and complete disarmament, 9 January 1995, A/RES/49/75 (1994), section G, paragraph 1, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/49/75 (accessed 9 November 2014).

92 UNGA, Assistance to States for curbing the illicit traffic in small arms and light weapons and collecting them, 10 October 2014, A/C.1/69/L.4, available at http://www.refworld.org/docid/543f77783.html (accessed 24 October). See, in detail: Preamble (paragraph 4) for the 2000 Bamako Declaration, Preamble (paragraph 8) for the 2006 ECOWAS Convention, and paragraph 2 of the resolution mentioning the 1994 UNGA Resolution.

93 Read about the Small Arms Control Programmes in Ghana about the Ghana National Commission on Small Arms and Light Weapons (GNACSA) at http://www.smallarmscommission.gov.gh/pages/programmes.php?parentpage=programmes&page=small%20arms%20control (accessed 9 October 2014): 'The Commission is spearheading the review of Ghana's legislation and regulations on SALW in order to conform to regional and international instruments such as the ECOWAS Convention on SALW, the UN Programme of Action on SALW (UNPoA) and other international best practices and norms.'

94 'Kenya […] has a wide range of pieces of legislation with relevance to SALW including the Firearms Act, Police Act, Explosives Act, Armed Forces Act, Customs and Excise Act, Wildlife Act, Extradition Act, Penal Code, Immigration Act, Administration Police Act, Prisons Act, Forests Act and Refugee Act. Despite the existence of these pieces of legislation, there is disjointed and cumbersome approach to addressing the problem of SALW in all its aspects.' see Republic of Kenya, Office of the President, Ministry of State for Provincial Administration and Internal Security, National Policy on Small Arms and Light Weapons (no date available) 12 available at http://www.kecosce.org/downloads/Final_SALW_policy_draft.pdf (accessed 12 October 2014).

95 '[In South Africa] a National Firearms Plan is being implemented in terms of this strategy with the objective to reduce the number of illegal small arms in circulation as well as to reduce the flow of illegal weapons into South Africa. It also concentrates efforts to ensure the lawful and proper use of licensed firearms and involves legislative amendments aimed at tightening up the issuing of licences and ensuring that fewer losses occur from legal owners.' Available at http://www.dirco.gov.za (accessed 9 February 2017).

Finally, on 24 December 2014, the Arms Trade Treaty (ATT), regulating the international trade in conventional arms, including SALW, entered into force.[96] Up to now,[97] the treaty received 69 ratifications, of which only ten are from Africa.[98] The ECOWAS proposed that this treaty should be open to regional integration organisations, as well, such as the UN Convention against Transnational Organised Crime and its Protocols. But this proposal found a strong aversion by a number of UN member states, above all China, because it was under arms embargo by the EU.[99]

According to article 5(3) of the ATT, national definitions of SALW '[s]hall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty.' The rationale of the treaty is well explained in its article 1 ('object and purpose') the object being to '[e]stablish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms' and to '[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion.' This should be done for three precise purposes, listed in article 1: '[c]ontributing to international and regional peace, security and stability,' '[r]educing human suffering' and '[p]romoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.' Some state parties wanted an ATT to deal exclusively with 'illicit' transfers, while the most part of them searched for controlling all transfers, wanting to curb transfers towards countries using the weapons transferred in a legal way.[100]

Conclusion

IHL adopts a global approach aimed at the preservation of the civilian population in its entirety. The fact that displacements of peoples are seldom mentioned in IHL does not mean that legal protection is deficient

96 UNGA, The Arms Trade Treaty, A/RES/69/49, 2 December 2014: 'The General Assembly, […], 1) Welcomes the 54 ratifications of the Arms Trade Treaty to date and its forthcoming entry into force on 24 December 2014; […]; 3. Calls upon all States that have not yet done so to sign and, thereafter, according to their respective constitutional processes, ratify, accept or approve the Treaty at the earliest possible date; 4. Calls upon those States in a position to do so to provide technical and/or financial assistance to requesting States in order to promote the universalization and effective implementation of the Treaty […]'.

97 Update to 9 February 2017.

98 The countries are: Benin, Burkina Faso, Cabo Verde, CAR, Chad, CIV, Ghana, Guinea, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Togo and Zambia. For the list of ratifications, see https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/02/ATT-status-table-WebReport-Feb-2017.pdf (accessed 9 February 2017).

99 Geneva Academy of International Humanitarian Law and Human Rights, The Arms Trade Treaty (2013), Geneva: Geneva Academy of International Humanitarian Law and Human Rights (2013) 12-13.

100 Geneva Academy of International Humanitarian Law and Human Rights (n 99 above) 17.

while the compliance with the law helps to avoid such displacements.[101] IHL also deals with the necessities of those refugees who, in an international armed conflict, find themselves in a region of a party to the conflict. In addition, IHL also protects the rights of IDPs both in international and domestic conflicts. IRL offers protection to those who have left their country of origin because they have a 'well-founded fear of persecution' based on acts of violence occurring in the framework of an armed conflict,[102] with the African definition of a 'refugee' opening the door also to a temporary protection of the people fleeing their home country. Nonetheless, criticisms still remain in place, doubtful of the fact that a situation of domestic or international conflict can raise a real 'persecution', which is an indispensable element to claim refugee status.[103]

Respect for the norms in place would contribute to avoiding displacements originating from conflicts. Training and instruction on the rules of IHL constitute important measures of prevention.[104] However, as Lavoyer noted, the nationals of a state fleeing from an armed conflict to the territory of a state not party to an international conflict are not protected by IHL, unless the latter state is in turn affected by a domestic armed conflict in which case the aforementioned common article 3 will apply.[105]

Indiscriminate violence or explicitly directed against civilians should be considered in defining if a displacement is forced. The flight of civilians from official military manoeuvres in which parties have adopted safeguards to protect civilians and civilian targets, cannot be compared to forced displacement triggered by the intimidation of civilians.[106]

The scourge of the proliferation of SALW is facing Africa and this affects the protection of refugees and IDPs, as well. Frequent and credible attempts to find an institutional solution by the AU are quite recent, although some concrete yet insufficient steps have been undertaken. For example, in Liberia in 2003, more than 2 000 former combatants turned in their weapons in a campaign aimed at reversing the proliferation of SALW; with UNHCR being part of the DDR process of the returnees[107]

101 Lavoyer (n 15 above).
102 Kalin (n 1 above) 648.
103 Kalin listed three reasons why a conflict *could not* 'generate' refugees (emphasis added). However, as the author *pointed* out above, '[M]ilitary or security operations directed against a particular group must be regarded as racially, religiously, politically […] motivated if their target is a group of persons *hors de combat* who share certain racial, religious or political characteristics and if the measures taken are disproportionate, eg because they are not justified by compelling reasons or are much harsher in the case of that particular group than they would be in the case of persons not regarded as (potential) enemies by the State.' See Kalin (n 1 above) 642.
104 Lavoyer (n 15 above).
105 As above.
106 Wilms (n 17 above) 565.
107 UNHCR 'Liberia's disarmament process' 9 December 2003, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3fd5bc924&query=small%20arms (accessed 8 October 2014). This news also explained that: '1,630 internally

in Sudan in 2004, where refugees showed their intention to return during what seemed a cease-fire in the conflict opposing Khartoum to the Southern regions of the country[108] and in the Horn of Africa in 2006, where almost eight per cent of the 150 million population of the seven countries from the IGAD sub-region of Africa (Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda) were affected by displacement.[109]

A detailed legal framework exists also at the regional level. However, a final solution for the issue at stake is still in urgent need to be found, as the attack perpetrated on May 2014 in Central African Republic clearly shows.[110] The legal instruments to limit the proliferation of SALW in Africa exist but their implementation seems far to be reached. That is why an actual application of them is required. But efforts undertaken by regional and national actors are not lacking. The support given in November 2014 by the AU Commission to the government of Gabon in establishing a National Commission for SALW constitutes an evidence of this effort made.[111] Several years earlier, Gabon was also the author of a

displaced Liberians were transferred from Harbel Multilateral High School Campus, Dolo's Town and Peter's Town all in Margibi County) on December 5, to the nearby official IDP camps: Unification, Mount Barclay and Rick. This was the highest number of IDPs ever transported in a single day to an official camp since the relocation process began in early September in Monrovia. This relocation of IDPs is an inter-agency initiative to help decongest Monrovia. After the attack on the city last June, some 30,000 people found shelter in 56 schools and a clinic in the capital. Following the beginning of the relocation process of these IDPs, schools in Monrovia were able to resume classes in November. Thousands of displaced Liberians spontaneously went home or moved to established IDP camps. For the IDPs, the move means increased assistance and better living conditions. At the IDP camps, UNHCR and other UN partners along with the government of Liberia and NGOs help to receive, register and distribute relief items. Reception halls are set up to provide temporary accommodation until the IDPs can finally settle into more private shelters in the camps.'

108 UNHCR 'Sudanese refugees need "real security" for any return' 17 March 2004, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=405834767&query=small%20arms accessed 10 September 2014. On the same regard, see also: UNHCR 'Security, women's views crucial as UNHCR paves way for south Sudan returns' 18 March 2004, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4059b70a4&query=small%20arms (accessed 10 September 2004).

109 UNHCR 'East and Horn of Africa states agree to tackle displacement regionally' 24 February 2006, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43ff30fbb&query=small%20arms (accessed 10 September 2014).

110 UNHCR 'At least 17 killed and 27 missing after attack on Bangui church sheltering the displaced' 30 May 2014, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=53885df86&query=small%20arms (accessed 10 September 2014): 'In the Central African Republic, an attack in Bangui on Wednesday on the Notre Dame de Fatima church has resulted in the deaths of at least 17 people and 27 civilians reportedly abducted by assailants who drove them to an unknown location. The attackers – who arrived in pick-up trucks in the early afternoon – threw grenades into the church ground before opening fire on people, using small arms. Those killed during the attack include a priest. Two children and two adults also succumbed to their injuries on Thursday.'

111 AU, African Union Commission supports the Gabonese Government towards the establishment of National Commission for Small Arms and Light Weapons, 4 November 2014, available at http://www.peaceau.org/en/article/african-union-commission-supports-the-gabonese-government-towards-the-establishment-of-national-commission-for-small-arms-and-light-weapons (accessed 15 November 2014).

letter addressed to the Secretary-General of the UN, in which it exposed the threat of the proliferation of the SALW in the Central African region and how this proliferation could affect the displacement of millions of people in the region, proposing the institution of registers of national stocks of SALW.[112]

Drawing a parallel between the regulation of light weapons and refugees, the implementation of the provisions on the limitation of SALW in Africa is not very dissimilar with what happens with the implementation of the refugee law on the continent. Refugee law, too, is often considered, also in Africa, as '[t]he unwanted child of states'.[113] In both instances, African legislators conceived real ground-breaking legislation and policies either to limit the proliferation of SALW or to protect refugees but, in both cases, they still need to translate their promising ideas, expressed through advanced legislation, into more tangible forms.

Finally, there is a certain lack of coordination between the multiple entities, both international and African, dealing with the different categories of persons fleeing situations of armed conflict. Therefore, greater cooperation among them would be of utmost significance.[114] Broadly speaking, efforts put in place by the different actors composing the international community should be focused in favouring the implementation of IHL by all the parties in conflict. In so doing, they will help to generate a reduction in the number of persons in need of protection, given that often the practice by African states that have ratified the various legal instruments protecting the displaced persons remains, unfortunately, still rather inconsistent.[115]

112 UNSC, Letter dated 15 March 2010 from the Permanent Representative of Gabon to the United Nations addressed to the Secretary-General, S/2010/143, 10 March 2010, 2-3.

113 R Byrne & A Shacknove 'The safe country notion in European asylum law' (1996) 9 *Harvard Human Rights Journal* 187.

114 JP Lavoyer (n 15 above). The author clarified 'This cooperation must be increased in a spirit of complementarity and must take their respective mandates into account. To be truly neutral and impartial, humanitarian action must moreover be independent of all political and military considerations, for only then is it possible to reach all victims. States must also recognize that humanitarian action has its limits; although indispensable, it is but a temporary remedy for problems that can be solved only by political means, with assistance from the international community when required.'

115 For an observation on the general status of the displaced persons worldwide, see Gan (n 24 above) 28.

CHAPTER 9

PROTECTION FROM SEXUAL AND GENDER-BASED VIOLENCE IN AFRICA

Dan Kuwali, Catherine Nakirya and Grace Amuge

Abstract: *Africa, especially the Great Lakes Region (GLR), has faced several armed conflicts leading to sexual and gender-based violence and abuse of fundamental human rights. The state and non-state actors (NSAs) have committed a series of violations of international humanitarian law (IHL) and human rights law in these conflicts. Sexual and gender-based violence (SGBV) constitutes both a violation of human rights and a crime. In order to promote respect for the law, regional framework policies were put in place under the auspices of the United Nations (UN) Security Council and the African Union (AU). The countries of the GLR illustrate an illuminating example in the prevention and suppression of SGBV, as they have formulated an elaborate legal framework under their Pact on Security and Development to oblige member states to ensure peace and security in the region in a bid to reduce human suffering as a result of armed conflicts. Given its adverse effects of SGBV on peace, security and development, its prevention and suppression is one of the pillars of the GLR Pact on Security and Development.*

Introduction

Africa is a continent which has been most affected by both internal and international armed conflicts, especially the Great Lakes Region (GLR). In a majority of cases, government forces and non-armed groups commit grave breaches of international humanitarian law (IHL) and international human rights law (IHRL). The breaches of law committed include sexual gender based violence on women and men. In extreme cases, the victims are young girls and boys. Armed conflicts *per se* are not outlawed under international law, but acts of the fighting forces that do not conform to the standard set under IHL are outlawed.[1] Gender-based violence during

1 See eg art 3 Common to the Geneva Conventions and art 35(1) Protocol I Additional to the Geneva Conventions of 12 August 1949; the Convention Against torture and other cruel, inhuman or degrading treatment or punishment, the protocol to the African Charter on Human and Peoples' Rights of Women in Africa, the Great Lakes Region Protocol on the Suppression and Prevention of Sexual Violence against Women and Children, the Children Convention, the Goma Declaration on Eradicating Sexual Violence and Ending Impunity in Great Lakes Region and the UN Security Council Resolution 1325.

armed conflicts manifests itself in different ways. The common forms are sexual assault and torture, especially against women.[2]

Although the majority of victims of sexual and gender-based violence are women and young girls, men and boys are increasingly being targeted and often become victims. Recent studies done in armed conflict affected countries such as the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) confirm this position.[3] Within the GLR, sexual and gender-based violence (SGBV) has been an integral component of armed conflicts.[4] SGBV is often systematic for the purposes of destabilising populations and destroying bonds within communities and families, advancing ethnic-cleansing, expressing hatred for the enemy, or supplying combatants with sexual services. Evidence suggests that the use of rape as a weapon of war has increased dramatically in recent years.[5]

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of IHRL and IHL. All violations of this kind, including murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.[6] The form of most cases of sexual and gender-based violence experienced during armed conflicts in GLR are characterised by a unique form of politics largely based on illegal exploitation of natural resources.[7] This discussion analyses the possible causes of sexual gender based violence and proposes how this can be prevented during armed conflicts in the GLR in order to enhance the protection of civilians in the region.

What constitutes sexual and gender-based violence?

The term 'sexual and gender based violence', refers to the physical or psychological violations which are inflicted by man or woman on a member of the opposite sex.[8] In its widest sense, SGBV is 'violence that is

2 See the cases of *Prosecutor v Akayesu,* case No ICTR-96-4-T; see also *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-2842, TC, 14 March 2012.

3 See for example, Population Council, Sexual and Gender Based Violence in Africa: Key Issues for Programming, Nairobi, 2008.

4 Although the terms 'gender based-violence' (GBV) and 'sexual and gender based-violence' are often used interchangeably, United Nations High Commissioner for Refugees (UNHCR) uses the latter to emphasise the urgency of protection interventions that address the criminal character and disruptive consequences of sexual violence for victims or survivors and their families.

5 M Grimaldi 'Variations in levels of rape as a weapon of war: A comparative analysis of Darfur and South Sudan' (2013) 22 *International Affairs Review* 2-19.

6 Male victims are mostly subjected to rape in the form of anal sex and genital mutilation and forced recruitment into the ranks of either government or those of opposing forces. See A Okot, A Isabella & O Gerald *Suffering in silence: A study of sexual and gender based violence in Pabbo, gulu district, Northern Uganda* (2005) 5-8.

7 A Kassaija 'The ICGLR and implementation of IHL in GLR' (2013) Uganda's paper series on international Humanitarian Law, ICRC, Kampala 49-55.

8 Government of Uganda 'National Policy on Gender Based Violence' 2011-2015, Ministry of Gender, Labour and Social Development (2010) 5.

directed against a person on the basis of gender or sex'.[9] SGBV is sometimes defined to include any harmful act that is perpetrated against one person's will and that is based on socially ascribed (gender) differences between males and females.[10] However, from a victim's viewpoint, this definition does not cover in detail how it is felt and may not include all perceptions about it. An attempt to improve on this definition extends its purview to include acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, whether occurring in public or in private life.[11] From a human rights perspective, it constitutes a breach of the fundamental right to life, liberty, security, and dignity, equality between women and men, non-discrimination and physical and mental integrity.[12]

While men and boys can be victims of SGBV, the overwhelming majority of the victims/survivors of SGBV are women and girls.[13] Violence against women as a form of gender-based violence and includes sexual violence.[14] United Nations (UN) General Assembly Declaration on the Elimination of Violence against Women defines 'violence against women' as

> any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[15]

SGBV may be meted out in various ways. The common types of SGBV include physical, sexual, and psychological violence occurring in the family, community, or perpetrated or condoned by the state, including: battering, sexual abuse of the female children in the household, dowry related violence, marital rape, female genital mutilations and other

9 As above.
10 See also United Nations, UN General Assembly Declaration on the Elimination of Violence against Women (1993) UN Doc 48/104, arts 1 and 2 and Recommendation 19, para 6 of the 11th Session of the CEDAW Committee.
11 Inter-Agency Standing Committee (IASC) 2005 'Guidelines for gender-based violence interventions in humanitarian settings' available at http://www.unhcr.org/refworld/docid/439474c74_html (accessed 28 March 2017). This definition is also based on the 1993 UN Declaration on the Elimination of Violence against Women (n 10 above).
12 See art 3 of the Universal Declaration of Human Rights, which states that: 'Everyone has the right to life, liberty and security of person'.
13 (n 10 above), see also United Nations High Commissioner for Refugees, Sexual and Gender Based Violence Refugees, Returnees and Internally Displaced Persons; Guidelines for Prevention (2003) 15.
14 UN General Assembly Declaration 48/104, art 1 (n 10 above).
15 As above.

traditional practices harmful to women, non-spousal violence and violence related to exploitation.[16]

Causes of sexual and gender-based violence

The root causes of SGBV lie in a society's attitudes towards and practices of gender discrimination, which place women in a subordinate position in relation to men. Lack of social and economic value for women and women's work and accepted gender roles perpetuate and reinforce the assumption that men have decision-making power and control over women. Through acts of SGBV, whether individual or collective, perpetrators seek to maintain privileges, power and control over others. This takes place both in peacetime and during armed conflict situations. The vice is, however, prevalent during armed conflicts, where it goes unchecked due to breakdown of socio-economic and political order.

Gender roles and identities are determined by sex, age, socio-economic conditions, ethnicity, nationality and religion. Relationships between male and female, female and female, and male and male individuals are also marked by different levels of authority and power that maintain privileges and subordination among the members of a society. The disregard for, or lack of awareness about, human rights, gender equity, democracy and non-violent means of resolving problems help perpetuate these inequalities. Poverty, poor living conditions, lack of access to adequate food, lack of access to education and lack of economic opportunities have made women and girls very vulnerable to sexual exploitation.[17] While gender inequality and discrimination are the root causes of SGBV, various other factors determine the type and extent of violence in each setting. It is important to understand these factors in order to design effective strategies to prevent and respond to sexual and gender-based violence.

From a socio-political perspective, armed conflicts in the GLR have largely been a result of poor governance systems in some of the countries where they have occurred. Issues of lack of good governance have been reported in Uganda, Rwanda, the DRC, the CAR and South Sudan.[18] The necessary outcome of poor governance is usually an outbreak of internal armed conflicts. Where governance issues have improved, for example, in Uganda and Rwanda, incidences of SGBV have reduced even in the post conflict phase. However, this does not necessarily mean that citizens of

16 The Republic of Uganda Ministry of Gender, Labour and Social Development 'The Uganda Action Plan on the Security Council Resolutions 1325 and 1820 and the Goma Declaration' December 2008 13.

17 As above.

18 See S Nakitto 'The role of the International Conference of the Great Lakes Region in the implementation of international humanitarian law: A case study of Uganda' (2013) 1 *Uganda's Paper Series on International Humanitarian Law* 1.

these countries are content with the politics of the day. It only means that there is relative peace and an attempt to rationalise sharing of the national cake thereby reducing incidences of SGBV, because the component of armed conflict is no longer active. In some cases, the concerned governments have introduced a number of legal reforms to address SGBV.

The magnitude of sexual and gender-based violence in Africa

In addition to the harm they exact on the individual level, SGBV also engenders a social toll and places a heavy and unnecessary burden on the community, health services as well as justice delivery systems.[19] SGBV both reflects and reinforces inequities between men and women and compromises the health, dignity, security and autonomy of its victims. It encompasses a wide range of human rights violations, including sexual abuse of children, rape, domestic violence, sexual assault and harassment, trafficking of women and girls and several harmful traditional practices. Any one of these abuses can leave deep psychological scars, can damage the health of victims or survivors – particularly women and girls – including their reproductive and sexual health, and in some instances, can result in death.

Violence may have profound effects – direct and indirect – on a woman's reproductive health, including: unwanted pregnancies and restricted access to family planning information and contraceptives; unsafe abortion or injuries sustained during a legal abortion after an unwanted pregnancy; complications from frequent, high-risk pregnancies and lack of follow-up care; sexually transmitted infections, including HIV; persistent gynecological problems; and psychological problems.

Psychological or emotional experiences of abuse often erode the victims' self-esteem and put them at greater risk of a variety of mental health problems, including depression, anxiety, phobias, post-traumatic stress disorder, alcohol, and drug abuse. For males, men and boys experience much trauma through abuse by wives or their mothers/step mothers/mother in laws. Men and boys become addicts of alcohol and drugs as relief to these abuses.[20] SGBV has also been used as a weapon of war and as a means of exercising power; it has been both a cause of forced displacement and a terrible consequence of the breakdown of family and community structures that accompanies displacement.

In June 2011, the United Nations High Commissioner for Refugees (UNHCR) approximated that 200 000 Sudanese citizens fled into Chad

19 United Nations Population Fund (UNFPA) 'Ending violence against women' available at http://unfpa.org/gender/violence.htm (accessed 28 February 2012).

20 Republic of Uganda 'National Action Plan on Gender-Based Violence (GBV)' Ministry of Gender, Labour and Social Developments October 2010 (Uganda National Action Plan on GBV) 4.

and another one million were estimated to be internally displaced due to increased violence in the Darfur region of Sudan.[21] Displaced Sudanese women and men reported abduction and widespread rape of women in Darfur by the Janjaweed militia. Women and girls in Chad crossing back to Sudan in search of water, food, and firewood also face the risk of sexual violence.[22] Due to systematic and exceptionally violent gang rape, doctors in the DRC now classify vaginal destruction as a crime of combat. Research has showed that thousands of Congolese girls and women suffer from fistula due to tearing of tissue in the vagina, bladder, and rectum, after surviving brutal rape in which guns and branches were shoved in their private parts.[23] In the South Kivu, for example, research has shown that over 91 per cent of the women suffered from one or several rape- related illness.[24]

According to United Nations Development Fund for Women (UNIFEM), mass rape in the DRC has been accompanied by sexual mutilation and cannibalism, with armed groups particularly targeting pygmy women for cannibalism and genocide.[25] As many as 3 000 women in central Kivu in the DRC were raped between 1999 and mid-2001, demonstrating the extent to which rape is used as a weapon of war in the Congo's five year conflict. Approximately 50 000 to 64 000 internally displaced women in Sierra Leone have histories of war assault. According to a 1999 Sierra Leonean government survey, 37 per cent of the country's prostitutes were less than 15 years of age, and more than 80 per cent of those under 15 were un-accompanied or children displaced by the war. Refugees' International estimates that up to 40 per cent of women were raped during Liberia's 14-year civil war and teenagers were the most targeted group.

The fragility of women rights during the reaction of the international community under the responsibility to protect or similar doctrines was brought to light. As vulnerable groups, women and girls, as shown in different reports, are victimised by national security forces and non-state actors (NSAs). At the same time, it is important to recognise the psycho-social impact of SGBV on its victims. The concept of state sovereignty should be re-examined, especially when a state is weak and cannot protect its nationals from abuses such as SGBV during armed conflicts. This should be an entry point at which the responsibility to protect is invoked. For all said, the humanisation of the methods employed in the responsibility to protect concept is needed. Women's rights can be protected only if their derogation is visible. To do that, there is a need to

21 Okot *et al* (n 6 above).
22 ED Temmerman *Aboke girls: Children abducted in Northern Uganda* (1995).
23 As above.
24 As above.
25 As above.

build up a system that can indicate at an early the violation and prevent additional abuses with gentle methods that are female friendly.

Consequences of sexual and gender-based violence

The consequences of SGBV include acute or chronic physical injury, unwanted pregnancy, sexually transmitted infections, HIV/AIDS, urinary tract infections and fistula, reproductive health problems, emotional and psychological trauma, stigmatisation, rejection, isolation, depression, increased gender discrimination and sometimes death. Women and girls who have been raped may be treated as criminals and imprisoned or fined for illegal pregnancy. Women who have experienced torture, violence and trauma may have specific physical and psychological needs. Survivors of SGBV (including rape, sexual exploitation, and domestic violence) are at heightened risk of being re-abused.

Victims (also called survivors) of SGBV are at high risk of severe health and psycho-social problems, sometimes death, even in the absence of physical assault. The potential for debilitating long-term effects of emotional and physical trauma should never be underestimated. Understanding the potential consequences of SGBV will help actors to develop appropriate strategies to respond to these after effects and prevent further harm.

Prevention and responding to sexual and gender-based violence

Firstly, prevention of SGBV requires close engagement and communication with the local population as well as women's groups and networks to ensure that women's interests are represented, and to help identify and protect the most vulnerable people to SGBV. Secondly, protection of victims of SGBV is part of an effective response to incidences of SGBV. Protection must include the provision of medical care and psycho-social treatment as well as follow-up. Thirdly, prosecution of offenders will vary depending on the national criminal and civil law of the country in which offences take place. Nevertheless, effective data collection and reporting on SGBV is imperative to ensure accountability and allow for prosecution.[26] A legal response in terms of prosecution, truth and reconciliation, can redress crimes and serve as a deterrent. To this end, the Rome Statute of the International Criminal Court has been fundamental in underlining rape as a war crime as well as a crime against humanity.

26 Pearson Peacekeeping Centre 'sexual and gender based violence' available at http://www.peaceoperations.org/index.php/peacekeeping-resources/topics-of-interest/sexual-and-gender-based-violence/lang/en/ (accessed 1 March 2012).

Legal framework for suppression and prevention of sex and gender-based violence

The United Nations and regional bodies have come up with frameworks that provide guidance in the work for the suppression and prevention of SGBV as well as achieving gender equality. UN member states are expected to sign and ratify these international legal instruments and to domesticate them according the needs of their country. States are also expected to align their policies and programmes in view of the frameworks so that the lives of people, especially those of women, girls and children, change for the better. It is critical for programme implementers to know and understand these frameworks so that they develop programmes that are tandem with governments' agenda in the protection of women, prevention of SGBV and promotion of gender equality.

International framework for the protection from sex and gender-based violence

The United Nations (UN) and the African Union (AU), among other regional groupings, have set a legal framework that consists of legal instruments for the prevention and suppression of SGBV and accomplishment of gender equality agenda. These instruments directly deal with issues affecting women and children in peace time as well as conflict situations. All members of the United Nations are bound by these instruments upon ratification of the treaties.

The UN General Assembly Declaration 48/104 on the Elimination of Violence against Women 1993

As indicated earlier, the term 'violence against women' has been elaborated in the UN General Assembly Declaration of 1993.[27] The Declaration calls on states to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons; and to develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; states should also inform women of their rights in seeking redress through such mechanisms.

27 The UN General Assembly Declaration 48/104 (n 10 above).

The Declaration also requires states to develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions. Under the Declaration, states are called upon to take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women. States are also required to adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.[28]

The 1995 Beijing Declaration and Platform for Action

The 1995 Beijing Declaration and Platform for Action states that

> violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms [...] In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. [29]

The Beijing Platform categorised rape in the conduct of armed conflict as a war crime, constituting a crime against humanity and an act of genocide, hence demanding the enforcement of international humanitarian law and international human rights instruments to prevent all acts of violence against women in situations of armed and other conflicts.

The United Nations Security Council Resolution 1325

The United Nations Security Council Resolution (UNSCR) 1325, which was unanimously passed by the Security Council, addresses the impact of war on women and their effectiveness as peace agents.[30] UNSCR 1325 explicitly stresses the role that women play in preventing and resolving conflict and peace building. It also calls for increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management and

28 As above.
29 United Nations 'Beijing Declaration and Platform for Action' Fourth World Conference on Women, 4-15 September 1995, adopted at the 16th plenary meeting on 15th September 1995, para 112.
30 United Nations *United Nations Security Council Resolution* 1325 (2000), UN Doc S/RES 1325 (2000), passed 31 October 2000.

resolution of conflict. The Resolution reaffirms the United Nation's commitment in the 1995 Beijing Declaration and Platform for Action to increase the participation of women in conflict resolution at the decision-making levels and protection of women living in situations of armed conflict.

UNSCR 1325 also advocates for special recognition and respect for international law applicable to the rights and protection of women and girls, especially as civilians. UNSCR 1325 calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse and violence in armed conflict. The Resolution emphasises the responsibility of states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls. UNSCR further calls upon all parties involved in armed conflicts to respect the civilian and humanitarian character of refugee camps and settlements, taking into consideration the particular needs of women and girls.

UNSC Resolution 1820

Realising some gaps in the implementation of UNSCR 1325, the UN Security Council adopted Resolution 1820 on 'Women, Peace and Security' stressing that sexual violence can significantly exacerbate situations of armed conflict and impede the restoration of international peace and security. Key provisions of the Resolution recognise a direct relationship between the widespread and systematic use of SGBV as an instrument of conflict and the maintenance of international peace and security; commit the Security Council to considering appropriate steps to end such atrocities and to punish their perpetrators; and request a report from the UN Secretary General on situations in which SGBV is being widely or systematically employed against civilians and on strategies for ending the practice.

Resolution 1820 demands 'immediate and complete halt to acts of sexual violence against civilians in conflict zones.'[31] This groundbreaking resolution rejected the notion that those who perpetrate sexual violence could in any way benefit from amnesty after conflicts die down, and called on warring factions to ensure that civilians are protected from sexual violence. Most importantly, the Security Council acknowledged through this resolution that sexual violence is not only about individuals – it also seriously affects countries' security and stability. It is, therefore, well within the rubric of matters to be addressed by the Security Council itself, including through sanctions or a more robust response. Resolution 1820

31 United Nations Security Council Resolution 1820 (2008), UN Doc S/RES 1820 (2008).

reiterates the United Nation's commitments in the Beijing Platform for Action, whereby governments, international and regional organisations were urged to identify and condemn the systematic practice of rape and other forms of inhumane and degrading treatment of women as deliberate instruments of war and 'ethnic cleansing'.

The UNSCR 1820, therefore, demands parties involved in armed conflict to immediately take appropriate measures to protect civilians, including women and girls from all forms of sexual violence, which could include, *inter alia*, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, demystifying the myths that fuel sexual violence, vetting armed and security forces to take into account any past actions of rape and other forms of sexual violence by individuals, and the evacuation of women and children under imminent threat of sexual violence to safety.

Prevention and suppression of sex and gender-based violence in international treaty law

Generally, all human rights instruments under the United Nations framework encourage respect for principles of human dignity and non-discrimination. The United Nations has seven core instruments: the Universal Declaration of Human Rights (Universal Declaration 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (CESCR, 1966), the Convention on the Elimination of Racial Discrimination (CERD, 1969), Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (CAT, 1987), Convention on the Elimination of all forms of Discrimination against Women (CEDAW, 1981) and the Convention on the Rights of the Child (CRC, 1990).

Article 4(h) of the Constitutive Act of the African Union

The GLR has demonstrated that it takes SGBV seriously. For example, the ICGLR Defence and Security Pact, which is the main legal instrument governing security matters in the GLR, amplifies the requirements of article 4(h) of the Constitutive Act of the AU, which accords the AU the right to intervene in a member state in cases of war crimes, genocide and crimes against humanity. Article 4(h) of the AU Constitutive Act enacts a key principle of international law that can be relied upon to intervene in a member state to stop violations of IHL and human rights law.[32] In the

32 The Constitutive Act of the African Union, adopted in Lomé, Togo, July 2002 and entered into force in May 2001.

same vein, article 4(j) of the AU Constitutive Act provides for the 'right of the member states to request intervention from the Union in order to restore peace and security'. According to the AU Constitutive Act, intervention under article 4(h) has to be sanctioned by the AU Assembly. The AU Constitutive Act is silent on whether the regional body should seek authorisation of the United Nations Security Council. Although it is not clear whether the AU can undertake article 4(h)-intervention based purely on SGBV, it can be argued that such violations certainly fall under the threshold of war crimes if committed during armed conflict and crimes against humanity if committed during peacetime.

The Rome Statute of the International Criminal Court

In addition to the above, the establishment of the International Criminal Court (ICC) was an attempt to create an international legal framework that could end impunity and more effectively administer justice to victims of international crimes including war sexual crimes. The Court has a mandate, derived from the Rome Statute (2002) to prosecute perpetrators of war crimes against humanity such as genocide, which include massive acts of sexual violence in war situations.

The Arms Trade Treaty

The adoption of a more legally binding instrument, the Arms Trade Treaty (ATT) in 2013 strengthened the legal regime to stop illicit proliferation of SALW in conflict prone regions such as the GLR of Africa. However, many countries that participated in the ATT process have not yet signed or ratified the treaty. It is only hoped that once signed and ratified by several countries, some of which are in the GLR of Africa, the ATT will go a long way to curtail proliferation of SALW, which as of now constitutes a major means of violence for those involved in protracted armed conflicts in the GLR of Africa.

Regional legal framework for the protection of sex and gender-based violence

At the regional level, Africa has developed its own framework derived from the UN. This includes the following: the African Charter on Human and Peoples' Rights (ACHPR, 1981); the African Charter on the Rights and Welfare of the Child (ACRWC 1990); the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2004) (Maputo Protocol); the AU Heads of State Solemn Declaration on equality between Men and Women (Gender Equality) in Africa (2004); the Inter-Governmental Authority on Development (IGAD) Gender Policy and Strategy (2004); the Africa UNITE campaign to end Violence against Women and Girls; the Common Market for Eastern and Southern Africa (COMESA) Gender Policy (2002); and the New Partnership for African

Development (NEPAD) through programmes aimed at enhancing women's human rights through the application of Social Development indicators.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2004 (Maputo Protocol)

The Maputo Protocol aims to eliminate discrimination and harmful practices against women and demands the integration of a gender perspective in policy decisions, legislation, development plans, programmes and activities in all sectors of life (article 2(c). The Protocol guarantees the right to peace, integrity and security of persons (article 4(a) and requires states to enact and enforce laws to prohibit all forms of SGBV against women including unwanted or forced sex whether the violence takes place in private or public (article 4(2)(a)). The Protocol also calls on states to eliminate harmful practices (article 5); to protect women during armed conflict, and to identify the causes and consequences of violence against women and to take appropriate measures to prevent and eliminate such violence (article 4(c)). It also encourages the right to positive cultural context which requires states to increasingly engage women in the formulation of cultural policies (article 17).[33]

Protection of the populations from sex and gender-based violence at the sub-regional level

At the regional level, both Uganda and the DRC are parties to the following treaties: Southern African Development Community (SADC) Declaration on Gender and Development (1997); Addendum on the Prevention and Eradication of Violence against Women and Children (1998); SADC Protocol on Gender and Development (2008); The Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (30 November 2006); and the Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region, 2008 (Goma Declaration).

Protocol on the Prevention and Suppression of Sexual Violence against Women and Children

The Protocol provides protection for women and children against the impunity of SGBV in the GLR; to establish a legal framework under which

33 African Union, Protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa, adopted by the African Union on 11 July 2003, entered into force on 25 November 2005 ('Maputo Protocol'), available at www.hrea.org/index.php?base_id=104&language_id=1&erc_doc_id=806&category_id=&category_type=&group (accessed 5 May 2012).

member states undertake to prosecute and punish the perpetrators of crimes of SGBV in the GLR; to provide a legal basis for the surrender of persons and fugitives charged with committing offences of SGBV; and to make provision for the establishment of a regional mechanism for providing legal, medical, material and social assistance, including counselling and compensation, to women and children who are victims/ survivors of SGBV in the Great Lakes Region.[34]

Under the Protocol, member states guarantee that SGBV shall be punishable in times of peace and in situations of armed conflict. The Protocol sets out categories and constituent elements of SGBV crimes, such as the crime of sexual violence; sexual violence in relation to trafficking in women and children; sexual violence in relation to the crime of genocide; sexual violence in relation to crimes against humanity, and sexual violence in relation to war crimes. The Protocol has an annex of Model Legislation on the Prevention and Suppression of Sexual Violence against Women and Children, which is aimed at giving effect to the Protocol and to make provision for an administrative framework for the implementation of the said Protocol and other related matters.[35]

The SADC Protocol

The SADC Protocol provides that by 2015, state parties should: enact and enforce legislation prohibiting all forms of sex and gender-based violence; ensure that laws on gender-based violence provide for the comprehensive testing, treatment and care of survivors of sexual assault; review and reform their criminal laws and procedures applicable to cases of sexual offences and gender based violence; enact and adopt specific legislative provisions to prevent human trafficking and provide holistic services to the victims, with the aim of reintegrating them into society; enact legislative provisions, and adopt and implement policies, strategies and programmes which define and prohibit sexual harassment in all spheres, and provide deterrent sanctions for perpetrators of sexual harassment.

The Goma Declaration

Member states of the International Conference on the Great Lakes Region (ICGLR) together with the civil society organisations (CSOs), religious and traditional leaders, international non-governmental organisations, development partners and the United Nations agencies, attending the High

34 International Conference on the Great Lakes Region (ICGLR) the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children ('the Protocol' 30 November 2006, available at http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/381B8D820A51C229C12572FB002C0C5B/$file/Final%20protocol.Sexual%20Violence%20-%20En.pdf (accessed 5 March 2012).

35 As above.

Level Regional Consultations on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region, in Goma in the DRC, committed themselves under the 'Goma Declaration' to eradicate all forms of gender-based violence, in particular sexual violence, and to take appropriate measures for empowerment and equal representation of women and girls.

The Goma Declaration provides an efficient and adequate framework for the prevention and fight against SGBV, and the prosecution and punishment of the perpetrators of sexual violence in the region. It recognises that SGBV represents a serious threat to national and regional peace and security, and increases the spread of HIV. The Goma Declaration also posits that the state has a duty to protect its citizens from all forms of human rights violations, including SGBV. The duty of the state emanates, among others, from the fact that the cost of SGBV on the economic and sustainable development of the GLR is very high. All survivors of SGBV, despite their social-political status including IDPs and refugees are entitled to protection, justice and rehabilitation.

The Goma Declaration consequently recognises that the struggle to end SGBV entails a combined effort of men, women, boys and girls, and all state institutions and thus calls upon different parties, including Government, international agencies and civil societies organisations, to jointly work together to eradicate all forms of gender-based violence, in particular sexual violence and to take appropriate measures for empowerment and equal representation of women and girls.

National frameworks for the prevention and suppression of sex and gender-based violence

Every member state of the UN is obliged to enact national laws that are in consonance with the different conventions and declarations of the UN. In the same manner, members of the AU and its sub-regional organisations such as SADC and Inter-Governmental Agency for Development (IGAD) are expected to make laws, policies and development strategies that are in tandem with the spirit of AU and the sub-regional groupings to which they belong. In short, states have the responsibility to establish a national legal system to implement laws relating to the prevention of SGBV, and in regard to prosecution of perpetrators and compensation to victims of SGBV.

SGBV remains a critical concern in Uganda.[36] The violations of human rights of women were previously exacerbated by the armed conflict in Northern Uganda. For example, about 1.5 million were internally displaced during the Northern Uganda Lord's Resistance Army (LRA)

36 The Uganda Action Plan on the Security Council Resolutions 1325 & 1820 (n 16 above).

insurgency. Approximately 80 per cent of them were women and children.[37] SGBV was prevalent in the Internally Displaced Persons (IDPs) camps in Northern Uganda yet it was generally under-reported since many survivors did not go to the police or seek medical care due to lack of access to police and medical services as well as complicated legal procedures in place at the time.[38] The situation degenerated into a general victim-blaming attitude in most local communities – women or girls were blamed even after their rights had been violated.[39] Further, transactional sex, that is, exchanging sex for money, food, soap or favours became 'normal' and for many, a necessary tool for survival. Many formerly abducted women and girls still suffer from the devastating consequences of sexual slavery and most of them have given birth to children in captivity. The perpetrators of SGBV are mostly family members, strangers, rebels and in some cases, some elements of the government troops.[40]

Uganda has accepted or supports various regional and international instruments including the CEDAW, which was ratified in 1985; the Beijing Declaration and Platform of Action, the Maputo Protocol, and the AU Solemn Declaration on equality between Men and Women in Africa of 2004, which condemns rape and other forms of sexual violence. Most if not all countries in the GLR are also parties to other human rights instruments such as the ICCPR and the CESCR. Other instruments are the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and Exploitation of Children, and the Optional Protocol on the involvement of children in armed conflict, which prohibits exploitation of children. However, Uganda has not yet ratified the Optional Protocol to CEDAW (1999), which offers individual or groups a direct means to seek redress at international level for violations of their rights. Uganda also ascribes to UNSCR 1235 and UNSCR 1820 as well as the Goma Declaration. In general, these instruments address the situation on women, peace and security by recognising that rape and other forms of sexual violence are war crimes that constitute grave breaches of the Geneva Convention.

Conclusion and recommendations

Armed conflicts in the GLR are likely to continue for some time because their root causes have not been addressed. Victims of gender-based violence, especially women, are not empowered to the extent that they can repulse their aggressors. There is willingness on paper and advocacy to prevent sexual gender based violence in the GLR, but there is no

37 Government of Uganda 'Poverty Eradication Action Plan (PEAP)' Ministry of Finance, Planning and Economic Development, Kampala (2004).
38 The Uganda Action Plan on the Security Council Resolutions 1325 & 1820 (n 16 above) 13.
39 As above.
40 As above.

identifiable means as yet to address this problem. There are some countries with weak government structures and poor governance systems, which are exploited by rebels to destabilise those governments. Indeed, the pervasiveness of SGBV requires robust, multi-sectoral initiatives that engage a wide range of actors to respond when it occurs. The law may not be the only option to address these problems. However, the law, especially at the national level, should provide for how victims will get the much-needed medical attention. Both as a cause and consequence of discrimination, inequality and oppression, SGBV is also pervasive in times of peace.

In times of armed conflicts, it often becomes even more extreme in the GLR to improve national legislation, there is need to take the following steps. First, national laws should conform to international obligations to protect women from SGBV. This may require the Government of Uganda to enact, review, repeal or amend discriminatory laws and provisions that are incompatible with the effective implementation of international obligations, including UNSC Resolution 1325 and 1820 as well as the Goma Declaration. Second, there is a need for amendment of some provisions on SGBV offences in the Penal (Criminal) Codes, for example providing for a more comprehensive and watertight definition of the offence of defilement. Third, Uganda may also need to enact a Sexual Offences Act, and the Marriage and Family Bill. Fourth, the criminal and civil procedure may need to be transformed to increase access to justice for female victims of SGBV. This should include simplified and readily accessible procedures for lodging complaints related to SGBV and other cases of SGBV in a language that the complainant understands.

By way of improving the implementation of legislation on SGBV, the national governments should, at the minimum, do the following. First, they should build public awareness and information dissemination on the existing laws on SGBV issues in order to enable victims (survivors) in seeking retributions from the legal system. Second, government should publicise records on the punitive measures taken against perpetrators of SGBV using the laws to build confidence on the law and order in Uganda. Third, they should establish a compensation scheme for survivors of SGBV.[41] Fourth, government should establish mechanisms for the protection of victims and witnesses who are willing to testify in courts against alleged perpetrators of SGBV. Fifth, national governments should provide support to transitional justice mechanisms so that they are equitable and inclusive of women. Sixth, they should initiate a policy of legal aid to provide legal assistance to women and the vulnerable in by providing support to women and the vulnerable so as to equitably access and utilise the legal system in relation to SGBV. For example, victims and

41 See generally the Uganda National Action Plan on Gender-Based Violence (n 20 above).

survivors of SGBV should be aware of their rights, for example, applying for a protection order; laying criminal charge; ensuring that one is capable of providing an in-depth statement; and seventh, ensure that proceedings of cases of SGBV are monitored so that they are handled up to completion.

CHAPTER 10

PROTECTION OF MINORITIES*

Dan Kuwali and Gudmundur Alfredsson

Abstract: *Identity-based tensions in Burundi, Rwanda and Kosovo, have degraded into armed conflicts, calling for United Nations Security Council intervention. The principle of protection of populations at risk lies at the heart of the human rights rules of equal rights and non-discrimination and of the notion of the responsibility to protect. As part of the international community, kin-states can provide assistance and fill capacity gaps to protect populations at risk. Nonetheless, their interference and intervention in the domestic affairs of other states has the propensity to destabilise internal and regional peace and security. Given that neighbouring states usually have strong ethnic, cultural, religious or linguistic links to minority populations across their borders, the international community cannot, and should not, stand by when the fundamental rights of minorities are being violated. If the international community fails in this responsibility, the danger of kin-states proceeding unilaterally and taking issues of protection of kin-minorities into their own hands will increase. The international community must build the domestic capacity of states to protect the rights of minorities, while at the same time strengthening the tools and political will to deliver timely collective responses when states fail in their responsibilities.*

Introduction

Identity-based tensions have been present in many of the violent conflicts that have required United Nations (UN) Security Council action since the end of the Cold War. More often than not, minorities have been the principal victims before, during and after these conflicts. There is no doubt that the human rights situations facing many minorities cause many of these conflicts. According to the UN High Commissioner for Human Rights,[1] minorities in all regions of the world continue to face serious threats, discrimination and racism, and are frequently excluded from

* This Chapter derived from an article published by the authors: 'The responsibility to protect minorities: The question of protection by kin-states' (2014) 71 *Europa Ethnica* 62-68.

1 United Nations Office of the High Commissioner for Human Rights 'Minorities' available at http://www.ohchr.org/EN/Issues/Minorities/Pages/MinoritiesIndex.aspx (accessed 1 September 2014).

taking part fully in the economic, political, social and cultural life available to the majorities in the countries or societies where they live.

States have the responsibility to protect all people residing in their territory, be they members of majorities, minorities or indigenous peoples. This principle of protection of populations at risk lies at the heart of the human rights rules of equal rights and non-discrimination, and of the political commitment concerning the responsibility to protect (R2P). The latter was adopted by all the UN member states at the 2005 World Summit. The notion of the responsibility to protect emerged in order to avert atrocity crimes in the form of genocide, war crimes and crimes against humanity, following the failure of the international community to protect people targeted by their fellow citizens or by the state, such as the 1994 genocide in Rwanda, where at least 800 000 Tutsis and Hutu sympathisers were killed and the 1995 slaying of more than 7000 Bosnian Muslim boys and men during the Srebrenica massacre.

States often have borders that divide people sharing ethnic, cultural, linguistic, religious or historic bonds, neighbouring or nearby states may have strong ethnic, cultural, religious or linguistic links to the minority population across their borders. The international community cannot and should not stand by when the fundamental rights of minorities are being violated but, at the same time, the protection of national minorities cannot, and should not, be invoked by kin-states as a justification for intervention in violation of the principles of state sovereignty and territorial integrity.[2] The controversial and divisive effects of a kin-state illustrate the dilemma emanating from the involvement of a kin-state in the implementation of the responsibility to protect minorities beyond its borders.[3] Although kin-states can provide assistance and fill capacity gaps as long as these are aimed at preventing and resolving minority tensions, their interference and intervention in the domestic affairs of other states also invites trouble by presenting a destabilising threat to internal and regional peace and security.[4] In relation to this view, Rwanda and Tanzania have refused to deploy troops in the African Union Intervention in Burundi.[5]

The international community has long grappled with the question of how to protect minorities, not least where kin-states are involved.[6] Minority communities that cross state borders 'can serve as a bridge and contribute to friendly relations, but the potential for tension can also exist,

2 S Olena & VN Kharkiv 'The responsibility to protect minorities' National University (Ukraine) Summer School, available at http://www.summerschooles.uni.lodz.pl/wgrane_pliki/the-responsibility-to-protect-minorities.pdf (accessed 3 September 2014).
3 N Turner & N Otsuki 'The responsibility to protect minorities and the problem of the kin-state' (2010) Policy Brief No 2 (2010) United Nations University 1.
4 Olena & Kharkiv (n 2 above).
5 IR Mugisha 'No Rwandan troops for AU Mission in Burundi' *The East African* 23 December 2015.
6 As above. See also D Moeckli *et al* (eds) *International human rights law* (2010) 365-837.

especially when states claim protection of their "kin" abroad, making these issues a matter of legitimate international concern'.[7] This approach of sovereignty, jurisdiction and responsibility of the state in which a minority resides is underlined in the Bolzano Recommendations on National Minorities in Inter-State Relations adopted under the auspices of the High Commissioner in 2008[8] and in a draft Report on the Preferential Treatment of National Minorities by their Kin-State issued in 2001 by the Council of Europe's Commission for Democracy through Law – Venice Commission.[9]

Inadequate protection of the rights of such minorities may raise grievances that can be and have been exploited by violent extremists or by neighbouring or kin-states, often with ulterior motives. History has shown that when states take unilateral steps to protect 'their kin' outside their borders, there is a risk of tension and violent conflicts. The issue of German minorities in Poland and Czechoslovakia prior to WWII was abused as a pretext for aggression in those countries by Nazi Germany, and the Russian Federation seeks to justify the 2014 annexation of Crimea and other Russian involvement in the Ukraine by reference to fellow Russians.

The international approach to the protection of minorities relies on human rights provisions stipulating equal rights and non-discrimination together with special measures when necessary to overcome discrimination. The responsibility for minority protection lies primarily with their state of residence. If the home state fails to fulfill its responsibility, whether it is unable or unwilling, the subsidiary responsibility shifts to the international community as a whole, not to the kin-state in particular.[10] This discussion, therefore, explores the implementation of the responsibility to protect, also in relation to the involvement of kin-states. The Chapter examines how the protection of national minorities can be strengthened to prevent violent conflicts. The discussion also offers concrete suggestions on how kin-states can contribute to the protection of minorities beyond their borders in a way that does not provoke bilateral or regional tensions.

The responsibility to protect minorities

The concept of the responsibility to protect was endorsed by world leaders at the UN General Assembly in 2005. The subsequent World Summit

7 Organization for Security and Co-operation in Europe (OSCE) 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note' (2008) available at http://www.osce.org/hcnm (accessed 14 December 2014).
8 As above.
9 Council of Europe 'Report on the Preferential Treatment of National Minorities by their Kin-State' adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001, available at http://www.venice.coe.int/webforms/documents/CDL-INF(2001)019-e.aspx (accessed 15 September 2014).
10 Olena & Kharkiv (n 2 above) 1.

Outcome Document affirmed that every sovereign government has a responsibility to protect its citizens and those within its jurisdiction from genocide, war crimes, and crimes against humanity.[11] As a matter of fact, the responsibility to protect is a restatement of binding obligations of states to protect their citizens from mass atrocity crimes, and it seeks to establish the collective responsibility of the international community to prevent such crimes.[12] The responsibility to protect is about taking effective action at the earliest possible stage to protect populations at risk.[13] These obligations are particularly relevant to minorities who, more often than not, are the victims of such atrocities.[14]

The concept of the responsibility to protect is more than a mere substitute for humanitarian intervention. Rather, the R2P norm is cast in three core pillars: first, an affirmation of the primary and continuing obligation of a state to protect its population from genocide, war crimes and crimes against humanity, as well as incitement thereof; second, a commitment by the international community to assist states in meeting these obligations; and third, acceptance by UN member states of their responsibility to respond in a timely and decisive manner through the UN Security Council if national authorities are manifestly failing to protect their populations from these mass atrocity crimes.

In addition, the African Union (AU) has incorporated the right to intervene in a member state as enshrined in article 4(h) of its Constitutive Act of 2000. The adoption by the AU of a security culture of indifference was against the background of the failure of the international community to act decisively in preventing the 1994 genocide in Rwanda, the conclusion of the liberation struggles in Southern Africa with the independence of Namibia in 1990, the outbreak of conflicts involving immense human suffering in the Great Lakes Region, the Democratic Republic of the Congo (DRC) and the Mano River Basin region of West Africa, and the determination to deter the illegal seizure of power by rebels in African countries.[15] It was within the new peace and security architecture of the AU that the norm of a responsibility to protect was embedded. Thus, by 2005, when the responsibility to protect was adopted by the UN General Assembly, a normative basis had been set for the congruence between the responsibility to protect and article 4(h).

This applies in respect of the fact that article 4(h) has the same triggers for intervention as the responsibility to protect, although article 4(h) does not use the innocuous term 'ethnic cleansing'. These thresholds are not

11 United Nations, The World Summit Outcome Document, Sixtieth Session UN Doc A/60/L.1/2005, 15 September 2005 paras 138-139.
12 D Kuwali 'The African Union and the challenges of implementing the responsibility to protect' (2009) 4 *The Nordic African Institute Policy Notes* 1.
13 G Evans *The responsibility to protect: Ending mass atrocities once and for all* (2009) 20.
14 Turner & Otsuki (n 3 above) 1.
15 Kuwali (n 12 above) 1.

only serious international crimes subject to universal jurisdiction but also crimes that invariably involve a government's action against its own citizens. The notable differences between the formulation of the responsibility to protect and article 4(h) are that (a) the implementation of the responsibility to protect is 'through the Security Council' whereas the AU Act is silent on the authorisation of the UN Security Council; (b) the R2P can be triggered when a target state is 'manifestly unable or unwilling' to protect its citizens, whereas the AU can intervene with or without the consent of the target member state; and (c) article 4(h) is a legal obligation while the responsibility to protect is more of a political commitment.

Like article 4(h) of the AU Constitutive Act, the primary goal of the responsibility to protect is the prevention of genocide, war crimes and crimes against humanity. These atrocities can occur in both peace time and during external or internal conflicts, regardless of the type of government or level of development. Local, national, regional and international actors must be able to recognise factors that can indicate the risk of article 4(h) and the responsibility to protect crimes. To this end, the Analysis Framework, developed by the UN Office on Genocide Prevention and the Responsibility to Protect (then the Office of the Special Adviser on the Prevention of Genocide), has developed eight factors that can determine whether there may be a risk of genocide in a country situation. These factors include, *inter alia*, discrimination, the incitement to violence against minority communities and the presence of illegal arms.[16]

Thus, in modern international law, the protection of minority rights is clearly the responsibility of the state in which they reside. States may have an interest in 'kin' living abroad, but no legal right of intervention. However, if the home-state fails to protect a minority group or groups, the international community, with the kin-state as part thereof, has the responsibility to protect populations at risk of mass atrocity crimes. The responsibility to protect and article 4(h) norms are particularly relevant to the protection of vulnerable communities and provide guidance on the protection of kin minorities.[17] The theory of the responsibility to protect reaffirms the primacy of the home-state responsibility to protect populations within its boundaries in numerous international human rights instruments. If a state fails to fulfill this responsibility, whether it is unwilling or unable to do so, the subsidiary responsibility lies with the international community as a whole – and not the kin-state as such.[18] States, therefore, have a dual responsibility where the first layer is the

16 International Coalition for the Responsibility to Protect (ICRtoP) 'The Responsibility to Protect Toolkit' available at http://responsibilitytoprotect.org/ICRtoP%20 Tool kit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf (accessed 11 September 2014).

17 Turner & Otsuki (n 3 above) 3.

18 See also A Eide 'The non-inclusion of minority rights: Resolution 217C (III)' in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999).

promotion and protection of the rights of minorities under their jurisdiction, and secondly, to act as responsible members of the international community with respect to minorities under the jurisdiction of other states.

The protection of minorities in international law

Most, if not all, countries in the world include persons belonging to national or ethnic, religious and linguistic minorities, enriching the diversity of their societies. All too often, minorities face multiple forms of discrimination resulting in marginalisation and exclusion from the wider population. Contemporary examples of extreme marginalisation of minorities include the persecution of Christian minorities in some countries of the Middle East, the massacre of the African population in the Darfur Region of the Sudan and the violence against the Muslim minorities in the Central African Republic and Burma/Myanmar. Thus, minority protection is clearly of prime concern for the maintenance of international peace and security.[19] There has been substantial progress by the international community in protecting persons belonging to national minorities, with standards adopted and monitoring mechanisms created through multilateral instruments. In these instruments, the primary responsibility to protect minorities consistently rests on the state having jurisdiction of the minorities in question. These standards and mechanisms are crucial to the maintenance of international peace and security, in particular conflict prevention.[20]

The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) was the first UN treaty to protect minorities, designed to protect them from the greatest threat to their existence.[21] The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities sets basic standards and offers guidance to states in adopting appropriate legislative and other measures to secure the rights of persons belonging to minorities. Not only does it state that minorities should not be targets of discrimination and marginalisation, but that ethnic, cultural, linguistic and religious diversity within a country should actually be encouraged and safeguarded. Now that the standard has been articulated, the next step is implementation.[22] A UN Special Rapporteur on Minority Issues and an Expert Forum are gradually reviewing the national implementation of the

19 R Ekéus OSCE High Commissioner on National Minorities, Organization for Security and Co-operation in Europe (OSCE) 26 October (2001) The Hague, available at http://www.osce.org/hcnm/53936 (accessed 2 September 2014).

20 As above.

21 The United Nations (UN) instruments quoted in this article are all available at www.ohchr.org; and also at www.un.org (accessed 29 September 2014).

22 The Bahá'í International Community 'Protection of minorities' Statement to the 55th Session of the UN Commission on Human Rights under item 16 of the provisional agenda: Report of the Sub-Commission on Prevention of Discrimination and

Declaration and addressing issues that its implementation will raise. Standard-setting initiatives at the regional level for the protection of minorities include two Council of Europe treaties, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages,[23] and the Organisation for Security and Co-operation in Europe (OSCE) has adopted a series of texts relating to the role of minority rights in enhancing peace and security.[24]

Minority rights, for ethnic, religious or linguistic minorities, are an integral part of international human rights law. Minority rights constitute a legal framework designed to ensure that a specific group which is in a vulnerable, disadvantaged or marginalised position in society is able to achieve equal rights and receive protection from discrimination. To protect minority rights, countries should adopt specific laws and set up commissions or ombudsman institutions. Generally, states, through their commitments under treaty law, with the participation of minorities, can influence the human rights implementation and monitoring procedures and work toward securing equal rights.

The propensity of kin-states to protect minorities beyond their borders

Minority communities are often divided by arbitrary boundaries, cutting across groups with social, cultural and linguistic ties. It is a basic principle of international law that the state can act only within its jurisdiction, which extends to its territory and citizenry. Although a state may have an interest in persons of the same ethnicity as its majority population but living abroad, this does not entitle or imply, in any way, a right under international law, to exercise jurisdiction over these persons. At the same time, persons belonging to a national minority may maintain contacts across frontiers with citizens of other states with whom they share common ethnic, cultural, linguistic, religious or national origins. History shows that when states take unilateral steps on the basis of national kinship to protect national minorities living outside of their jurisdiction, it often leads to tensions and frictions and sometimes violent conflicts. These conflicts and refugees and asylum seekers may also spill over borders.[25]

National minorities have a right to protect and promote their identity, and it is the obligation of the state in which they live to defend that right. International norms affirm the rights of persons belonging to minority

Protection of Minorities. Circulated at UN Document # E/CN.4/1999/NGO/14, available at http://statements.bahai.org/99-0107.htm (accessed 7 September 2014).

23 Council of Europe 'Report on the Preferential Treatment of National Minorities by their Kin-State' (n 9 above).

24 For instruments and description of activities, see Council of Europe, available at www.osce.org and also www.osce.org/hcnm (accessed 29 September 2014).

25 Ekéus (n 19 above) 1.

groups to establish peaceful contacts across borders with those of a common identity or heritage. But the strengthening of bonds between a kin-state and a neighbouring minority risks creating or exacerbating tensions with their state of residence, resulting in a deterioration of bilateral relations. When the interest of the kin-state extends to cross-border interference and even attempts to take unilateral action on the basis of kinship to protect national minorities in third states, the likelihood of the situation degenerating into conflict is high.[26] Consequently, two related fears overshadow such tensions: irredentist claims by the kin-state advocating annexation of the territory of another state; and secessionist claims from the minorities themselves.[27]

History shows that the intervention of a so-called 'kin-state' or 'motherland' to defend a threatened minority in a third state can increase rather than defuse conflict.[28] Instead of helping find a solution, the kin-state exacerbates the problem. For example, Hitler invoked the concept of Schutzmacht as an ethnically based 'right' of Nazi Germany to protect 'its' kin in Poland and Czechoslovakia; India and Pakistan have fought wars in Kashmir in defense of their respective kin; wars in the Balkans demonstrated what happens, both when minority protection fails and when kinship ties lead to inter-state conflict; Russia's relations with Russophones in its 'near abroad' highlight the potential for tensions; Hungary's attempts to strengthen ties with Hungarians abroad also highlight the potential for tensions; Kosovo's future will hinge on the relationship between Kosovo's Serbian community and its links with Serbia; and failure to protect minorities has led to atrocities in Rwanda, the Central African Republic, the Darfur region of Sudan in Africa and tensions in the Middle East.[29]

The state in which minority populations reside has the responsibility to protect minority rights, but if it fails to do so, the subsidiary responsibility shifts to the international community as a whole.[30] A kin-state has no special responsibility and no right to protect minority groups abroad, beyond its responsibility as any other state in and as part of the international community. There is a clear need to ensure that the interest of the kin-state in protecting minorities abroad is pursued through constructive international engagement rather than unilateral interference. The kin-state's interest can be utilised as means to stimulate efforts to improve the general level of minority protection. Kin-state support should be offered only with the full cooperation and consent of the home-state in which the minority resides, to avoid escalating tensions. International and regional organisations must also strengthen the tools and political will to

26 As above.
27 Olena & Kharkiv (n 2 above) 1.
28 As above.
29 As above. See also F Viljoen *International human rights law in Africa* (2012) 222-223.
30 Turner & Otsuki (n 3 above) 4. See also Olena & Kharkiv (n 2 above).

implement timely and decisive collective responses when states are manifestly failing to protect minorities.

Strengthening the legal framework for the protection of minorities

In his 2009 report on implementing the responsibility to protect, the UN Secretary-General emphasised that the responsibility to protect encompasses the responsibility to prevent atrocities from occurring in the first place, so that intervention is not required.[31] Given the role of discrimination and ethnic conflict in atrocity crimes, implementing the responsibility to prevent requires effective protection of minority rights. If minorities are adequately protected, this avoids the exploitation of minority issues, either by radicals in the minority community or by neighbouring states that may even use violence to seek the world's attention. Below are some of the strategies for enhancing the protection of minorities by the international community, including the kin-state.

Upholding the responsibility to protect by home countries

It should be remembered that the primary responsibility to protect always rests with the home-state. It is only when that state is unable or unwilling to adequately protect its population that the international community including kin-states would be inclined to intervene.[32] The home government must be able to uphold its responsibility to protect the whole population of the country, regardless of ethnicity or religion. Home governments must end institutionalised discrimination against all minorities within their borders. It must also hold accountable all those who commit abuses, including inciting ethnic and religious violence and hate speech. It is also necessary for home governments to facilitate the safe voluntary return of internally displaced persons (IDPs) and refugees to their communities.[33] The home government must allow unhindered humanitarian access to those affected by violence.

Political leadership

To protect minorities, political leaders must work to address issues of regional autonomy and perceptions of sectarian discrimination. Convening dialogues with minority representatives and allowing and facilitating minority participation in public life are essential components of

31 Turner & Otsuki (n 3 above) 3.
32 The Global Responsibility to Protect 'Iraq' available at http://www.globalr2p.org/regions/iraq (accessed 13 September 2014).
33 The Global Center for the Responsibility to Protect 'Burma/Myanmar' available at http://www.globalr2p.org/regions/burma_myanmar (accessed 15 August 2014).

such leadership. Politicians should refrain from incendiary sectarian speech and work towards national reconciliation, including equal treatment and representation for all communities.[34]

Constructive engagement by kin-states

While there is need to recognise the interest of the kin-state in protecting related minorities abroad, such interest should be pursued through constructive international engagement rather than unilateral interference. In this way, the kin-state's interest can be utilised as a means to stimulate efforts to improve the general level of minority protection in both states. To avoid escalating tensions, the kin-state's support should only be offered with the full cooperation and consent of the home-state in which the minority resides. Bilateral treaties and intergovernmental commissions between the states involved can be an effective means to facilitate such constructive engagement by the kin-state; providing a legitimate means for active involvement of the kin-state enables improvements in minority protection while alleviating concerns and suspicions on both sides.[35] Kin-states may also be directly affected if a state is failing to protect its minorities through, for example, strong public opinion advocating intervention to protect the kin abroad or through an influx of refugees. Kin-states, including neighbouring states, may offer advice or assistance to improve the protection of related minorities abroad. Neighbouring countries are also crucial as they usually offer protection to asylum seekers.[36]

Wider minority participation in public institutions

Wider minority participation in public institutions should be encouraged. For example, Hungary's agreement with Serbia and Montenegro ensures minority representation in public services, including the national police. The state is clearly the most appropriate actor to implement these measures, as part of its primary obligation to protect its entire population and to ensure equal rights. But the second 'pillar' of the responsibility to protect also requires the international community to assist states in building their capacity to implement the responsibility to prevent. A kin state can play a role in a multilateral context, in its capacity as an integral member of the international community.[37]

34 As above.
35 Turner & Otsuki (n 3 above) 7.
36 n 3 above, 2.
37 The potential constructive role for kin-states in resolving sensitive and volatile minority issues was evident in the successful resolution of a long-running disagreement between Italy and Austria over the status of the German-speaking minority in the South Tyrol region of northern Italy. Following World War II, Austria

Promotion of equal rights

States are required to promote full and effective equal rights between minority and majority persons.[38] Such protection is beyond ensuring that policy and practice guarantee the minimum of minority rights. Ruling groups (whether they be the majority or a minority) have a special responsibility, for the sake of justice and peace, to bring about the social and political adjustments that will enable the other components of their society to exercise, to the fullest extent possible, their common and fundamental rights. Those groups not in power ought to respond positively to genuine efforts made toward them and to recognise, accept and fulfill their responsibilities toward society at large. As issues arise, both majorities and minorities must view them in the context of an increasingly interdependent world, where the advantage of the part is best served by ensuring the advantage of the whole, and where the whole cannot flourish when parts are oppressed or deprived.[39]

Eradicating conditions that disenfranchise minorities

Governments need to take the lead by proving and acting on their determination to accord to minorities the same rights accorded to other citizens. This they can do by identifying the conditions that tend to disenfranchise certain minorities and by enacting and implementing legislation that will address those conditions. Such legislation is an important step, but legislation alone will never, in and of itself, end discrimination against minorities. Attitudes and prejudice must change. Groups must learn to view one another in fundamentally different ways. They must see each other as partners, as co-workers, as worthy of respect and just treatment. Majorities must rid themselves of the assumption of entitlement, and minorities must eventually break free of the helplessness and suspicion induced by prolonged discrimination.[40]

Ending a culture of impunity by prosecution of perpetrators of discrimination

Attacks by belligerents pose a grave threat to civilians. There is need to end a pervasive culture of impunity which usually provides a fertile ground for commission of further mass atrocity crimes.[41] Legislation can actually facilitate changes in attitude by placing legal sanctions on behaviour that was once considered acceptable. By motivating people to change the way

pursued its kin interest through bilateral negotiations with UN oversight, leading to the eventual implementation of a treaty giving greater autonomy to the region. See Turner & Otsuki (n 3 above) 1.

38 Ekéus (n 19 above).

39 The Bahá'í International Community 'Protection of Minorities' (n 22 above).

40 As above.

41 The Global Center for the Responsibility to Protect 'Burma/Myanmar' (n 33 above).

they behave, legislation can stimulate an examination of the beliefs underlying the old behaviour and consideration of the principles that support the new behaviour.[42]

Promotion of multicultural and inter-cultural education

Unity is not uniformity. In order to move toward a world characterised by unity in diversity, children must be taught to recognise diversity as a source of enrichment, not as a threat. The UN monitoring bodies on minority rights have rightfully focused on the promotion of multicultural and inter-cultural education. An understanding of cultural diversity as the varied expression of our common humanity is one of the keys to the peaceful and lasting resolution of conflicts involving minorities. School curricula should aim at rendering obsolete old animosities, based upon ethnic, linguistic and religious differences, by providing instruction about the various cultures present in each country in a way that highlights common aspirations and characteristics.

When children are taught to recognise fundamental human qualities in a wide variety of cultural forms, they will be able to regard each culture as enriching society as a whole. They will also be much less vulnerable to manipulation by those who would pit one group against another for political reasons.[43] States must support minority groups in expressing and preserving their identities, while promoting integration and equality before the law to strengthen social cohesion and prevent discrimination. Language and history are particularly important – from the integration of minority languages and minority cultures into educational curricula and media content, to the general involvement of minority language speakers in public life.[44]

Bilateral agreements

Bilateral treaties can serve as a useful function in respect of national minorities in the sense that they offer a vehicle through which states can legitimately share information and concerns, pursue interests and ideas, and further protect particular minorities on the basis of the consent of the state in whose jurisdiction the minority falls. However, the bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, states should be careful not to create such privileges for particular groups which could have discriminatory and disintegrative effects in the states where they live.[45]

42 The Bahá'í International Community (n 22 above).
43 As above.
44 Turner & Otsuki (n 3 above) 4.
45 Ekéus (n 19 above).

Bilateral agreements on minority issues can serve to build confidence for both sides. For the kin-state, they provide a means through which to legally and legitimately improve protection of kin minorities in the home-state. Perhaps more importantly, for the home-state they relieve concerns of interference by the kin-state. Indeed, they can expressly stipulate that the parties have no territorial claims on each other – a particular concern where there are fears of secessionist movements.[46] To be effective, agreements must use specific language which addresses the practical concerns of the minority community, rather than vague references to 'protecting identity'. The implementation of minority-specific bilateral agreements – or of minority provisions within general treaties on friendly bilateral relations – must also be monitored to avoid further disputes, through mechanisms such as joint intergovernmental commissions.[47]

Standard setting by the international community

For the wider international community, efforts to improve minority protection by building domestic state capacity are the primary means to implement the responsibility to protect in this context. Global and regional organisations must also strengthen the tools and political will to implement timely and decisive collective responses when states are manifestly failing to protect their citizens.[48] In Burma/Myanmar, for instance, the international community must urge the government to prioritise the development of a comprehensive plan to engage all ethnic and religious minorities in an inclusive reconciliation process. The international community should only lift sanctions following a demonstrable improvement in the welfare of ethnic and religious minorities.[49]

Early warning and standard setting

Under the auspices of the United Nations and regional organisations, a range of multilateral treaties and declarations setting forth standards for minority protection have been adopted and commitments undertaken by states. But regional organisations may be particularly well placed to implement the responsibility to prevent. As the early warning and conflict

46 Most bilateral agreements affirm the right of individuals to express, preserve and promote ethnic, cultural, linguistic and religious identity individually and as a member of a group. Culture features prominently in bilateral treaties concerning national minorities, including provisions on the rights to express, preserve and promote the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities. See Turner & Otsuki (n 3 above) 6.

47 Turner & Otsuki (n 3 above) 6.

48 Olena & Kharkiv (n 2 above).

49 The Global Center for the Responsibility to Protect 'Burma/Myanmar' available at http://www.globalr2p.org/regions/burma_myanmar (accessed 4 August 2014).

prevention capacity of the United Nations is relatively limited, regional arrangements for conflict prevention should be encouraged.[50]

Conclusion

The issue of protection of minorities has long been on the international agenda owing to the prevalence of tensions and violent conflicts throughout the world. Considering that most countries have minorities of some sort within their borders and that discrimination against them is widespread, such problems should not come as a surprise and governments are slowly realising that the potential for instability is indeed a common one. The lessons of the past have underlined the necessity of respect for the rights of persons belonging to national minorities freely to express, preserve and develop their cultural, linguistic and religious identity free of any attempts at assimilation. While maintaining their identity, a minority should be integrated in harmony with others within a state as part of society at large.[51] This is fundamental to international peace, security and prosperity. Achieving effective participation of minorities and ending their exclusion requires embracing diversity through the promotion and implementation of international human rights law.

A kin-state with strong ethnic, cultural, religious or linguistic links to a minority population abroad, may be well-placed to assist in its protection through international efforts. But unilateral interference by kin-states will likely raise tensions with home-states, thereby endangering international peace and security. If a state neglects its primary responsibility to protect minorities under its jurisdiction, a subsidiary responsibility lies with the international community as a whole, not the kin-state alone. Kin-state interest in minorities abroad must thus be pursued through constructive engagement, rather than unilateral interference.

Global and regional organisations must build the domestic capacity of states, while at the same time strengthening the tools and political will to deliver timely collective responses when states fail in their responsibilities. Bilateral and multilateral mechanisms alike can counter nationalist rhetoric and policies by emphasising that a diverse, well-integrated society is in the interest of both the majority and minorities.[52] Bilateral and multilateral mechanisms for minority protection should focus on specific, practical difficulties and solutions, such as minority languages and representation in public institutions. If the dialogue is dominated by vague, emotive questions of 'national identity', minority issues will be vulnerable to exploitation. At the same time, nationalist rhetoric must be countered by emphasising that a diverse, well-integrated society is in the interests of

50 Turner & Otsuki (n 3 above) 5.
51 Ekéus (n 19 above).
52 n 3 above, 1.

both the majority and minorities, and that the existence of minority groups enriches the cultural values of the respective countries.[53]

For the wider international community, efforts to improve minority protection by building domestic state capacity are the primary means to implement the responsibility to protect in the context of protecting the fundamental rights of minorities. Effectively mobilising international efforts requires accurate risk assessment and early warning for minority-related conflicts. The intergovernmental organisations must build and strengthen the third 'pillar' of the responsibility to protect. If the international community, both the human rights and security mechanisms, fails in this responsibility, the danger of kin-states proceeding unilaterally and taking issues of protection of kin-minorities into their own hands will increase.[54]

The responsibility of all actors extends beyond when the threat to populations is no longer imminent, and includes holding perpetrators accountable, establishing mechanisms for rebuilding and reconciliation, restoring the peace and preventing the recurrence of violence. Protecting populations from R2P crimes and violations requires strengthening the prevention capacities and mobilising the political will of states and global and regional organisations to respond early when threats of the responsibility to protect crimes and violations arise. Upstream prevention involves measures that governments can employ in their countries, such as developing institutions and policies and strengthening sectors, that reduce the risk that mass atrocities will occur. Downstream prevention involves responses to imminent threats of mass atrocities. These measures may be economic, political, humanitarian or military, and can be undertaken by actors in the international community, including civil society, individual governments, regional and sub-regional arrangements, and UN bodies.[55]

53 n 3 above, 6.
54 Olena & Kharkiv (n 2 above).
55 ICRtoP (n 16 above).

CHAPTER 11

PROTECTION OF CULTURAL HERITAGE DURING ARMED CONFLICTS IN AFRICA

Jan F Mutton

Abstract: *The protection of civilians in armed conflict often focuses on physical and mental well-being without due attention for their cultural environment and heritage, such as their monuments, books, documents and customs. This analysis first looks at the different instruments that establish the international legal framework for the protection of cultural heritage, both at the global and African levels. Due attention is given to the role international customary law plays in cases where treaty law is not applicable. A short survey shows how African countries have adopted and integrated the obligations of international instruments into their military manuals, their national legislation and, exceptionally, into their national jurisprudence. Then, the Chapter looks at the extent to which protection of cultural heritage has been included in the case law of the various ad hoc international tribunals and the International Criminal Court, established at the regional and global levels. This contribution emphasises the importance of cultural heritage when protecting civilians during conflict, to encourage a widening of the scope of cultural heritage to accommodate African traditions and to stress the need for political will to prosecute those responsible for the destruction of cultural heritage, as part of war crimes and crimes against humanity.*

Introduction

Throughout history, cultural heritage has been damaged and destroyed during armed conflicts, both of a non-international and international nature. The destruction of cultural heritage is usually the direct or indirect consequence of conflict, either as part of a military strategy or as collateral damage of hostilities, exemplified by the burning of the library of Alexandria in Egypt in ancient times and the iconoclastic fury during the religious wars in the 17th century in Europe. The two World Wars and the many international conflicts around the world amply illustrate the disasters of such warfare. Destruction of heritage often goes beyond mere military operations and is, especially in non-international conflicts (civil wars), often the expression of intolerance, anger and frustration through senseless looting. This was witnessed with the destruction of Dubrovnik during the Balkan conflict in the 1990's. It can also be an act of provocation, intended to erase history and put a new narrative in place, as

in the mutilation of the Buddha's of Bamiyan in Afghanistan in 2001,[1] or the ongoing attack on the historic sites of Palmyra in Syria. The destruction of culture during war and conflict has also taken place in Africa all through its history, especially during colonial times. Examples in post-colonial Africa include the destruction of heritage during the civil war in Nigeria in the 1960's, the destruction of the Stela of Matara in Eritrea during the Eritrean-Ethiopian conflict, the looting and illicit sale of Egyptian artefacts during the 2010 revolution, termed the 'Arab Spring', and the burning of manuscripts in Timbuktu in Mali.[2] In the recent past, a growing number of armed conflicts has been characterised by cultural and religious intolerance, and contesting claims around cultural identity.[3]

The physical well-being of a people, which is the main focus of the protection of civilians in conflict, cannot be separated from its cultural and historical environment, namely its spiritual well-being. Indeed, an assault on cultural heritage destroys the identity of a population, its soul, its framework of reference, its collective memory, its strength and its self-worth.[4] It destroys its reference to the past and its bridge to the future, its achievements and its values. It not only destroys civilian resistance during conflict, it also complicates post-conflict reconciliation and reconstruction, destabilising a society for a long time to come. The destruction of the cultural heritage of one people affects the collective heritage of all humanity. It is, therefore, important to remain focused on the protection of cultural heritage in conflict, even though the International Criminal Court (ICC) stated in *Prosecutor v Ahmad Al Faqi Al Mahdi* (*Al Mahdi* case) that crimes against property, which in this instance means cultural heritage, are less grave than crimes against a person.[5]

The recent past has seen two important milestones in the protection of cultural heritage in the context of conflict. One milestone has been the judgment of the ICC in the *Al Mahdi* case, dated 27 September 2016, which

1 See with respect to the broader issue of destruction of cultural heritage during war and conflict: J Tollebeek & E van Assche (eds) *Ravaged: Art and culture in times of conflict* (2014), the extensively researched and annotated catalogue to the exhibition of the same name which was held in Leuven, Belgium, from 20 March to 1 September 2014, commemorating the centenary of the First World War. See in particular E Brems & Y Janssens 'From Abkhazia to Bamiyan: Hitting where it hurts' in J Tollebeek & E van Assche (eds) *Ravaged: Art and culture in times of conflict* (2014) 232.

2 See with respect to protection of cultural heritage from an African perspective: CA Folorunso 'Heritage resources and armed conflicts: An African perspective' in P Stone (ed) *Cultural heritage, ethics and the military* (2011) 158 170.

3 E Brems & Y Janssens 'From Abkhazia to Bamiyan: Hitting where it hurts' in Tollebeek & Van Assche (n 1 above) 32.

4 See in this respect, South Africa's vision of cultural heritage, South African History Online 'Defining culture, heritage and identity' 2005 http://www.sahistory.org.za/topic/defining-culture-heritage-and-identity (accessed 31 October 2014).

5 *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15 (27 September 2016) (*Al Mahdi* case) available at https://www.icc-cpi.int/Court/Records/CR2016_07244.PDF (accessed 29 March 2017). The Court's view should however be understood as reflecting the opinion of critics that scarce prosecution resources should rather be spent on prosecuting crimes against persons and crimes of terrorism.

found the perpetrator guilty of the war crime of destruction of cultural property and sentenced him to nine years imprisonment.[6] The significance of this case is not restricted to Mali, because it sets a precedent for the prosecution of cultural heritage crimes in other areas such as Afghanistan and Syria. A second milestone is the recent adoption at the United Nations Security Council (UNSC) of Resolution 2347 on 24 March 2017, the Security Council's first resolution on the protection of cultural heritage in conflict zones. The Resolution was unanimously adopted at the end of a debate on the maintenance of international peace and security dealing with the destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict.[7] Due to the serious threat of international terrorism, the focus on heritage in conflict has somehow shifted from the interests of a local population in preserving its history, values and traditions to the use of heritage as a source of financing for terrorist groups through looting and smuggling of artefacts from well-known internationally protected cultural sites.

The legal framework for the protection of cultural heritage at the global level

At present, the basic document for the protection of cultural heritage and the prosecution of perpetrators is the Hague Convention of 1954 and its Additional Protocols of 1954 and 1999. However, other documents have paved the way and some of them have, together with the 1954 Convention, become part of international customary law addressing the issue.

The Lieber Code, the Brussels Declaration and the Oxford Manual

The need to protect cultural heritage during armed conflict was first addressed in the 19th century, during the American Civil War, when President Abraham Lincoln in 1863 requested Francis Lieber to draft general orders for the Union Forces. The Lieber Code, which emerged from this request, was the first comprehensive codification of rules regulating armed conflicts. In its articles 34 to 36, it defines how to treat art works, libraries, museums, schools, hospitals and universities during conflict. The Code furthermore defines the concept of attacks on such sites out of military necessity and deals with the removal of artwork by the conqueror, later to be settled in a peace treaty.[8] The Code remains relevant today and was at least on two occasions, one of them in the *Al Mahdi* case,

6 As above.
7 UN S/RES/2347 (2017) Resolution on maintenance of international peace and security, 24 March 2017 http://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage (accessed 25 March 2017).
8 Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863, available at http://www.icrc.org/ihl.nsf/FULL/110?Open Document (accessed 3 November 2014).

referred to by the ICC for purposes of interpretation and clarification.[9] The Code was later incorporated into the Brussels Declaration of 1874,[10] and was followed up by the Oxford Manual of 1880.[11]

The Hague Conventions of 1899 and 1907

The adoption of the Brussels Declaration and the Oxford Manual ultimately led to the adoption of the 1899 Conventions of The Hague, a set of three treaties and three declarations, and the first international documents to define the rules of warfare in a multilateral context. These treaties and declarations were signed on 29 July 1899 and entered into force on 4 September 1900. The Second Hague Treaty, the Hague Convention Regarding Respect for the Laws and Customs of War on Land, in particular, lays down a number of basic principles with respect to the protection of civilians and civilian property in warfare. Article 27 requires that during sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religious, art, science, charitable purposes and historical monuments, provided they are not being used for military purposes. Such places should be indicated by the state concerned and should be communicated beforehand. This article first of all gives a description of what is to be understood by cultural property, rather limited in its understanding measured against present-day standards. Second, article 27 does not impose a clear obligation to respect cultural property and does not explicitly prohibit the destruction of such property. Cultural property must only be spared as far as possible. Military necessity may be invoked to justify damage or destruction. Prosecution of offenders, either at the national or international level, is not mentioned.Article 56, concerning cultural property during occupation, is much more precise. It prohibits seizure, confiscation and destruction, which, if taking place, must be done legally.[12]

The 1899 Hague Conventions were ultimately reviewed in 1907, resulting in a new set of documents consisting of 13 treaties and one declaration, signed on 18 October 1907 and entering into force on 26 January 1910. The Annex to the new Convention IV simply replaced the Regulations in the Annex to Convention II of 1899 regarding the

9 *Al Mahdi* case (n 5 above) para 14. See also *Katanga* case, *Prosecutor v Germain Katanga*, Judgment of 7 March 2014, available at http://icc-cpi.int/Pages/record.aspx?docNo=icc-01/04-01/07-3436-tENG (accessed 17 April 2017).

10 Project of an International Declaration concerning the Laws and Customs of War, adopted by the Conference of Brussels, 27 August 1874 available at http://www.cprinst.org/Home/cultural-property-laws/1874-brussels-declaration (accessed 27 October 2014).

11 The Institute of International Law 'Laws of War on Land' Oxford, 9 September 1880 https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/140?OpenDocument (accessed 3 November 2014).

12 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land available at https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument (accessed 30 April 2017).

protection of cultural property during warfare on land. A new Convention IX was, however, introduced in 1907, repeating, with respect to naval attacks, in article 5, provisions regarding cultural property applicable to land warfare.[13] Despite their limited approach, the Hague treaties continue to play an important role as they have become customary international law, especially important in conflicts involving states that have not adhered to treaty law on the issue.[14] This has been confirmed by the Eritrea-Ethiopia Claims Commission, with respect to the damage done to the Stela of Matara during the Eritrea-Ethiopia conflict.[15]

The Roerich Pact of 1935

Following the inability of the Hague Conventions to stop or prevent the excesses of warfare experienced during the First World War, several states of the Americas signed on 15 April 1935 a Treaty for the Protection of Artistic and Scientific Institutions and of Historic Monuments (the Roerich Pact).[16] This Pact is still in force today. This agreement states that museums, historic monuments and scientific, cultural and educational institutions must be considered as neutral, as long as they are not used for military purposes. The Roerich Pact was innovative in that it does not mention the acceptability of an attack out of military necessity. Furthermore, it introduces the marking of cultural property in peace time as a protective measure.

The Geneva Conventions of 1949 and their Additional Protocols

The four Geneva Conventions, which constitute the foundation of international humanitarian law, especially the Fourth Geneva Convention regarding the protection of civilians in conflict, do not address the issue of protection of cultural heritage as such. The Fourth Geneva Convention remains general in this regard and only defines, in its article 147, as a grave breach of the Convention, the destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[17] The First Additional Protocol to the Conventions of 1977, applicable in international armed conflict, in its article 53, extends the scope and prohibits acts of hostility directed towards historic monuments,

13 Convention (IX) concerning Bombardment by Naval Forces in Time of War available at https://ihl-databases.icrc.org/ihl/WebART/220-260014?OpenDocument (accessed 30 April 2017).

14 M Sorensen (ed) *Manual of public international law* (1968) 141, considers The Hague Treaties as the first official codification of customary international law.

15 Ethiopia-Eritrea Claims Commission (EECC) 'Partial award, Central Front, Eritrea's claims, 2, 4, 6, 7, 8 and 22 paras 113 and 114' UN Reports of International Arbitral Awards, 28 April 2004 Volume XXVI 149-150 available at http://legal.un.org/riaa/cases/vol_ XXVI/115-153.pdf (accessed 3 November 2014).

16 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments.

17 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

works of art or places of worship which constitute the cultural or spiritual heritage of peoples. Such sites cannot be used for military purposes and cannot be the object of reprisals.[18] A similar rule is formulated in article 16 of Additional Protocol II to the Geneva Conventions, also of 1977 and applicable in non-international armed conflict.[19]

The Hague Convention of 1954 and its Additional Protocols

Apart from the Roerich Pact, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (1954 Hague Convention) is the first international instrument specifically dealing with the protection of cultural property during armed conflict, and not, as in the Hague Conventions of 1899 and 1907, within a wider framework of general rules and regulations for warfare.[20] For the first time in an international instrument, it addresses the issue of internal armed conflicts in its article 19.

The 1954 Hague Convention was adopted on 14 May 1954 and entered into force on 7 August 1956. As at 31 March 2017, 128 states either ratified or acceded to the Convention, 31 of which are African, including South Africa which acceded in 2003. [21] Unfortunately, countries that need the Convention most due to on-going armed conflict, such as Somalia and the Central African Republic, did not become party to the Convention.

The Convention gives a clear definition of cultural property, making a distinction between movable and immovable property. It mentions monuments, works of art, history, collections of books, archives and manuscripts, buildings such as libraries and museums as well as cultural centres.[22] It remains, however, traditional in its approach and does not mention natural heritage, parks and reserves, nor does it refer to immaterial cultural heritage such as traditions, customs and values. It places as much emphasis, if not more, on safeguarding cultural property in peacetime as on respecting it in conflict. With regard to safeguarding cultural property, measures have been advised such as the listing and marking of property (Blue Shield), placing property under special protection, and the instruction and training of cultural and military personnel. With regard to respecting such property during conflict, and as long as it is not used for military purposes, specific rules have been laid

18 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Conflicts (Protocol I).
19 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Conflicts (Protocol II).
20 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
21 UNESCO available at http://unesco.org/eri/la/convention.asp?KO=13637&language=E (accessed 31 March 2017).
22 The Hague Convention of 1954, art 1.

down, not only for direct attack, but also for theft, pillage, export, handling of heritage during occupation, and the return of property after conflict.

Somewhat insufficient and vague, article 28 of the Convention requires state parties to put in place national measures to sanction violations and to prosecute offenders, irrespective of their nationality, within their national criminal justice system. The Convention also lays down precise indications for extradition.

The 1954 Convention was a major achievement, irrespective of the fact that the obligation to protect may be waived out of military necessity and even though the instrument fails to unequivocally define the destruction of cultural property during conflict as an international crime. Experts, however, prefer not to aim for a review in order not to jeopardise the enormous strides this Convention has made.[23] Additional Protocol I was immediately adopted to augment the 1954 Convention, was signed and entered into force on the same day, dealing with the specific issue of export of cultural objects from occupied territory.[24]

The inclusion of protection of cultural heritage into the Additional Protocols of 1977 to the Geneva Conventions did not seem to be enough to address the inadequacies of the 1954 Convention after the atrocities of Cambodia, the Balkans and the Middle East in particular. The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. was, therefore, adopted on 26 March 1999,[25] and entered into force on 9 March 2004. As at 31 March 2017, 72 states have become party to the Protocol, 11 of which are African, including South Africa which acceded in 2015.

This Protocol strengthens the implementation of the main Convention with a better description of internal conflicts, more precise rules regarding the prevention of destruction and respect for heritage, the protection of immovable heritage, strengthening the conditions for a military waiver or military necessity, the conditions for enhanced protection, the protection of art during occupation, criminal responsibility, prosecution as well as extradition. The Protocol, furthermore, states that destruction of cultural heritage or property during conflict cannot be considered as a political offence. It also defines more precisely the conditions for individual responsibility.

Countries which are not party to the 1954 Convention or to its Protocols can still be held responsible for destruction of cultural heritage under customary international law, such as emphasised by the Eritrea-

23 Van der Auwera & Van Balen (n 1 above) 263.
24 Protocol for the Protection of Cultural Property in the Event of Armed Conflict.
25 UNESCO available at http://unesco.org/eri/la/convention.asp?KO=15207&language=E (accessed 31 March 2017).

Ethiopia Claims Commission.[26] The 1954 Hague Convention remains the most effective tool to prosecute destruction of heritage in conflict, especially because of the dispositions laid down in its Additional Protocol II.

According to records held by the International Committee of the Red Cross (ICRC),[27] measures to protect cultural property during military action or during occupation, either in military manuals or through legislation, have been taken by several countries around the world, including several countries in Africa.

Military instructions have been adopted in Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, the Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Ethiopia, Guinea, Kenya, Madagascar, Malawi, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Togo and Zimbabwe. Legislation, either in military or civil and penal codes or in laws on genocide, crimes against humanity and war crimes, has been adopted in Burundi, Congo, the Democratic Republic of the Congo, Ethiopia, Malawi, Mali, Niger, Rwanda, Senegal, South Africa, Sudan and Zimbabwe. More generally, on 6 December 2016, the United Nations Educational Scientific and Cultural Organisation (UNESCO) launched a military manual for cultural heritage protection.[28]

The World Heritage Convention

Within the framework of UNESCO, the Convention concerning the Protection of the World Cultural and Natural Heritage was adopted on 16 November 1972 and entered into force on 17 December 1975. As of 31 January 2017, 193 states had become party to the Convention.[29] Apart from a general commitment to take measures to protect cultural and natural heritage in article 5, under article 6, states undertake not to take deliberate measures that might damage directly or indirectly the cultural and natural heritage situated in other state parties to the Convention. The World Heritage Committee, established by the Convention, maintains a list of sites in danger, including by 'the outbreak or threat of armed conflict'.

26 EECC (n 15 above) paras 113 & 114.

27 ICRC 'Customary international law: Practice relating to Rule 38 (during hostilities) and Practice relating to Rule 40 (during occupation) available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule38 and 'Practice relating to Rule 40, respect for cultural property' available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule40 (accessed 30 March 2017).

28 UNESCO, Protection of Cultural Property, Military Manual available at http://unesdoc.unesdoc.org/images/0024/002466/246633e.pdf (accessed 17 April 2017).

29 Convention Concerning the Protection of the World Cultural and Natural Heritage. For the ratification table, see states parties ratification status available at http://whc.unesco.org/en/statesparties/ (accessed 30 March 2017).

The World Heritage Centre, established by UNESCO in 1992, and the Secretariat of the Convention have the mandate to respond to endangered sites in cases of armed conflict and natural and man-made disasters. Forty-six sites around the world are on the danger list, of which 17 are in Africa and of which nine are directly and indirectly related to armed conflict, including the influx of refugees. These sites are mostly national parks. Only the sites in Mali are considered to be sites of a purely cultural nature, namely in Timbuktu and in Askia.[30]

On 17 October 2003, UNESCO adopted a Declaration concerning the Intentional Destruction of Cultural Heritage.[31] This Declaration specifies that the intentional destruction of cultural heritage is a violation of international humanitarian law, with negative consequences for human rights and human development. It is explicit regarding the obligations of states and of individuals. This Declaration is a further indication that the system of protection of cultural heritage during armed conflict is gradually improving.[32]

More specifically, the destruction of cultural heritage in Mali is a very sensitive issue in Africa. The preservation of the ancient scripts in Timbuktu was the first cultural project of the New Partnership for African Development (NEPAD) and a personal commitment of former South African President Thabo Mbeki. Manuscripts, especially those from the new Ahmed Baba Research Centre, have been damaged and mausoleums and shrines have been destroyed by armed groups.

On the occasion of the 40th anniversary of the Convention in 2012, African Ministers condemned the destruction of heritage sites and cultural objects in Mali, at Timbuktu and in Askia. They called on the Malian Government and on all other governments to prevent the trafficking in cultural objects and manuscripts. They welcomed Mali's cooperation with the ICC to prosecute perpetrators of destruction and illegal trafficking. They made a commitment to end the destruction of heritages as a result of conflict, wherever it occurs.[33]

30 United Nations Educational, Scientific and Cultural Organisation 'List of World Heritage in Danger' available at http://whc.unesco.org/en/danger/ (accessed 30 March 2017).

31 Declaration Concerning the Intentional Destruction of Cultural Heritage.

32 See in this respect, A Frigerio 'Heritage under attack: A critical analysis of the reasons behind the destruction of cultural property in the event of armed attack' *Aedon* (2014) 2 available at http://www.aedon.mulino.it/archivio/2014/2/frigerio.htm (accessed 31 October 2014).

33 Declaration on the Situation in Mali by the African Ministers in charge of World Heritage properties at a colloquium in Johannesburg from 26 to 28 September 2012 on the occasion of the Africa celebration of the 40th Anniversary of the World Heritage Convention available at http://whc.unesco.org/document/123346 (accessed 30 April 2017).

The Intangible Cultural Heritage Convention

The Convention for the Safeguarding of Intangible Cultural Heritage, adopted under the aegis of UNESCO in October 2003 and entered into force in 2006, takes the definition of cultural heritage a step further by including a number of traditions, rituals, social practices and forms of arts to be respected and protected.[34] This Convention is of particular importance for Africa, where numerous forms of intangible cultural heritage are under threat from armed conflict. The Convention requires a number of measures to be taken from state parties and puts in place mechanisms to register intangible cultural property and to keep track of those in danger. Several traditional rites and artistic traditions in Uganda, Botswana, Kenya and Mali have been placed on the endangered intangible cultural heritage list.[35]

United Nations Security Council Resolution 2374

On 24 March 2017 the UNSC, within the context of maintenance of international peace and security, unanimously adopted Resolution 2347 dealing with the protection of heritage.[36] This Resolution primarily addresses the destruction of heritage and the looting and smuggling of artefacts in armed conflict areas as a source of income for terrorist groups and criminal gangs, especially in Syria and Iraq. However, at the same time the Resolution enumerates a number of general principles and directives regarding the primary responsibility of states to protect their heritage in conformity with the UN Charter and international law, the need to ratify international instruments in this respect, preventive measures to be taken by states and the need for more international cooperation, especially in view of eliminating the financial networks that fuel terrorism, war and conflict. The Resolution also confirmed that the protection of cultural heritage may be part of the mandate of UN peacekeeping operations. According to UNESCO, this is the first ever resolution adopted by the UNSC to focus on cultural heritage.[37]

34 Convention for the Safeguarding of Intangible Cultural Heritage.
35 See UNESCO *List of intangible cultural heritage in need of urgent safeguarding* (2010/2011) available at http://unesco-bg.org/file_store/188329e.pdf (accessed 2 November 2014).
36 UN S/RES/2347 (n 7 above).
37 UNESCO 'UN Security Council adopts historic resolution for the protection of heritage' available at http://en.unesco.org/news/security-council-adopts-historic-resolution-pro tection-heritage (accessed 28 March 2017).

The legal framework for the protection of cultural heritage at the regional level in Africa

The Constitutive Act of the African Union

In article 4(h) of the Constitutive Act of the African Union, adopted on 11 July 2000 and entered into force on 26 May 2001, the African Union (AU) accorded itself the right to intervene in a member state pursuant to a decision of its Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.[38] The AU Peace and Security Council is tasked with the responsibility to make a recommendation to the AU Assembly based on the interpretation given to such grave circumstances in international instruments.[39] Since the destruction of cultural property is a war crime, acted upon for example by the ICC in the *Al Mahdi* case, the AU should, in principle, have the right to intervene whenever such destruction occurs in conflict on the continent.[40]

African Union human rights treaties

The AU has the right to intervene. It may not have a direct obligation, but it is arguable that the AU could be held responsible on the basis of omission in case of non-intervention in grave circumstances.[41] That this right is in fact an obligation also follows from the formulation of article 8 of the AU Convention for the Protection and Assistance of Internally Displaced Persons, adopted on 23 October 2009 but not entered into force yet, which states that the AU has the obligation to intervene in a member state in the face of genocide, war crimes and crimes against humanity. The African Charter on Human and Peoples' Rights does not recognise as such the right to cultural heritage, but its article 22 reads that all peoples have the right to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States have the duty to respect and ensure the realisation of this right.

38 Constitutive Act of the African Union art 4(h).

39 Protocol relating to the Establishment of the Peace and Security Council of the African Union art 7(e).

40 Statute of the International Criminal Court, Rome, 17 July 1998, in its article 8(2)(e)(iv) (for international conflicts) and article 8(2)(b)(ix) (for non-international conflicts) defines attacks on buildings of religion, education, art, science etc., namely cultural property, as a war crime, available at https://www.icrc.org/ihl.nsf/INTRO/585?OpenDocument (accessed 3 November 2014).

41 D Kuwali 'Article 4(h) + R2P: Towards a doctrine of persuasive prevention to end mass atrocity crimes' (2008) 3 *Interdisciplinary Journal of Human Rights Law* 66; J Mutton 'Article 4(h) and the citizen's right to be protected' in D Kuwali and F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) 97 108.

Case law at the global level

Under this heading, the case law of a number of international tribunals is canvassed and analysed.[42] These tribunals are those established under the UN namely the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the ICC.

The International Court of Justice

The ICJ in its judgment in *Bosnia and Herzegovina v Serbia and Montenegro* held that even though the deliberate destruction of historical, cultural and religious heritage of a specific group is directed to eliminate traces of its culture and religion, it does not qualify as genocide under article II of the Geneva Convention on Genocide of 1949.[43] The Court agreed with the ICTY in *Prosecutor v Radislav Krstic* (*Krstic* case)[44] that, under customary law, the definition of genocide is limited to physical and biological destruction, even though cultural destruction may be invoked as evidence of genocide.[45] With respect to the destruction of mosques and houses, this notion was accepted as such by the ICTY in that particular case.[46]

The International Criminal Court

On 1 July 2002, the Rome Statute of the ICC entered into force. Article 5 of the Statute provides that the ICC's jurisdiction is limited to serious crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression,[47] while article 21 specifies that the ICC will apply its Statute and annexed documents, treaties, the principles and rules of international law and general principles of law derived from national legal systems.[48]

The ICC Statute classifies destruction of cultural property or cultural heritage as a war crime, whether in international or in internal conflict. With respect to international conflict, the Statute defines attacks against buildings of religion, education, art, science or charity and historical

42 Apart from these international cases with respect to cultural destruction during conflict in Africa, one case stands out at the domestic level, regarding this issue. In 2006, a Military Garrison Court in Ituri in the Democratic Republic of Congo (DRC) sentenced a member of the rebel group, operating in the Eastern DRC to 20 years imprisonment for the destruction of cultural property during the on-going armed conflict in that area (ICRC (n 27 above) 38).

43 *Application of the Court of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (26 February 2007) (2007) ICJ Reports 1 (*Bosnia and Herzegovina v Serbia and Montenegro*) available at http://www.icj-cji.org/docket/files/91/13685.pdf (accessed 28 March 2017).

44 *Prosecutor v Radislav Krstic (Trial Judgment)* ICTY IT-98-33-T (2 August 2001) para 580.

45 *Bosnia and Herzegovina v Serbia and Montenegro* (n 43 above) para 344.

46 n 44 above, para 580.

47 Statute of the International Criminal Court (n 40 above) art 5.

48 n 40 above, arts 5 & 21.

monuments, as long as they are not used as military objects, as serious violations of laws and customs within the established framework of international law.[49] Article 8(2)(a)(iv) of the ICC Statute, furthermore, cites, with reference to the 1949 Geneva Conventions, the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,[50] while article 8(2)(b) of the ICC Statute refers to direct attacks on civilian objects, which are not military objects, with the knowledge of destroying objects and the natural environment in excess of military advantage as well as attacks on villages and dwellings which are not military objects. As far as internal conflicts are concerned, article 8(2)(e)(iv) of the ICC Statute confirms the provision of section 2(b)(ix), namely the attack on buildings of religion, education, art and science and historical monuments as a violation of the laws and customs in armed conflict.[51] Article 8(2)(f) of the ICC Statute defines internal armed conflict as between Government forces and armed groups or between armed groups, excluding riots.[52] Such attacks could, however, also under article 7 be prosecuted as a crime against humanity.

Until recently, only the case brought before the Court against Bosco Ntaganda for war crimes allegedly committed in Ituri, in the North-Eastern DRC, in 2002 and 2003, had listed destruction of heritage on the accusation chart. The charges for war crimes and crimes against humanity held against him include attacks on protected objects and destruction of enemy property. Ntaganda surrendered voluntarily on 22 March 2013 and the charges were confirmed on 9 June 2014. Ntaganda is in custody at the seat of the ICC in The Hague. His trial opened on 2 September 2015. At the time of writing, the next trial hearing was scheduled for 10 April 2017.[53] On 27 September 2016, however, the ICC gave judgment and sentence in the *Al Mahdi* case, pertaining to the destruction of mausoleums and shrines in Timbuktu, within the framework of the Mali internal conflict, in June and July 2012. The defendant was found guilty and was sentenced to nine years imprisonment. This case is the first court case for the ICC, and one of the few international cases to deal solely with the destruction of heritage during conflict under article 8(2)(e)(iv) of its Statute, namely the destruction of heritage in internal conflicts.[54] Most other international court cases, in particular those brought before the ICTY, deal with destruction of heritage as only one of the many charges of war crimes, crimes against humanity and genocide brought against perpetrators.

49 n 40 above, art 8 (2)(b)(ix).
50 n 40 above, art 8(2)(a)(iv).
51 n 40 above, art 8(2)(e)(iv).
52 n 40 above, art 8(2)(c).
53 *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 (9 June 2014) available at https://www.icc-cpi.int/drc/ntaganda (accessed 30 April 2017).
54 n 5 above.

The *Al Mahdi* case concerned the attack by armed fighters on nine Muslim mausoleums and one shrine in the city of Timbuktu, all UNESCO World Heritage Sites. This case is most significant in the fight against destruction of cultural heritage during armed conflict, primarily because it confirms the international criminalisation of the destruction of heritage in conflict. It also shows that perpetrators can be brought to justice. Since the defendant admitted guilt and entered into a plea bargain, the case is not very elaborate and, as such, is not very instructive, in contrast to several cases before the ICTY, on how international courts view destruction of heritage as a crime. Nevertheless, the judgment offers a number of interesting insights.

The body of law which the ICC referred to consists, apart from its own Statute, of the Hague Convention IV of 1907, in particular articles 27 and 56 of the Hague Regulations, the Lieber Code especially articles 35 and 36, the 1949 Geneva Conventions and their Protocols as well as the Second Protocol to the 1954 Hague Convention.[55] In the case of *Prosecutor v Germain Katanga*, the ICC also made reference to the Lieber Code with respect to the interpretation of 'military necessity'.

The Court gives a broad interpretation of attacks on cultural heritage falling under article 8(2)(e)(iv) of the Rome Statute, as any act of violence against protected objects whether during hostilities or after the object fell under the control of an armed group.[56] It also clarifies the nature of internal conflict, namely a protracted armed conflict between government authorities and organised armed groups[57] and specifies the difference with disturbances and tensions in this case as a large part of Mali and Timbuktu had been conquered by armed fighters without foreign intervention.[58] The actions of the defendant, namely his knowledge of the attacks, his intention to damage, his moral and technical support, his planning, his active participation in some attacks and his communication with the media afterwards, all constituted his guilt.[59]

The ICC drew a difference between crimes against people and crimes against property because, as the Court put it, a sentence must reflect the seriousness of the crime. The ICC is generally concerned with the most serious crimes affecting humankind but all crimes do not have the same gravity, pointing at the difference between crimes against a person and crimes against property.[60] Even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons.[61] This must be reflected in the sentence. However, the ICC considers, that the

55 n 5 above, para 14.
56 n 5 above, para 15.
57 n 5 above, para 17.
58 n 5 above, para 49.
59 n 5 above, para 39.
60 n 5 above, para 72.
61 n 5 above, para 77.

destroyed buildings had a high emotional and symbolic value for the population, that the attacks were inspired by discriminatory religious motives and that all mankind was affected because the sites appeared on the World Heritage List.[62] The attacks were carefully planned and took a long time (around ten days). This led to a complete destruction of the buildings, which had a high impact due to media coverage, and the ICC considered these as crimes of 'significant gravity'.[63] Taking into account the admission of guilt by the defendant, his expression of remorse, his empathy with the victims and his offer of some repair, the ICC decided on a sentence of nine years imprisonment. Reparations to victims will be addressed separately and in due course pursuant to article 75 of the ICC Statute.

The International Criminal Tribunal for the former Yugoslavia

The systematic violations of the 1949 Geneva Conventions in Bosnia-Herzegovina, including the destruction of cultural and religious property, led to the establishment of the ICTY. Its Statute, adopted on 25 May 1993 and amended by several UN resolutions, gave direct protection to cultural property. Article 3(d) of the ICTY Statute reads that the Tribunal shall have the power to prosecute persons in violation of the laws and customs of war that include the seizure of, the destruction of or the willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.[64] In the *Al Mahdi* case, the ICC pointed at the difference between its article 8, which addresses attacks against cultural property and article 3 of the ICTY Statute, which concerns the seizure of, destruction of and damage to heritage. The ICC concluded that two different legal contexts are at stake here and that the jurisprudence of the ICTY is, therefore, of little guidance to the ICC with respect to crimes against cultural heritage.[65]

Several cases brought before the ICTY have directly dealt with these issues and have led to the conviction of individuals for the destruction of cultural property, as part of hostilities as well as under occupation.[66] The jurisprudence of the ICTY has dealt with different questions related to the criminalisation and the prosecution of destruction of cultural property. It has made a significant contribution towards further development of the law around destruction of cultural heritage during armed conflict. These

62 n 5 above, para 79-81.
63 n 5 above, para 77.
64 Statute of the International Criminal Tribunal for the Former Yugoslavia.
65 n 5 above, para 16.
66 See in this respect ICRC (n 29 above). See also R O'Keefe 'Protection of cultural property under international criminal law' (2010) 11 *Melbourne Journal of International Law* 1 54.

issues relate to the force of customary law, the definition of destruction of cultural heritage as a war crime,[67] the universal significance of cultural heritage,[68] the concept of non-international conflicts, the definition of individual responsibility and intent, the relationship between destruction and conflict, the issue of military sites in the vicinity of destroyed cultural heritage, and the importance of the World Heritage List to ensure prosecution for the destruction of some cultural sites.[69] The prosecutions before the ICTY have largely improved a clarification of the law, in particular customary international law, applicable to the protection of cultural heritage during armed conflict.[70]

The jurisprudence of the ICTY elaborated also on the meaning and consequences of the destruction of heritage, identity, diversity and memory; the elimination of a people; and the removal of evidence of its existence. It furthermore described the concepts of killing and destruction, life and culture, as different stages in ethnic cleansing and genocide. The ICTY produced landmark decisions on destruction of cultural property not only as war crimes but also as genocide. In *Prosecutor v Dario Kordic,* and *Mario Cerkez*, for example, the ICTY expressly recognised that the criminalisation of the willful destruction of cultural heritage is sanctioned by customary international law. In doing so, the ICTY went beyond the application of article 3(d) of its own Statute. In the *Krstic* case, the ICTY decided that destruction of heritage cannot as such be considered genocide but that it can be part of the evidence to prove genocide.[71]

67 See eg ICTY, the *Dubrovnik* judgment, n 70 below, paras 303(ff) and following paras available at http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf (accessed 30 April 2017).

68 The ICTY has gradually changed its position in this respect. In the *Blaskic* case (n 70 above) para 185, the Tribunal held that in order to be protected, an object should not be in the vicinity of a military site. In later cases, however, the Tribunal held that the proximity of a military site was of no consequence for the obligation to respect cultural heritage under article 3(d) of its Statute. See in this respect eg the *Prosecutor v Naletilic and Martinovic* (31 March 2003) para 604, available at https://www.icty.org/x/cases/naletilic-martinovic/tjug/en/nal-tj030331-e.pdf (accessed 2 April 2017) and the *Kordic* case, para 361.

69 See *Prosecutor v Pavle Strugar* (*Dubrovnik* judgment) ICTY (n 67 above) paras 321(ff) and following paras.

70 See eg *Prosecutor v Tihomir Blaskic* ICTY (3 March 2000) para 164. See in this respect also C Forrest *International law and the protection of cultural heritage* (2010). See more generally also, with respect to the prosecution of crimes of destruction of cultural heritage, M Frulli 'The criminalization of offences against cultural heritage in times of armed conflict: The quest for consistency' (2011) *European Journal for International Law* 22(1) 203 217 (accessed 3 November 2014).

71 *Prosecutor v Radislav Krstic (Trial Judgment)* ICTY IT-98-33-T 2 August 2001 para 580.

Case law at the regional level in Africa

The International Criminal Tribunal for Rwanda

Following the genocide, an International Criminal Tribunal for Rwanda (ICTR) was established on 8 November 1994 by UNSC Resolution 955, to prosecute persons responsible for the genocide and other serious violations of international humanitarian law in Rwanda and for acts of genocide or other serious crimes committed by Rwandans in neighbouring countries between 1 January and 31 December 1994.[72] The ICTR was dissolved on 31 December 2015. This Court had jurisdiction over crimes of genocide, crimes against humanity and war crimes, defined as violations of Article 3, Common to the Geneva Conventions of 1949, and their Additional Protocol II, dealing with crimes committed during internal conflicts.[73] The ICTR Statute does not specifically mention the international crime of destruction of cultural property or cultural heritage. Article 4 of the Statute, which deals with violations of Article 3, Common to the Geneva Conventions and of Additional Protocol II, only mentions pillage. However, destruction or pillage of cultural heritage had not been raised in cases before the ICTR.

The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) had been established by an agreement between the UN and the Government of Sierra Leone pursuant to UNSC Resolution 1315 of 14 August 2000.[74] Its mandate was to prosecute serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone after 30 November 1996 and during the Sierra Leone civil war. As for the ICTR, its Statute,[75] published by the UNSC on 16 January 2002, does not specifically refer to the international crime of destruction of cultural property or cultural heritage. It has the power to prosecute persons who committed or who ordered the commission of serious violations of Article 3 common to the Geneva Conventions of 1949 and its Additional Protocol II, including pillage. The Court for Sierra Leone has, however, wider reference than the ICTR and could more easily have accommodated the crime of destruction of cultural property. Article 4 of its Statute foresees that serious violations of

72 UN S/RES/955 (1994) Resolution on the establishment of the International Criminal Tribunal for Rwanda, 8 November 1994 including the Tribunal's Statute in annex available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/955(19940 (accessed 30 April 2017).

73 Statute of the International Criminal Tribunal for Rwanda, art 4 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1315%20(2000) (accessed 30 April 2017).

74 UN S/RES/1315 (2000) Resolution on the establishment of a Special Court for Sierra Leone, 14 August 2000.

75 Statute of the Special Court for Sierra Leone, available at https://www.rscsl.org/Documents/scsl-statute.pdf (accessed 30 April 2017).

international humanitarian law such as those intentionally directed against the civilian population could be prosecuted. Article 5 of the Statute specifies that the setting of fire to buildings could be prosecuted according to Sierra Leone's Malicious Damage Act of 1861. The SCSL, which made its final decision on 26 September 2013, has dealt with pillage in its judgments but has not specifically referred to the destruction of cultural heritage.

The Eritrea-Ethiopia Claims Commission

After two years of violent border disputes, Eritrea and Ethiopia on 12 December 2000 reached an agreement in Algiers, following which the Eritrea-Ethiopia Claims Commission (EECC) was established in The Hague pursuant to article 5 of the Agreement.[76] The EECC received a wide mandate to decide through binding arbitration on claims for loss, damage or injury suffered by the parties during the conflict. This broad mandate, laid down in article 5(1) and (13) of the Agreement, made it possible to include claims concerning damage to cultural property suffered by the parties. Furthermore, the EECC could base its considerations on a broad spectrum of applicable law, including international treaties and international customary law.[77] Several partial awards were delivered. One of the claims raised by Eritrea concerned the heavy damage brought upon by Ethiopia to a cultural relic, namely the Stela of Matara. The EECC in its partial award of 28 April 2004, found Ethiopia liable for the unlawful damage inflicted upon the Stela of Matara during its occupation of the area in May 2000. The EECC felt that this was a violation of customary international humanitarian law. While the 1954 Hague Convention on the Protection of Cultural Property was not applicable, since neither Eritrea nor Ethiopia were a party to it, the EECC was of the opinion that Ethiopia had violated article 56 of the Hague Regulations, which had become part of customary law.[78] Consequently, the EECC in its Final Award, dated 17 August 2009, regarding Eritrea's Damages Claims, allowed Eritrea the amount spent to restore the Stela as well as an additional, symbolic, amount to reflect the unique cultural significance of the Stela, namely a total of US$ 50 000.[79] This decision is particularly significant in that an international tribunal applied, for the first time, customary international law with respect to the destruction or damage to cultural heritage as a consequence of conflict in Africa.

76 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers, 12 December 2000 available at http://www.pcacases.com/web/sendAttach/786 (accessed 30 April 2017).

77 Eritrea-Ethiopia Claims Commission, Rules of Procedure available at http://www.pca-cpa.org/showfile.asp?fil_id=140 (accessed 2 November 2014).

78 Eritrea-Ethiopia Claims Commission (n 17 above) paras 113 & 114.

79 Eritrea-Ethiopia Claims Commission 'Final award, Eritrea's damages claims' paras 223 & 226 available at http://www.pca-cpa.org/showfile.asp?fil_id=1259 (accessed 3 November 2014).

The African Court on Human and Peoples' Rights

According to article 3 of the Protocol to the Statute of African Court on Human and Peoples' Rights, the African Court has jurisdiction over all cases and disputes concerning allegations of violations of the AU Constitutive Act, the Protocol to the Statute of the African Court or any relevant human rights instrument ratified by the states concerned.[80] The Court shall, according to article 7 of the Protocol, apply the provisions of those instruments. This would, in principle, include the 1954 Convention and all other international instruments regarding the protection of cultural heritage in armed conflict. However, the Court has no jurisprudence to illustrate its position in this matter.

The African Commission on Human and Peoples' Rights

According to article 60 and article 61 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) must in its interpretation of the Charter draw inspiration from African and international instruments on human and peoples' rights, including those expressly recognised by the member states of the AU.[81] Such instruments include the 1954 Hague Convention and all other relevant treaties. Different to the African Court, the Commission's jurisprudence illustrates its stance on cultural heritage. In the 2004 case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, the Commission referred in a general manner to several provisions of the Geneva Conventions and their Protocols, as well as to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land as conventions and general principles of law recognised by African states and thus applicable to determine the case.[82] Although not invoked in this case, it implies that article 53 of the First Protocol and article 16 of Protocol II to the Geneva Conventions, which deal with the protection of cultural heritage, could in principle also be applied by the African Commission regarding cultural heritage in armed conflict. More specifically and within a context of preservation of cultural heritage, the African Commission refers to the Preamble and to article 22 of the African Charter on Human and Peoples' Rights, as well as to article 34 of Protocol I to the Geneva Conventions, to determine that indiscriminate dumping or mass burial of victims violates the cultural development and the values and traditions of African people.[83] The Commission also refers to the *Celebici* judgment of the ICTY to decide that, with respect to article 23 of the Hague Convention (II) of 1899, private

80 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which was adopted on 10 June 1998 and entered into force on 25 January 2004.
81 African Charter on Human and Peoples' Rights, art 29.
82 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 84.
83 n 82 above, paras 78, 79 & 87.

property cannot be confiscated and that pillage is formally forbidden. These are issues that indirectly touch upon the respect for and protection of cultural property, often expressly defined as private property in international texts.[84]

Conclusion

Often, the physical and including mental suffering of civilians in armed conflict is so horrendous that attention is only sparingly given to the protection of their cultural environment, their cultural heritage. This may be the reason why cultural heritage is not regulated as it should be and does not feature more prominently when prosecuting war crimes and crimes against humanity, especially in the *ad hoc* tribunals set up for this purpose. Efforts should, therefore, be made to have the protection of cultural heritage better included in international and national instruments dealing with civilians in conflict. This proposal applies especially to a better definition of criminal responsibility and a more prominent place in the prosecution of crimes related to armed conflict. In this context, efforts should also be made to have cultural heritage included in the mechanism to ignite action under article 4(h) of the AU Constitutive Act, Africa's version of the responsibility to protect.

A better concept of the cultural heritage of the African peoples should be developed. The protection of cultural heritage should, especially in Africa, cover a broader spectrum than buildings and art work. It should equally, and maybe even more urgently, cover intangible heritage such as traditions and values. It should also cover wildlife and nature, nature reserves and national parks. Most African sites, mentioned on the List of Endangered Sites, established within the framework of the 1972 World Heritage Convention, are natural reserves that are now under threat from armed conflict. The efforts of South African conservationist, the late Lawrence Anthony, to save the rhinos from armed conflict in Central Africa, as documented in his book *The last rhinos*, have been a striking example of work in this area. His efforts even resulted in a draft resolution entitled 'Wildlife in War Zones', presented at the UN to protect nature reserves on par with schools and hospitals as the heritage of whole mankind.[85]

African governments should be encouraged to ratify the relevant international instruments. The *Al Mahdi* case before the ICC has demonstrated how productive the cooperation between a government and the Court can be. This case also illustrates how the ICC can work to the

84 n 82 above, 85.
85 L Anthony & G Spence *The last rhinos*: *The powerful story of one man's battle to save a species* (2012).

advantage of Africa as it had done in several other cases, putting perpetrators of atrocities behind bars.

PART III: MEANS AND STRATEGIES FOR DEALING WITH MASS ATROCITIES

CHAPTER 12

THE ROLE OF HUMANITARIAN AGENCIES IN THE PROTECTION OF CIVILIANS

Anna Larsson and Dan Kuwali

Abstract: *There is a growing recognition for the importance of protecting civilians because of the humanitarian obligation to spare endangered populations from the effects of armed conflicts. In this vein, humanitarian agencies have attempted to develop strategies that enable the protection of the most vulnerable populations in armed conflicts. Particular efforts have been directed to overcome the challenges of politicisation and militarisation of aid, which is an increasing problem with negative effect on access, protection and safety of humanitarian actors and also undermine their efficiency. This Chapter argues that humanitarian relief should be provided in the best interest of the beneficiaries by establishing solidarity with beneficiaries. As the protection of civilians and provision of humanitarian relief require a secure space to access by the victims, humanitarian agencies should earn the humanitarian space by engaging with, and building relationships to be accepted by, local communities. Humanitarian actors should also maintain an apolitical image so that they should be viewed as beneficial contributors to local communities instead of being seen as enemies or strategic military targets. Humanitarian agencies should systematically collect and share relevant information to help avoid future incidents and understand the cultural, political, and socioeconomic contexts of the situation.*

Introduction

Civilians, whether resident or displaced, are often deliberately targeted for violent attacks, rather than being incidentally affected by war, leading to an unacceptably high toll on human life and excessive suffering in contemporary armed conflicts. The death toll and the number of the wounded innocent civilians have risen to appalling levels in recent years. Yet, the distinction between combatants and non-combatants, as well as between military objectives and civilian objects, is the single most important principle of international humanitarian law (IHL). The principle of 'protection of civilians' is rooted in IHL, which calls for the protection of civilians from violence, and in human rights and refugee law,

which, among others, obliges the protection of human life and human dignity.[1] Belligerents, including government forces, armed rebel groups, and terrorist organisations, often deliberately target civilians as a tactic to achieve their political goals.

As a result, there has been a growing recognition for the importance of protecting civilians because of the humanitarian obligation to spare endangered populations from the effects of armed conflicts. Many humanitarian agencies have stepped up their work to protect civilians in armed conflicts and other situations of violence in order to mitigate their suffering and to stop the atrocities. In recent years, a significant amount of work has been done by humanitarian agencies to develop practical strategies and tools that enable the protection of the most vulnerable populations in armed conflict situations. The growing tension between adherence to IHL and the practical realities of protecting civilians and delivering assistance to vulnerable populations in complex and volatile humanitarian context, represents a significant challenge for the humanitarian community. Humanitarian assistance is traditionally managed as a state-centric system, requiring aid agencies to cooperate with a state for the provision of relief to its citizens.

While Common Article 3 of the Geneva Conventions of 1949 authorises an impartial humanitarian actor to offer its services to the parties to unarmed conflict, IHL does not grant humanitarian agencies the legal right to enter a sovereign territory without the consent of the state. Likewise, international law prohibits interference in the internal affairs of another state in article 2(7) of the Charter of the United Nations (UN). For this reason, humanitarian assistance is provided to beneficiaries upon consent by the host state. Even when the host government gives this consent, insurgents may hinder humanitarian actors to access those in need of relief aid in an armed conflict. This discussion explores the role of humanitarian agencies in the protection of civilians in armed conflicts and investigates the interoperability of these humanitarian agencies and other actors in the field. It exposes the challenges faced by these agencies in order to find ways of enhancing the protection role of humanitarian agencies.

The notion of 'protection of civilians'

Following the atrocities against civilians in the 1990s especially in Bosnia, Rwanda, and Sierra Leone, and the failure of the UN peacekeepers and other international forces to prevent mass atrocities, the UN Security Council started including within the mandates of peacekeeping missions the 'protection of civilians from imminent violence'. From the perspective

1 Arts 49-51 of to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3, entered into force 7 December 1978.

of humanitarian agencies such as Oxfam, the concept of 'protection of civilians' (PoC) refers to the protection of civilians from widespread threats of violence, coercion, and the deliberate deprivation of aid.[2] To be sure,

> [t]he concept of protection encompasses … all activities aimed at ensuring the full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law. ie. human rights law, international humanitarian law and refugee law. Human rights and humanitarian organisations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).[3]

The protection of civilians has been brought to the fore with the development of the norms associated with the 'responsibility to protect', the right to intervene under article 4(h) of the Constitutive Act of the African Union (AU) and 'protection of civilians in armed conflict' which include, but go beyond, the protection provided in IHL, human rights and refugee law.

Why civilian protection matters? The plight of civilians in armed conflicts

In contemporary armed conflicts, innocent civilians often constitute an overwhelming majority of victims and have at times been deliberately targeted. The most vulnerable populations at risk include women and children, who are often killed, raped or otherwise sexually abused, kidnapped and enslaved, and children, who are taken and forced to become soldiers and girls, who are forced to become 'wives' of warlords. Survivors are often displaced, by force or for lack of choice, taking refuge in camps where they are often defenseless against armed attacks and harassment. Many are maimed by anti-personnel land mines and other indiscriminate munitions.[4] Even more die of the indirect effects of armed conflict such as disease, malnutrition, and famine.[5]

There are several reasons why the protection of civilians is essential in contemporary armed conflicts. Firstly, the protection of civilians is critical to the perceived success of peace support operations (PSOs) and, therefore, for the UN to operate effectively in its role of maintenance of international peace and security. Secondly, protection of civilians is important to the broader political goals of creating and upholding peace agreements. For

2 Oxfam 'What is the "Protection of Civilians" principle?' available at http://www.oxfam.org/en/campaigns/conflict/protection-of-civilians (accessed 17 August 2014).
3 International Committee of the Red Cross (ICRC) *Strengthening protection in war: A search for professional standards* International Committee of the Red Cross, Geneva (2001) 20.
4 Citizens for Global Solutions 'Protecting civilians in armed conflicts' available at https://globalsolutions.org/files/public/documents/CP-Factsheet-Protecting-Civilians-in-Armed-Conflict.pdf (accessed 10 August 2014).
5 Citizens for Global Solutions (n 4 above).

example, in a situation of armed conflict, the security of the population is also a prerequisite for an enduring political arrangement between warring factions. Thirdly, humanitarian assistance cannot be provided by relief agencies, international and regional organisations, and non-governmental organisations (NGOs) when civilians and third party providers are at risk of being attacked. Fourthly, preventing attacks on civilians also preempts spoilers from creating instability and weakening fragile peace processes in post-conflict situations. Fifthly, the security of civilians is also a key aspect of providing development assistance in post-conflict situations.[6]

The mandate of the humanitarian sector

United Nations humanitarian agencies

At the end of the Cold War, the crises of the 1990s had a significant impact on the practice of the humanitarian sector. In 1991, the UN Department of Humanitarian Affairs, established under UN General Assembly Resolution 46/182, was created with the aim

> [to] mobilize and coordinate the collective efforts of the international community, in particular those of the UN system, to meet in a coherent and timely manner the needs of those exposed to human suffering and material destruction in disasters and emergencies. This involves reducing vulnerability, promoting solutions to root causes and facilitating the smooth transition from relief to rehabilitation and development.

The resolution provided a framework for post – Cold War humanitarian action, clearly expressed the humanitarian imperative, and re-asserted the notion that humanitarian action should be based on the principles of humanity, impartiality, independence and neutrality – principles deeply rooted in international humanitarian law. In addition to establishing a principled framework for humanitarian action, the resolution also established the Department of Humanitarian Affairs, the precursor to the Office for the Coordination of Humanitarian Affairs (OCHA).

Many UN humanitarian agencies are mandated to fulfill certain roles. There are, however, two organisations that have a particular role in protection. First, the UN High Commissioner for Refugees (UNHCR) is mandated under the Refugee Convention to provide protection and assistance to refugees. More recently, UNHCR has also assumed responsibility for internally displaced persons (IDPs). Among other UN agencies with specialist protection skills and mandates are United Nations International Children's Fund (UNICEF), which has responsibilities relating to the rights of women and children; the World Food Programme (WFP), which has a mandate to provide food in crises; and the Office of

6 n 4 above.

the High Commissioner for Human Rights (OHCHR), which is responsible for the protection of human rights more generally.

Non-governmental humanitarian agencies

The International Committee of the Red Cross (ICRC) has a mandate to provide protection in armed conflict; this is established in law in the drafting of the first Geneva Convention of 1864. There are, however, many humanitarian organisations that are not mandated in law and are able to determine their own role within accepted humanitarian principles and practice. Traditionally, such organisations have worked to meet the material needs of people affected by armed conflict and other crises. However, experience in the early 1990s led to the realisation that in some instances, where material needs are generated by the actions of the parties to a conflict, providing assistance alone can prolong and contribute to war and have other unintended consequences.[7] Some humanitarian organisations, such as *Médecins Sans Frontières* (MSF), began to include protection as an aspect of their work, recognising that humanitarian action called for both assistance and protection to be effective. In contrast, human rights organisations such as Amnesty International and Human Rights Watch have always focused on protection and the encouragement of duty bearers to fulfill their responsibilities and adhere to the law.[8]

Humanitarian principles

Recently, the international humanitarian community agreed on four basic Protection Principles that should inform all humanitarian actions. These principles are found in the Sphere Humanitarian Charter and Minimum Standards in Disaster Response: firstly, avoid exposing people to further harm as a result of your actions; secondly, ensure people's access to impartial assistance – in proportion to need and without discrimination; thirdly, protect people from physical and psychological harm arising from violence and coercion; fourthly, assist people to claim their rights, access available remedies and recover from the effects of abuse.[9] At the same time, the neutrality and independence of humanitarian activities must be maintained to ensure adequate access.

Thus, humanitarian agencies are bound by principles of neutrality, impartiality and independent action in conflict situations – foregoing political engagement in order to safeguard access for humanitarian assistance. The nature of this is captured in the idea of 'humanitarian principles', which derive from international humanitarian law. These at once establish the non-aligned role (neutral, impartial, independent)

7 M Anderson *Do no harm: How aid can support peace and war* (1999).
8 ICRC (n 3 above) 8.
9 Oxfam (n 2 above).

humanitarian agencies in situations of violence and protect the 'humanitarian space' required by agencies to assure the safety and well-being of civilians (and other categories of 'protected persons'). These are sometimes further elaborated in *ad hoc* ground rules, memorandums of understanding (MOUs), or other arrangements which establish a basis for 'principled humanitarian action' – setting out expectations and responsibilities of different parties in implementing humanitarian principles in a particular situation, thereby controlling the conduct of war and allowing for the coordination of humanitarian activity.

The roles of humanitarian agencies in the protection of civilians

Provision of humanitarian assistance

The primary role of humanitarian agencies in the protection of civilians consists of providing aid, assistance and necessary relief to those who suffer in armed conflicts. However, there are other important actions that humanitarian agencies carry out in addition to, or alongside with, their primary role. Some agencies, such as the International Committee of the Red Cross, UNHCR, UNICEF and OHCHR have mandates to fulfil certain roles. Some agencies such as Amnesty International and Oxfam have no specific mandates. Further organisations such as ICRC, UNHCR, UNICEF and OHCHR, have 'protection mandates' for specific categories or groups of persons.[10]

Monitoring and reporting

Humanitarian organisations play an important role to monitor the level of protection given or refused by the belligerents to civilians. If belligerents forcibly displace civilians, there is no way humanitarian agencies can stop such abuse as it requires the use of force. In such situations, humanitarian organisations can only monitor the pattern of violence imposed on populations and, by so doing, trigger other mechanisms of responsibility that are not humanitarian but rather political or military through monitoring and reporting. Reporting on the Protection of Civilians by missions is key not least to keep the UN Security Council and troop contributing countries (TCCs) informed about the situation on the ground. In this regard, the UN Security Council Resolution 1894 specifically requested for the guidance on reporting on Protection of Civilians.

10 United Nations (UN) Internally Displaced Persons (IDP) Division 'Implementing the collaborative response to situations of internal displacement, guidance for UN humanitarian and/or resident coordinators and country teams' Geneva: UN IDP Division (2004).

Training

Carrying out civilian protection mandates also requires better planning support to missions, capturing lessons learned effectively and improving the understanding of how to support host states in protecting civilians. In many ways, training is the cornerstone of improving civilian protection. In this regard, several humanitarian agencies such as the ICRC and Oxfam have developed training modules on the protection of civilians, to better prepare peacekeepers for this task. For example, this includes training on human rights, IHL, humanitarian principles, gender, children associated with armed groups and protection of civilians. States are required to ensure that their peacekeepers receive proper training before the deployment. We also welcome that the mission-specific, tactical level pre-deployment and in-mission training modules are under development. For its part, the EU has also integrated this dimension in its training programs.

In 1996, the ICRC began a process of consultation on how protection of civilians could be strengthened in wartime. Human rights and humanitarian agencies participated in a series of workshops designed to improve understanding of protection and the complementary roles humanitarian and human rights organisations can play. The aim was to find common ground on definitional questions about what was protection and what constituted a protection activity. In addition, the ICRC workshops had sought to define what kinds of tasks could be considered protection activities.[11] An 'egg' protection framework was developed, identifying three types of protection activities in the face of any pattern of abuse: firstly, responsive action, designed to prevent or mitigate an established pattern of abuse or violation; secondly, remedial action, aimed at restoring people's dignity through rehabilitation and reparation following violations or abuse; thirdly, action to create an environment that contributes to the establishment of a 'political, social, cultural; fourthly, institutional, economic and legal' environment conducive to the respect of the rights of the individual.[12]

Lobbying

Humanitarian agencies have also been involved in vigorous campaigns to ensure the protection of civilians in armed conflicts and other situations of violence. For example, Amnesty International played an important role in lobbying for the adoption of the Arms Trade Treaty (ATT), which has the potential of contributing to the improvement of living and security conditions of hundreds of thousands of people around the world, mainly

11 See SPHERE 'The Sphere handbook: Humanitarian charter and minimum standards in humanitarian response' available at http://www.sphereproject.org/handbook/ (accessed 11 August 2014).
12 ICRC (n 3 above) 22 4.

civilians, women and children in particular, by ensuring that arms are traded in the most responsible way, thus reducing human suffering and improving international peace, security, and stability.

Challenges for humanitarian agencies in the protection of civilians

The UN Secretary-General's report to the UN Security Council of May 2009 noted five core challenges facing the effective achievement of protection of civilians: firstly, enhanced compliance by parties to the conflict with international law – in particular, in the conduct of hostilities; secondly, improved compliance with the law by non-state armed groups; thirdly, greater protection through more effective and better resourced peacekeeping and other relevant missions; fourthly, better humanitarian access; and fifthly, stronger accountability for violations of the law.[13] These five core challenges remain relevant today. They reflect the fact that protection of civilians is not only a humanitarian task but also a task that requires 'focus and action in the peacekeeping, human rights, rule of law, political, security, development and disarmament fields.' The wide range and extent of tasks and activities identified as contributing to protection of civilians at the UN Security Council may be partly responsible for the lack of clarity between the different roles and responsibilities of the various protection actors and the real definition and role of protection of civilians in the humanitarian action paradigm.

Interoperability with the military

Although a number of policies and guidelines have been published on humanitarian protection, these documents say remarkably little about how humanitarian agencies should engage with peacekeeping missions in this area.[14] A continuing challenge is the division between human rights and humanitarian organisations that envision civilian protection being a broader concept that includes humanitarian assistance and guarantees of human rights standards, whereas militarily-oriented institutions see protection as preventing physical harm. So far, the official guidelines from the UN provide little detail on what defines civilian protection.[15]

This is not to say that peacekeepers and humanitarians do not communicate or work together on protection. In UN peacekeeping

13 United Nations 'Report of the Secretary-General to the UN Security Council on protection of civilians' para 5, UN Doc S/2009/277, 2009.
14 D Lilly 'Peacekeeping and the protection of civilians: An issue for humanitarian?' *Humanitarian Practice Network* (2010) 48, available at http://www.odihpn.org/humanitarian-exchange-magazine/issue-48/peacekeeping-and-the-protection-of-civilians-an-issue-for-humanitarians (accessed 12 August 2014).
15 Citizens for Global Solutions (n 4 above).

missions in the Democratic Republic of Congo (DRC), South Sudan, Darfur (Sudan), and Chad, peacekeepers and the humanitarian community do interact around protection issues, but their relationship can often be best described as one of co-existence rather than a meaningful desire to coordinate better. Despite the growing importance of civilian protection, the interaction is often *ad hoc* and not strategic. Coordination at the field level is not always clear, and at headquarters there is a big gap in policy and guidance to provide direction for what has arguably become a vital relationship.[16]

Principles and pragmatism

Humanitarian organisations have been keen to distinguish their protection action from that of peacekeeping missions in order to safeguard humanitarian principles. UN peacekeeping missions have political mandates and use military personnel; in some contexts, such as with the United Nations Stabilisation Mission in the DRC (MONUSCO), they are perceived as having become a party to the conflict. Many agencies believe that any association with a peacekeeping mission could undermine their neutrality in the eyes of armed groups, compromise the safety and security of their staff and reduce their ability to act independently to access populations in need of aid.

For their part, peacekeeping missions have taken a narrow view of their protection role, seeing it primarily in terms of ensuring the physical security of civilians, and have not always seen the need to coordinate with humanitarian organisations. Most peacekeeping missions today, however, are multi-dimensional, with traditional uniformed peacekeepers but also significant police contingents and civilian components including units dealing with child protection, gender and sexual violence, human rights and rule of law – all of which are relevant to the protection of civilians. As a result, the protection mandates of peacekeeping missions have become much more diverse, and the need to coordinate with external actors much greater.[17] While there is still the need to maintain a clear distinction between their respective roles and responsibilities, not least to safeguard humanitarian principles, a pragmatic approach is required to ensure better coordination between peacekeepers and humanitarians on the protection of civilians.[18]

Politicisation of humanitarianism

The politicisation of humanitarian assistance is one of the most critical issues facing humanitarianism today. While the integrated mission

16 Lilly (n 14 above).
17 As above.
18 As above.

concept of peace support operations are meant to offer effective protection for civilians in armed conflicts, it converges humanitarian agendas with political and military operations thereby endangering humanitarian space by compromising the humanity, independence, impartiality and neutrality of humanitarian actors. Humanitarian work becomes politicised when politics, not need, determines the purpose, extent and type of the humanitarian response, namely, to win hearts and minds in pursuit of military, security and political goals.

Whereas humanitarian agencies are motivated by the humanitarian imperative and develop their programs on the basis of need, the Security Council and mandated UN missions are necessarily motivated by political considerations and objectives in their drive towards peace and security.[19] One of the challenges for humanitarian agencies working on the ground is the co-option of humanitarianism for political ends. Hence some humanitarian agencies often sacrifice the core principle of impartiality, which requires the provision of assistance to vulnerable people on the basis of need.

Militarisation of humanitarian action

The involvement of the military in humanitarian action tends to antagonise warring factions. The resulting effect is magnified security risks to civilians and aid workers rather than the reverse. For example, the absence of security in places of little strategic interest to powerful states means that agencies cannot deliver relief to those in most need. The net effect has been to undermine, rather than protect, the needs and rights of the vulnerable. There is a real danger, especially in times of large-scale war, of humanitarian agencies accepting the militarisation of their role and becoming little more than sub-contractors to governments of military-political blocs. In some instances the military may be engaged to provide humanitarian assistance either because of security reasons or as a military strategy to win hearts and minds of the local population.

The blurring of the humanitarian imperative

Another challenge is that, in certain crises, a wide range of activities may be carried out under the banner of humanitarian action or 'relief', some of which run counter to traditional ideas about humanitarianism, including independence, impartiality and independent action. Today, the word humanitarian is a label that tends to be used for a wide variety of activities undertaken by actors who do not meet the IHL standard of an 'impartial humanitarian organisation', operating under very different forms and legal

19 P Wynn-Pope 'Evolution of protection of civilians in armed conflicts' Oxfam Australia, available at http://acmc.gov.au/wp-content/uploads/2013/04/12515_ACMC_Oxfam_paper_5.pdf (accessed 3 August 2014).

conditions. In Southern Sudan, for example, observers have noted a wide range of NGOs, including profit-making corporations, and with different religious, political and economic motivations, working to different ends yet variously describing their work as humanitarian. Operations by such NGOs tend to blur the humanitarian imperative.

The over-stretch of humanitarian agencies' mandates

There have been concerns within the humanitarian community about the over-stretch of some agencies' mandates, responsibilities and abilities – especially as political actors have 'backed off' from certain situations – and of getting involved in areas where the humanitarian imperative is clouded, and the protection afforded under IHL less clear.

Non-compliance with the law by belligerents

In more general terms, frequent failure of parties to armed conflicts to comply with their obligations under applicable IHL, international human rights law and refugee law to respect and protect civilians is a troubling trend. Nonetheless, all parties to armed conflicts have an obligation to ensure security of the humanitarian space and ensure access to humanitarian assistance for those in need. Humanitarian agencies face challenges of non-compliance by belligerents in many situations such as in South Sudan, Sudan, the DRC and Somalia, where civilian populations, and in particular women and children, continue to be subject to various forms of extreme violence, causing grave humanitarian crisis with huge displacements of population.[20]

Attacks on humanitarian workers

There is a grave concern for the continuous attacks on, and other interferences with, humanitarian workers including medical personnel and facilities, as well as the increase of threats to journalists in situations of armed conflict. Experiences from recent conflicts beg the question of how the principle of distinction is implemented in practice, in particular when conducting warfare within densely populated areas.

20 European Union Delegation to the United Nations 'European Union (EU) Statement – United Nations Security Council: Protection of civilians in armed conflicts' 12 February 2013 available at http://www.eu-un.europa.eu/articles/en/article_13155_en.htmSummary (accessed 12 August 2014).

Enhancing the role of humanitarian agencies in protecting civilians

There are several issues that need to be addressed for humanitarian agencies when engaging with peacekeepers on protection.

Definition and conceptual understanding of protection

There is debate about whether peacekeepers and humanitarians should have the same definition and conceptual model for the protection of civilians. While it is generally agreed that both are working to the same end, each community goes about things in noticeably different ways. Much has been said about the Joint Protection Teams (JPTs) of MONUSCO in DRC, which bring together the military and civilian components of the mission to devise on-the-ground protection interventions in given locations. However, there has been concern in the humanitarian community that it is not the role of civilian protection actors to advise on what are essentially military tactics. As ostensibly political-military actors, peacekeeping missions tend to see their protection role in terms of providing physical security. Humanitarian actors view their protection role more in relation to rights and remedial action once violations are committed. It may be more useful to talk of 'humanitarian protection' and 'military protection' to denote these fundamental differences. Although it is unlikely that peacekeepers and humanitarians will arrive at precisely the same conceptual understanding of civilian protection, nevertheless, it is important that they continue to discuss this point.[21]

Developing protection strategies

Both Security Council Resolution 1894 of 2009, which recognised the notion of the responsibility to protect and reaffirmed the commitment to protect civilians in armed conflicts and the report of the Special Committee On Peacekeeping Operations of the United Nations (C34) require that all UN peacekeeping missions with protection mandates should develop protection strategies, though MONUSCO, UNMIS and UNAMID are the only operations that currently have them. There is clearly a need for continued collaboration between peacekeepers and humanitarian agencies and greater effort is required to bring these strategies together.[22]

21 Lilly, n 14 above.
22 As above.

Clear division of labour between peacekeepers and humanitarian actors

There is need to clearly define the protection roles and responsibilities of peacekeepers and humanitarians, a concern repeatedly raised by humanitarians. In many ways, this is a civil-military coordination issue. While for some areas of protection responsibilities are quite clear, in others this is not the case. For example, in some contexts, peacekeeping missions are responsible for seeking the release of children from armed groups, while in others this is UNICEF's responsibility. Clarification on this is important not only because of concerns about humanitarian principles, but also to make the overall response more effective. Guidelines on civil-military coordination in crisis situations developed by the IASC are clearly relevant here, but they say little about the specific issue of the protection of civilians. More specific civil-military guidelines on the protection of civilians might be required.[23]

Information sharing and analysis

There is need for information sharing and analysis between humanitarian agencies and peacekeepers. Having reliable and verified information is the cornerstone of effective protection work, and this is an obvious area where peacekeepers and humanitarians have an interest in collaboration. Peacekeeping missions have enormous potential to collect information on protection risks, and peacekeepers on the ground often see the merit of establishing relations with local populations. While humanitarian organisations may be unable to go where peacekeepers are deployed, the opposite can also be true, and humanitarians regularly possess information useful to peacekeepers. The ability of humanitarian organisations to protect civilians is limited, so lobbying for the deployment of peacekeepers into areas where they believe people are at risk is a key protection activity. For example, under MONUSCO, the Protection Cluster has developed a matrix in which peacekeepers and the Protection Cluster identify areas with the most pressing protection risks, into which peacekeeping units 'should' or 'could' deploy. MONUSCO has deployed peacekeepers in 80 percent of areas in the 'should' category, showing that good collaboration is possible. However, passing on information about protection problems is a sensitive issue, and doing so might affect the perceived neutrality of humanitarian organisations and endanger the people providing the information.[24]

23 As above.
24 As above.

Coordination on the protection of civilians

Another key priority is coordination on the protection of civilians. The Protection Cluster is the primary coordination mechanism for humanitarian actors.[25] A priority for UN peacekeeping operations is to coordinate the disparate actors within the mission involved in the protection of civilians, including the military, police and civilian components, which in itself is a big task and requires the establishment of working groups and other such mechanisms. Like protection strategies, parallel coordination structures seem to be the established practice. Not only should participation and communication be a two-way process between the different coordination mechanisms, but a priority is surely for there to be a common decision-making forum for peacekeepers and humanitarians on the protection of civilians. MONUSCO has recently established a Senior Management Group on Protection chaired by the SRSG and comprising all relevant sections of the mission, as well as UNHCR – as the head of the Protection Cluster – and OCHA, to represent broader humanitarian interests.[26]

Establishment of systemic accountability

The global governance system will prove to be ethically unjustifiable and practically impotent in dealing with humanitarian crisis, if it does not itself uphold ethical accountability. For this reason, donor countries must be held accountable in terms of the strategic assessment, response, and consequences of their political actions or inactions. The donor countries' accountability in this sense should not only be with regard to their domestic constituencies but also towards the victims and beneficiaries of their aid, as legitimate members of the global family. Donor countries should account for the consequences of not using their political and economic muscles to address the foreign dimensions of the conflict; and should be answerable for the consequences of undermining the efforts of UN and the international community at large. While victims in oppressive regimes may understand and sympathise with the concerns of the international community, they do not have control over what causes and sustains such concerns. Victims can legitimately expect the world community not to act irresponsibly in a way that will add to the miseries of the already oppressed people. Strategic withdrawal, containment policy and a one-sided arms embargo are only a few examples of irresponsible actions.[27]

25 As above.
26 As above.
27 LH Spang 'The humanitarian faction: The politicization and targeting of aid organizations in war zones' *International Affairs Review* available at http://www.iar-gwu.org/node/63 (accessed 12 August 2014).

Conclusion and recommendations

Innocent civilians – particularly women, children and persons with disabilities – are specifically targeted and subjected to terrible atrocities and suffering due to, among others, the blurring of the principle of distinction in contemporary armed conflicts. For this reason, the mandates of many peace support missions and other humanitarian agencies are increasingly including the protection of civilians' activities. There are many challenges remaining in terms of effective implementation of these protection mandates which need to be addressed. Mission specific comprehensive strategies are a very useful tool to facilitate carrying out these tasks.

There is a need for humanitarian agencies to focus on efforts on making sure that the normative progress in the protection of civilians is translated into concrete improvements in the protection of civilians on the ground. Peacekeeping and the protection of civilians is obviously an issue that should, and is, being addressed by humanitarians. There are certainly concerns about safeguarding humanitarian principles, but these should not get in the way of effective engagement between both communities to ensure complementary, and where possible, coordinated approaches to the protection of civilians.[28] The Security Council should continue to request the UN Secretary-General to explicitly report on the implementation of protection of civilians mandates by peace support operations (PSOs). Protection of civilians should also be a standard benchmark against which the success of PSOs should be measured.

Strengthening accountability is an important element in enhancing compliance by the parties to armed conflicts with their international obligations. The national authorities have the primary responsibility to provide accountability for violations of international humanitarian and human rights laws. Where national authorities fail to take the necessary steps to ensure accountability, the Security Council can, as appropriate, play a more proactive role.[29]

Politicisation and militarisation of aid is an increasing problem with negative effects on the access, protection and safety of humanitarian actors and also undermines their efficiency. The more aid is perceived as politicised, the less effective it is. When aid is tied to military force, it can hardly be considered as humanitarian. Humanitarian aid workers are endangered when they are perceived as an extension of donor countries' foreign policy. Their neutrality is compromised when aid is contingent on military necessity or political expediency; when funding is restricted or based on extraneous conditionalities, and when access to crisis-affected regions is not secure. When political expediency or military necessity – not

28 Lily (n 14 above).
29 European Union Delegation to the United Nations (n 20 above).

need – determines the purpose, extent and type of the humanitarian response, the implication is the deprivation of humanitarian relief to those who are mostly in need. Humanitarian relief agencies are independent bodies whose independence and impartiality should be respected by donor governments.

Donor governments should not use humanitarian agencies to further any political or ideological aim. While aid may be provided by donor countries, the implementation of relief actions on the ground is ultimately the responsibility of humanitarian agencies. Humanitarian relief should be provided in the best interest of the beneficiaries, which requires humanitarian agencies to establish solidarity with beneficiaries. According to Slim, solidarity with the victims involves consultation with, and accountability to, the beneficiaries. This does not only mean sharing the risk and suffering with the victims but also taking concrete action in support of the people and their cause, and respecting their rights and commitment to the pursuit of justice.[30]

On their part, it is the responsibility of humanitarian actors to earn the humanitarian space by building relationships to be accepted as beneficial contributors to the communities instead of as enemies or strategic military targets. Humanitarian actors should also project an apolitical image to eliminate the risk of politicisation in the field by ensuring neutrality by not taking political sides in the conflict; to secure the best access possible to protect and assist. Recently, some humanitarian non-governmental organisations (NGOs) have developed a further notion of solidarity that connotes shared suffering among those seeking to assist through the physical presence of a humanitarian agency, which might be an appropriate guiding principle for relief agencies in many political emergencies and armed conflicts.[31] Both donor states and humanitarian agencies should also be held ethically accountable for the consequences of politicisation, militarisation and conditionality of aid.

The protection of civilians and the provision of humanitarian relief require a secure space for the safety of the relief workers and unimpeded access by the victims. For this reason, humanitarian agencies should earn the humanitarian space by engaging with, and building relationships to be accepted by, local communities. Humanitarian actors should also maintain an apolitical image so that they should be viewed as beneficial contributors to local communities instead of being seen as enemies or strategic military targets. Humanitarian agencies should systematically collect and share relevant information to help avoid future incidents. An

30 H Slim 'Relief agencies and moral standing in war: Principles of humanity, neutrality, impartiality and solidarity' (1997) 7 *Development in Practice* 342-352 349-50. See also E Bjoreng 'Taking a stand: Solidarity and neutrality in humanitarian action' (2003) 25 *Humanitarian Exchange* 9-10.

31 As above.

important component of this information gathering is a sound understanding of the cultural, political, and socio-economic contexts of the attacks. Security policies should cater for all humanitarian aid workers, including both national and foreign staff.

CHAPTER 13

THE ROLE OF THE UN HUMAN RIGHTS COUNCIL SPECIAL PROCEDURES IN PROTECTING THE RIGHT TO LIFE IN ARMED CONFLICTS

Thomas Probert

Abstract: *The United Nations (UN) Special Procedures have contributed to the protection of the right to life during armed conflict through reports to the Human Rights Council, which have affirmed the continued application of human rights based standards, and the continued jurisdiction of human rights mechanisms in this context. The role of Special Procedures can be characterised as that of an entry point, or facilitator of access, to or for international mechanisms, a source of international pressure, a stimulus for future investigation (at both national and international level), and a guardian of and commentator upon the relevant international standards. This Chapter uses the example of the Special Rapporteur on extrajudicial, summary or arbitrary executions, and particularly the way in which the mandate was involved in bringing to the attention of the Human Rights Council the violations of the right to life during the Sri Lankan civil war, as an illustrative case study of how such an entry-point can be effective. It also notes the important contribution made by the revised Minnesota Protocol in establishing the extent of the state's duty to investigate during armed conflict.*

Introduction

The right to life has been described as the 'supreme' human right.[1] Others have described it as 'the ultimate meta-right, since no other right can be enjoyed without it.'[2] Although the exact scope of the right to life can be contested, there is no serious challenge to its foundational status. This discussion examines the role played by the UN Human Rights Council's primary mechanism for the protection of the right to life, the Special Rapporteur on extrajudicial, summary or arbitrary executions, in the protection of civilians in armed conflict. After introducing the norm and the relevant violations, the discussion explores the jurisdiction of the Human Rights Council (and by implication, the Special Rapporteur) over situations of armed conflicts. After surveying the extent to which the

1 United Nations (UN) Human Rights Committee General Comment No 6: The Right to Life (Article 6) (30 April 1982) para 1.

2 C Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* UN Doc A/67/275 (9 August 2012) para 12.

Rapporteur is a mechanism that often calls for accountability for violations perpetrated during conflict, an example will be taken from outside the African continent – that of Sri Lanka – to examine how the Special Rapporteur can directly contribute to such a process of accountability. After briefly introducing an important, recently-revised set of standards on the duty to investigate, and the application of that duty during armed conflict, the discussion will then conclude with some reflections on the extent to which Special Procedures can add to the protection of the right to life during armed conflict.

The right to life in international law

The prohibition of arbitrary killing has been described as a rule of customary international law, as well as a general principle of international law and a *jus cogens* norm.[3] The right to life is included in the Universal Declaration of Human Rights (Universal Declaration) – often regarded as establishing rules of general international law – in a broad fashion.[4] The right to life is widely recognised in the constitutional and other legal provisions of states and unlawful killing is universally criminalised.[5] Certain violations of the right to life are considered to be war crimes when committed in armed conflicts or crimes against humanity when they are systematic and widespread attacks directed against a civilian population.[6]

A further layer of protection is added to the right to life by various human rights treaties and the monitoring mechanisms created to address violations by state parties. The International Covenant on Civil and Political Rights (ICCPR) confirms respect for the right to life as a primary obligation, stating that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[7] Regional instruments, including the African Charter on Human and Peoples' Rights (African Charter or the Banjul Charter), the European Convention on Human Rights and Fundamental Freedoms, and the

3 The UN Human Rights Committee has affirmed that the prohibition of torture and arbitrary deprivation of life are among the rights than cannot be reserved against, both because of their non-derogable status and 'because of their status as peremptory norms' CCPR/C/21/Rev.1/Add.6 (4 November 1994) para 10.

4 See art 3 of the Universal Declaration of Human Rights.

5 Since most cases of arbitrary deprivations of life by governments would amount to murder under domestic laws, the prohibition against state-sanctioned killing is consistent with what the Statute of the International Court of Justice refers to as 'general principles of law recognised by civilised nations' (art 38(1)(c)). This was reinforced, in 1980, by the Sixth UN Congress on Prevention of Crime and the Treatment of Offenders, which passed a resolution affirming that 'murder committed or tolerated by Governments is condemned by all national legal systems and, thus, by general principles of law' (Resolution 5 ('Extra-legal Executions') [A/CONF.87/14/Rev.1]).

6 See generally *Prosecutor v Mile Mrkšić and Veselin Šljivančanin* ICTY Case No IT-95-13/1-A.

7 Art 6(1) of the International Covenant on Civil and Political Rights.

American Convention on Human Rights (Pact of San José) similarly recognise the importance of the right to life.[8]

Since the prohibition of arbitrary deprivation of life cannot be derogated from under human rights law, the permissibility of lethal force during armed conflict depends on what is considered to be 'arbitrary' in that context.[9] The International Court of Justice (ICJ) addressed this question in its Advisory Opinion in the *Nuclear Weapons* case, when it observed as follows:[10]

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 … can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

This was elaborated in the ruling on the *Israel Wall* case in 2004, when the ICJ emphasised that 'the protection offered by human rights conventions does not cease in case of armed conflict,' and pointed out that different rights could be influenced by the different bodies of law to different extents.[11] In practice, the ICJ has found separate violations of both bodies of law arising from the same set of facts, demonstrating that one does not replace the other.[12]

In the African context, it is interesting to note that in their recent General Comment on the right to life, the African Commission on Human and Peoples' Rights made clear that '[t]he right to life continues to apply during armed conflict' and that '[d]uring the conduct of hostilities, the right to life needs to be interpreted with reference to the rules of international humanitarian law.' Later it detailed more specifically that

> [i]n armed conflict, what constitutes an 'arbitrary' deprivation of life during the conduct of hostilities is to be determined by reference to international humanitarian law. This law does not prohibit the use of force in hostilities against lawful targets (for example combatants or civilians directly participating in hostilities) if necessary from a military perspective, provided that, in all circumstances, the rules of distinction, proportionality and precaution in attack are observed. Any violation of international

8 See art 4 of the African Charter on Human and Peoples' Rights; art 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR); and art 4 of the American Convention on Human Rights.

9 By contrast, the ECHR's prohibition of 'intentional' killings may be derogated from to allow 'lawful acts of war, which raises the same question of determining lawfulness.

10 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, 8 July 1996) para 25.

11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, 9 July 2004) para 106.

12 *Democratic Republic of Congo v Uganda* (ICJ, 19 December 2005) paras 220, 345(3).

> humanitarian law resulting in death, including war crimes, will be an arbitrary deprivation of life.[13]

More broadly, respecting and protecting the right to life can be said to have two core components – the prevention of arbitrary deprivations of life, and the pursuit of accountability should arbitrary deaths nonetheless occur. Importantly, the failure of the state to undertake the latter, more procedural component, still amounts to a violation of the right to life. As the African Commission has noted,

> [t]he failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right.[14]

Much of what follows in this Chapter, including the role of the UN Special Procedures, is directed at how accountability can be pursued for violations.

The mandate of the UN Special Rapporteur

The position of the Special Rapporteur on extrajudicial, summary or arbitrary executions (the Special Rapporteur) was created in 1982, as the second of what would become known as the 'thematic' mandates.[15] Various international bodies were at that time expressing concern at the incidence around the world of summary or arbitrary executions, many of which were regarded as having been politically motivated.

Since 1989, the mandate of the Special Rapporteur has been guided by the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, which made clear that exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification for unlawful killing.[16] In 2011, the Human Rights Council adopted Resolution 17/5, setting out the current scope of the mandate and calling for 'effective action to combat and eliminate the abhorrent practice of extrajudicial, summary or arbitrary executions, which represent a flagrant violation of the inherent right to life.'[17]

13 African Commission on Human and Peoples' Rights (ACHPR) General Comment No 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4) (2015) paras 13 and 32.

14 ACHPR General Comment No 3 (n 13 above) para 15.

15 The UN Economic and Social Council (ECOSOC) Res. 1982/35 (7 May 1982) E/CN.4/RES/1982/29 (11 March 1982). Since 1982, there have been five Rapporteurs: SA Wako (1982-92); BW Ndiaye (1992-8); A Jahangir (1998-2004); P Alston (2004-10); and C Heyns (2010).

16 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' [E/1989/89 (1989)] para 1. Also see ECOSOC Res 1989/65 (24 May 1989) and UN General Assembly Res 44/159 (15 December 1989).

17 United Nations Human Rights Council, UN Doc A/HRC/RES/17/5 (1 July 2011) preamble.

Resolution 17/5 states that the mandate of the Special Rapporteur is aimed against such executions 'in all their forms' and implores the mandate holder to 'continue to examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason.'[18] A previous Special Rapporteur pointed out that the mandate is 'not best understood through efforts to define individually the terms "extrajudicial", "summary" or "arbitrary", or to seek to categorise any given incident accordingly'.[19] However, the framing of the right to life within most international instruments indicates that it is the *arbitrary* character of such killings that is most problematic.

As with the Human Rights Council's other special mechanisms, the Special Rapporteur has three primary working methods: communications, country visits, and thematic reports. With respect to the application of the death penalty, for instance, it may be possible for a Special Rapporteur to act pre-emptively with respect to the right to life. However, it is a sad reality that most of the conduct of this mandate (perhaps more than others) is retrospective in its approach, seeking accountability for killings that have already taken place. In this respect, the Rapporteur often underlines that the full protection of the right to life involves both positive steps on the part of the state to prevent arbitrary deprivations of life, but also steps to ensure accountability where they occur.

Violations of the right to life in armed conflict

The targeted killing of civilians or non-combatants (generally referred to in IHL parlance as 'wilful killing') or the use of force in such a fashion as directly to lead to disproportionate harm to civilians ('collateral damage') would both constitute arbitrary killing. It is important to note that the protections afforded by the right to life in armed conflicts extend beyond civilians, also applying to those who have laid down their arms and those placed *hors de combat* (outside combat or not taking direct part in hostilities) by injury, detention, or any other cause.[20] However, given the focus of this book, the discussion here will be limited to the impact of these legal guarantees on the protection of civilians.

The changing character of armed conflict has arguably led to a situation in which such violations of the right to life have become more common. While not the primary focus of this discussion, the analysis of these 'new wars', including with reference to new actors, goals and

18 United Nations Human Rights Council, UN Doc A/HRC/RES/17/5 (1 July 2011) para 1, 3, 7(a).

19 P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc E/CN.4/2005/7 (22 December 2004) para 6.

20 Additional Protocol I to the Third Geneva Convention (1949); also see Common Article 3, and P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc E/CN.4/2006/53/Add.5 (27 March 2006) para 31.

methods, is relevant in a number of ways.[21] The changes to *actors* have, to some extent, blurred the lines between combatants and civilians. The evolution of *goals*, whereby new wars may be fought for the sake of identity politics, clearly changes the character of the conflict for the civilian non-combatant, whose identity can be mobilised as an aim of the war, rather than a means. Linked with this, and most important in terms of the threat to civilians, is the development of new *methods* or *tactics* of war. Parties to a conflict have moved beyond the military capture of territory, towards the enforced political capture of territory through the control of the (civilian) population. Large-scale population displacement – the removal of those of a different identity – is a common tactic. In this sense, violence is deliberately directed at civilians in order to control territory, rather than against enemy forces.

The arbitrary killing of civilians, whether because of wilful killing or because of disproportionate collateral damage, will amount to a war crime. In circumstances in which it can be shown that non-combatants have been targeted in a widespread and systematic way, and where this has been the result of a deliberate governmental or other organisational policy, it may also amount to a crime against humanity.

The jurisdiction of the Human Rights Council during armed conflicts

Both the Human Rights Council and its predecessor, the Commission on Human Rights (the Commission), have consistently considered violations occurring in the context of armed conflicts to fall within their mandate. This was perhaps most clearly stated in the 2005 resolution of the Commission under the theme of 'Protection of the human rights of civilians in armed conflicts', which affirmed that 'human rights law and international humanitarian law are mutually reinforcing' and that 'the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as *lex specialis*.'[22] The Resolution emphasised that 'conduct that violates international humanitarian law, including grave breaches of the Geneva Conventions … may also constitute a gross violation of human rights.'[23]

21 This summary of the changes accommodated by 'new wars' along with a useful review of that literature, can be found in M Kaldor 'In defence of new wars' (2013) 2 *International Journal of Security and Development* 1-16.

22 United Nations Commission on Human Rights, UN Doc E/CN.4/RES/2005/63 (20 April 2005) preamble.

23 As above.

During the 1990s, the Commission had regularly treated IHL as falling within its mandate.[24] For example, with respect to the former Yugoslavia, it issued a resolution categorically condemning 'all violations of human rights and international humanitarian law by all sides' and denounced 'continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons … non-combatants [and] relief operations.'[25]

In the resolution creating the Human Rights Council, the UN General Assembly was silent on limiting the jurisdiction of the Human Rights Council.[26] The following year, when establishing the mechanism of the Universal Periodic Review, the Council made clear that 'given the complementary and mutually interrelated nature of international human rights law and international humanitarian law' the process should incorporate both.[27] The Council also pronounced its own resolution, reinforcing the Commission's Resolution 2005/63, stating:

> that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law.[28]

Various special procedures mandate holders have used their reports further to clarify the relationship between obligations of international human rights law (IHRL) and IHL. In 1983, the first report produced under the mandate on extrajudicial executions included in its survey of international legal standards a section on 'Killings in war, armed conflict and states of emergency' and observed that:

> [e]ach of the Geneva Conventions [of 1949] clearly prohibits murder and other acts of violence against protected persons. They explicitly provide that 'wilful killings' are to be considered 'grave breaches' of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.[29]

24 See generally D O'Donnell 'Trends in the application of international humanitarian law by United Nations human rights mechanisms' (1998) 324 *International Review of the Red Cross* No 324 (30 September 1998) available at https://www.icrc.org/eng/resources/documents/article/other/57jpga.htm (accessed 28 April 2017).

25 E/CN.4/RES/1994/72 (9 March 1994); also see its earlier resolution, E/CN.4/RES/1992/S-1/1 (14 August 1992).

26 United Nations General Assembly, UN Doc A/RES/60/251 (3 April 2006).

27 United Nations Human Rights Council, UN Doc A/HRC/RES/5/1 (18 June 2007) annex.

28 United Nations Human Rights Council, UN Doc A/HRC/RES/9/9 (18 September 2008).

29 SA Wako Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc E/CN.4/1983/16, (31 January 1983) paras 29-39. It should be noted that the concept of grave breaches refers to international rather than to non-international armed conflict.

One former Special Rapporteur, Philip Alston, directly addressed the question of whether his mandate could consider international humanitarian law, stating emphatically that 'it falls squarely within the mandate. All major relevant resolutions in recent years have referred explicitly to that body of law.'[30] However, this conventional understanding of the Special Rapporteur's role with respect to armed conflict has been contested, most prominently by the Government of the United States of America (US).[31] In the context of allegations of targeted killings in Pakistan, Yemen and Iraq, the US Government submitted in 2006 that '[t]he conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the law of armed conflict' and outside the mandate of the Special Rapporteur.[32] In response, however, Alston highlighted that in its Resolution 2005/34 on extrajudicial, summary, or arbitrary executions, the Commission had acknowledged 'that international human rights law and international humanitarian law are complementary and not mutually exclusive'[33] and that in another resolution it had expressed 'grave concern over the continued occurrence of violations of the right to life highlighted in the report of the Special Rapporteur as deserving special attention [including] violations of the right to life during armed conflict.'[34] As Alston commented, '[i]t would be inexplicable for the Commission to explicitly endorse this aspect of the report if it considered human rights law inapplicable during armed conflict or believed such violations were beyond the mandate.'[35]

It should be noted that recent Human Rights Council resolutions on Syria, Sri Lanka, and Iraq, all condemning violations of international humanitarian law, have enjoyed the support of the US.[36] Although remnants of the debate can still be perceived in the interactive dialogues following the Special Rapporteur's reports on the use of armed unmanned aerial vehicles ('UAVs' also known as 'drones') or the development of autonomous weapons systems, they focus on the jurisdiction to discuss weapons rather than IHL *per se*. There has been a general acceptance that

30 Alston Report of the Special Rapporteur (n 19 above) para 45.
31 See generally P Alston, J Morgan-Foster & W Abresch 'The competence of the UN Human Rights Council and its Special Procedures in relation to armed conflicts: Extrajudicial executions in the "War on Terror"' (2008) 19 *European Journal of International Law* 183-209.
32 Response of the Government of the United States of America to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (4 May 2006), reproduced in A/HRC/4/20/Add.1 344
33 United Nations Commission on Human Rights UN Doc E/CN.4/RES/2005/34 (19 April 2005).
34 United Nations Commission on Human Rights UN Doc E/CN.4/RES/2002/34 (22 April 2002) para 13(a).
35 Communication from UN Special Rapporteur on extrajudicial, summary or arbitrary executions to the Government of the United States of America (30 November 2006) reproduced in A/HRC/4/20/Add.1348f.
36 UN Doc A/HRC/RES/26/23 (Syria), A/HRC/RES/25/1 (Sri Lanka), A/HRC/RES/S-22/1 (Iraq, adopted without a vote).

the Human Rights Council and its Special Procedures are mandated alongside others to investigate violations of human rights during armed conflicts.

This being the case, over the last several decades, different mandate-holders have at various points, brought to the Council's attention violations of the right to life that have been taking place in the context of armed conflicts in Africa. In 1993, for example, a report by the Special Rapporteur on extrajudicial executions in Rwanda was widely recognised as having sounded a warning to the international community of the impending genocide.[37] Similarly, a report on the killings in Kisangani in the Democratic Republic of the Congo (DRC) in 2002 was provided by a Special Rapporteur after a mission to the country.[38]

The Special Rapporteur visited the Central African Republic in early 2008 highlighting the violations committed by all parties to the conflict in the North-West of the country from 2005-2007. This included killings, beatings, forced displacement, and village burnings committed by the Republican Guard, usually as reprisals against perceived civilian support for or cooperation with rebel forces.[39] The Rapporteur's report to the Human Rights Council in the following year underlined that there was widespread impunity for these violations. In particular, he highlighted the General Amnesty Law passed by the National Assembly in 2008, and underlined the importance of the exception is provided for acts amounting to war crimes, crimes against humanity or other crimes over which the International Criminal Court has jurisdiction. Specifically, the Rapporteur called on the Government to begin the effort to end impunity by investigating Eugène Ngaïkosset, who was alleged to have commanded troops who carried out egregious instances of village burnings, targeting of civilians and unlawful killings. In his 'follow-up' report to the Council in the following year, the Rapporteur noted that, far from this happening, Ngaïkosset had in fact been promoted.[40]

37 BW Ndiaye Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc E/CN.4/1994/7/Add.1 (11 August 1993). For the place of this report in early-warning, see Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda [enclosure of S/1999/1257 (16 December 1999)].

38 A Jahangir Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc E/CN.4/2003/3/Add.3 (4 November 2002).

39 P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc A/HRC/11/2/Add.3 (27 May 2009). See also Human Rights Watch 'State of anarchy: Rebellion and abuses against civilians' (September 2007).

40 P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc A/HRC/14/24/Add.5 (19 May 2010) para 47.

In October 2009, the Special Rapporteur (now a different individual) visited the DRC again. His report to the Council in the following year highlighted the political killings perpetrated by both rebels and government forces.[41] This includes drawing attention to the extent that, unable successfully to engage government forces militarily, the rebel groups had devised a deliberate campaign of intimidation and revenge attacks against civilians. The Special Rapporteur underlined the responsibility of the rebel leaders for these attacks despite the fact that they were personally residing outside the DRC itself.[42] The Rapporteur also highlighted the extent to which UN peacekeepers ought to have required them to take into account the risk of revenge attacks in their military planning, especially with respect to troop movements and maintaining proximity to civilian areas. Humanitarian law principles require that decisions about whether to move into new territory or to vacate villages be taken in the light of any expected harm to civilians.[43]

It should be noted that the Special Rapporteur on summary executions is not the only Special Procedures mechanism of the Council with a role to play in highlighting violations of the right to life during armed conflicts. This can also fall to country-specific mandates. For example, in 2011 the Human Rights Council appointed an Independent Expert on the situation of human rights in Côte d'Ivoire.[44] Likewise, in 2013, condemning 'all human rights violations and violations of international humanitarian law', including those involving summary executions, the Council appointed an Independent Expert on the situation of human rights in Central African Republic.[45] These country-specific Rapporteurs are usually mandated to survey all human rights in the state in question, and often include among their recommendations the imperative to pursue and bring to justice those responsible for violations of international humanitarian law and human rights, including the right to life, and to take steps to end impunity.[46]

Investigating extrajudicial executions during the civil war in Sri Lanka

One of the primary mechanisms Special Procedures can enhance protection during armed conflict is through pressure for investigation and accountability. The place of accountability within the doctrine of

41 P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc A/HRC/14/24/Add.3 (14 June 2010)
42 Alston (n 41 above) para 18.
43 Alston (n 41 above) para 23.
44 United Nations Human Rights Council, UN Doc A/HRC/RES/17/21 (17 June 2011).
45 United Nations Human Rights Council, UN Doc A/HRC/RES/24/34 (27 September 2013), operative paras 3 and 13.
46 See for example MTK Bocoum Report of the Independent Expert on the situation of human rights in the Central African Republic UN Doc A/HRC/30/59 (24 July 2015) para 108.

responsibility to protect (R2P) has been discussed in Part VII of this volume. Here, an example from outside the African continent – that of Sri Lanka – is used to illustrate the way a Special Rapporteur can act as a focal point for efforts to achieve accountability for violations of the right to life, including against civilians, during armed conflicts.

After a country visit to Sri Lanka in 2005, Philip Alston described extrajudicial killings in the country as

> symptomatic of the widespread use of police torture, of the failure to rein in abuses committed or tolerated by the military, and of the systematic efforts by various armed groups, and particularly the [Liberation Tigers of Tamil Eelam] LTTE, to kill Tamils who refuse to support the LTTE and to provoke military retaliation.[47]

In his follow-up report three years later, Alston again drew the attention of the international community to the fact that

> [w]ars may be fought while respecting the provisions of international human rights and humanitarian law. The Government and the LTTE have, however, chosen to conduct this conflict in a manner that treats human rights and human rights defenders as obstacles to effective tactics. It is imperative that the Human Rights Council address this crisis.[48]

However, it was in the aftermath of the declared end of the conflict in 2009, with the emergence of footage captured on mobile phones actually showing what appeared to be extrajudicial executions perpetrated by Sri Lankan troops, that international pressure began to be mobilised. The footage, which domestic non-governmental organisations (NGOs) alleged portrayed events in January 2009, was aired by the British broadcaster Channel 4.[49] Alston sent several communications to the Government of Sri Lanka, requesting it to conduct an independent investigation, but the Government categorically denied the allegations and claimed that the videos had been doctored. This claim was reportedly based on four 'independent experts', two of whom seemed to work for the Sri Lankan armed forces. At this point, Alston decided to conduct his own investigation.[50]

47 Alston (n 19 above) para 3.

48 P Alston Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc A/HRC/8/3/Add.3 (14 May 2008) para 6.

49 *Sri Lanka's Killing Fields* (first aired 14 June 2011), available at http://www.channel4.com/programmes/sri-lankas-killing-fields/on-demand (accessed 19 March 2017).

50 P Alston *Technical Note prepared by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, in relation to the authenticity of the 'Channel 4 videotape'* (January 2010) [http://www.extrajudicialexecutions.org/application/media/SL%20Technical%20Note.doc] (Alston, *Technical Note*). The NGO in question was Journalists for Democracy in Sri Lanka.

The idea of conducting a private, independent investigation was something new for Special Procedures, and with no funding to support it, the Special Rapporteur relied on the experts providing their assistance free of charge. The experts commissioned included a firearms and ballistics expert, who affirmed that the recoil and muzzle gases shown on the video were consistent with live ammunition; a forensic pathologist who confirmed that the movement and reaction of the bodies and the blood evidence were consistent with real shootings; and a forensic video analyst to consider evidence of breaks in continuity, and to confirm there were no additional layers or suggestions of image manipulation.[51] In the light of this report, which strongly suggested that the video was authentic, as well as 'the persistent flow of other allegations concerning alleged extrajudicial executions committed by both sides during the closing phases of the war against the LTTE,' Alston called for an independent inquiry to be established 'to carry out an impartial investigation into war crimes and other grave violations of international humanitarian and human rights law allegedly committed in Sri Lanka.'[52]

In November 2010, Channel 4 shared a further five minutes of the video with the then Special Rapporteur, Christof Heyns. In this 'extended video' the faces of some of the soldiers were visible. Also clearly visible was the fact that others were filming the scene with mobile phones (which was relevant given that the Government had alleged the first video was not produced on a mobile phone but rather doctored to look that way). One of the voices on the extended video could be heard saying '[d]o not use the phone, we will be reprimanded.'[53] Based on this new evidence, Heyns commissioned further inspection by relevant experts, which again found the evidence to be authentic, and provided technical clarification regarding the issues which Alston had openly highlighted as unresolved.

In his report to the Human Rights Council in June 2011, Heyns concluded that '[w]hat is reflected in the extended video are crimes of the highest order – definitive war crimes. Judging by the use of cell phones by soldiers in the video, there may well be other records of the same events available.' He suggested that

> [i]nvestigating the identity of those whose faces are captured so clearly on these videos cannot be difficult for the Government … Similarly, an international investigation with appropriate powers of inquiry and witness protection mechanisms will also be well placed to address these issues.[54]

51 As above.
52 As above.
53 UN Doc A/HRC/17/28/Add.1 (27 May 2011) Appendix, *Part A: Technical Note by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Christof Heyns, in relation to the authenticity of the second, extended Channel 4 videotape regarding Sri Lanka* (Heyns, *Technical Note*) para 11.
54 Heyns, *Technical Note* (n 53 above) para 41.

As Heyns made clear during communication with the Sri Lankan Government, the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (one of the core documents of the mandate) establish that 'it is the primary duty of the state to investigate this compelling evidence of horrendous crimes – crimes which the international community cannot allow to go unpunished.'[55] In this respect he went further, stating that

> [t]his obligation on the State to investigate cannot be discharged by simply denying that anything untoward has happened. It can also not be discharged by assembling a group of people tied in one way or another to the government under question who are asked to comment on the videos, and expecting the international community to accept their expertise in all matters ranging from forensic analysis of videos to pathology to ballistics, without even seeing the full text of their reports or establishing their expertise in these fields. Denials based on such evidence are not credible.[56]

Heyns re-emphasised that nothing in the investigations he had undertaken purported to find the Government of Sri Lanka guilty of any offense, but rather had highlighted credible evidence. This evidence, he insisted,

> should be examined systematically and professionally by domestic investigators, as well as by an independent, international investigational body, with a clear mandate in this regard, in order to establish who should be held accountable.[57]

Up to this point, the Government of Sri Lanka had been successfully representing their efforts in defeating the LTTE as a case study for the combatting of terrorism worldwide, and encouraging other states to share their 'best practices', inviting delegates from more than 50 countries to a Seminar in Colombo in mid-2011. This was at a time after the UN Secretary- General had just made public a report concluding that both government forces and the LTTE had conducted military operations 'with flagrant disregard for the protection, rights, welfare and lives of civilians and failed to respect the norms of international law' and had suggested that as many as 40 000 civilians had been killed in the final months of the conflict. Civil society was highly critical of the concept of such a seminar.[58] Channel 4 aired their full-length documentary, *Killing Fields*, which reached a wide audience all around the world and increased pressure for action.[59]

55 Heyns, *Technical Note* (n 53 above) para 42.
56 Heyns, *Technical Note* (n 53 above) para 43.
57 Heyns, *Technical Note* (n 53 above) para 45.
58 Human Rights Watch 'Sri Lanka: Military conference to whitewash war crimes' (23 May 2011) available at http://www.hrw.org/news/2011/05/23/sri-lanka-military-conference-whitewash-war-crimes (accessed 19 March 2017).
59 Channel 4's two 'Killing Fields' films won the 2012 Amnesty International Media Award for Best Documentary. Also see A Cole 'Sri Lanka's killing fields: Will the

Disappointed by the lack of meaningful official investigation, and despite a co-ordinated campaign on the part of the Government, in March 2012 the Human Rights Council voted for a resolution calling on Sri Lanka to fulfil its obligations regarding justice and accountability.[60] The Resolution encouraged the government to establish a national action plan to implement the recommendations of its own (often-criticised) Lessons Learned and Reconciliation Commission, and called upon Special Procedures to provide technical assistance to this end. There was not yet, however, sufficient political pressure to call for an international inquiry.

The Government of Sri Lanka did unveil a 'National Action Plan' in July 2012, but it delegated responsibility for implementing constructive recommendations away from central government. Reporting to the Human Rights Council in 2013, the Office of the High Commissioner for Human Rights (OHCHR) highlighted that there remained at least eight outstanding requests by UN Special Procedures to visit the country.[61]

As pressure for meaningful accountability continued to grow, civil society resistance developed to the notion of holding the 2013 Commonwealth Heads of Government Meeting in Sri Lanka in 2013.[62] This pressure resulted in a number of member-states boycotting the meeting – the heads of state of Canada, India, and Mauritius stayed away – and those who attended were conditioned by the general public in their countries to draw attention to the problems of human rights and accountability for past violations.

In March 2014, the Council adopted a strong resolution on 'Promoting reconciliation, accountability and human rights in Sri Lanka' requesting the UN High Commissioner for Human Rights to 'undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka' and to 'establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures' mandate holders.'[63] In June of the same year, the High Commissioner appointed three experts, namely: Martti Ahtisaari, the

world listen' *Colombo Telegraph* (15 May 2012) available at https://www.colombotelegraph.com/index.php/sri-lankas-killing-fields-will-the-world-listen/ (accessed 19 March 2017).

60 United Nations Human Rights Council, UN Doc A/HRC/RES/19/2.

61 Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka, UN Doc A/HRC/22/38 (11 February 2013) para 8.

62 Human Rights Watch 'Open letter regarding Sri Lanka hosting the 2013 Commonwealth Heads of Government Meeting (CHOGM)' (6 February 2013) available at http://www.hrw.org/news/2013/02/06/open-letter-regarding-sri-lanka-hosting-2013-commonwealth-heads-government-meeting-c (accessed 19 March 2014).

63 United Nations Human Rights Council, UN Doc A/HRC/RES/25/1.

former President of Finland; Silvia Cartwright, a former High Court judge of New Zealand; and Asma Jahangir, a former Special Rapporteur on extrajudicial executions. The investigation sought the assistance of various special procedures' mandate holders including on extrajudicial executions.[64]

In his oral update to the Human Rights Council in September 2014, the newly appointed UN High Commissioner responded to the criticism that there is a contradiction between the request for Sri Lanka to conduct a credible and independent investigation, and the request that OHCHR also conduct an international investigation. He pointed out that the fact of an international investigation 'does not relieve Sri Lanka of its obligations' under IHL and IHRL to conduct investigations, and 'nor does the existence of domestic initiatives (which only partially cover the period and allegations concerned) prevent an international investigation moving forward.'[65]

In January 2015 Sri Lanka went to the polls in elections that the incumbent President Mahinda Rajapaksa was expected to win. Instead, he was unseated by a former member of his own government, Maithripala Sirisena. After lobbying from the new government, the Human Rights Council agreed with the High Commissioner's recommendation that the report of his Office's investigation be delayed from March 2015 to September. This decision, a 'one time only' deferral, was agreed as a reflection of 'the changing context in Sri Lanka, and the possibility that important new information may emerge which will strengthen the report.'[66]

The new government's proposal for a domestic investigation (with limited technical assistance from the international community) speaks partly to the High Commissioner's 2014 comments to the Council, before the elections had been called, when he pointed out that '[t]he question is how Sri Lanka will take further the results of the international investigation in its own domestic process, or whether further steps will be required.'[67] The answers to that question may well have important implications for the future of oversight and accountability by the Human Rights Council and, by implication, its Special Procedures concerning human rights violations committed during armed conflict.

64 For more information on the OHCHR Investigation on Sri Lanka, see http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx (accessed 19 March 2015).

65 Oral update of the High Commissioner for Human Rights on promoting reconciliation, accountability and human rights in Sri Lanka UN Doc A/HRC/27/CRP.2 (22 October 2014) para 10.

66 OHCHR 'Zeid requests "one time only" deferral of key report on Sri Lanka conflict' (16 February 2015) available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15574&LangID=E (accessed 19 March 2017).

67 Oral update of the High Commissioner (n 65 above) para 10.

Shortly after the change of government, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, conducted a short visit in March/April 2015. In a statement released after the visit, de Greiff highlighted that in the past, Sri Lanka had established numerous commissions of inquiry for mass violations. While some had produced useful reports, including wide-ranging recommendations, others had produced reports that were never made public, and inadequate implementation of their recommendations had been a common feature:

> They have not contributed to closing the significant confidence gap between communities, to securing the rights of victims to truth, justice, reparation, and guarantees of non-recurrence, or to making State institutions more trustworthy in the eyes of citizens. On the contrary, the accumulated result of these efforts has increased mistrust in the Government's determination to genuinely redress those violations.

At this critical juncture, he suggested, Sri Lanka could not afford an approach characterised by the proliferation of largely unrelated and inconsequential '*ad hoc*' initiatives: 'Serious consideration needs to be given to establishing transitional justice mechanisms that contribute to building lasting institutions and capacities, and which allow for effective implementation.'[68] Conducting a follow-up visit the following year, in January/February 2016, the same Special Rapporteur expressed concerns that the national debate about accountability was only addressing part of the problem, and that a valuable opportunity was potentially being missed.[69]

Developing standards for investigations during armed conflict

Separate from the example of Sri Lanka, but underlining the importance of investigations as part of the pursuit of accountability, and thereby also the greater protection of the right to life, it is worth briefly noting the work over the past three years that the mandate of the Special Rapporteur on summary executions undertook in revising the Minnesota Protocol, a

68 'Observations by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr. Pablo de Greiff, on the conclusion of his recent visit to Sri Lanka' (11 April 2015) available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820& (accessed 19 March 2016).

69 See 'Observations by the Special Rapporteur on the conclusion of his second advisory visit to Sri Lanka' (10 February 2016) available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17029&LangID=E (accessed February 2016). In addition to these visits from the mandate on truth, justice, reparation and non-recurrence, it is worth noting that Sri Lanka also facilitated the visits of a variety of other Special Procedures mechanisms: the Working Group on Enforced or Involuntary Disappearances visited in November 2015, the Special Rapporteurs on torture and on the independence of judges and lawyers conducted a joint visit in April/May 2016 and the Special Rapporteur on minority issues visited in October 2016.

document which outlines the content of the State's duty to investigate in the first instance at national level.[70]

The Minnesota Protocol (or, to give it its original, formal, title, the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) is an expert document elaborating the standards of an effective investigation, (for example detailing what it means to require that an investigation be prompt, independent, thorough and transparent), but also looking at the circumstances in which the state's duty to investigate is engaged under international law. In general this duty can be said to be 'triggered where it knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.'[71]

This general duty includes all cases where the state has caused a death or where it is alleged or suspected that the state caused a death (for example, where law enforcement officers used force that may have contributed to the death). The duty applies to all peacetime situations and also to situations of armed conflict outside the conduct of hostilities.[72]

The duty to investigate potentially unlawful death caused during the conduct of hostilities is addressed separately in the Protocol, which provides that '[w]here, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting.'[73]

Furthermore, building on Customary Rule of IHL regarding Prosecution of War Crimes, the Protocol notes that '[w]here there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible.'[74] Where the suspected violation of IHL would not amount to a war crime, at a minimum there should be further inquiry beyond the post-operation assessment.

The updating of the Minnesota Protocol provides an illustration of the role that Special Procedures can play in convening experts to undertake

70 The role of the mandate in the revision of the Minnesota Protocol, and the document's relevance with respect to forensic investigations and the right to life were detailed in Christof Heyns Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc A/70/304 (7 August 2015) paras 16-68.

71 *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* para 15.

72 n 71 above, para16.

73 n 71 above, para 21. See also Second Report of the Public Commission to examine the maritime incident of 31 May 2010, 'the Turkel Commission' (February 2013) paras 48-50,102-3.

74 n 71 above, para 21.

important work in reinforcing international standards. The document itself will be an important reference point for the triggers and content of the duty to investigate (and thereby protect a wide range of human rights) during armed conflict.

Conclusion: Enhancing the role of Special Procedures

The most obvious contribution of Special Procedures to the protection of the right to life during armed conflict is the extent to which reports to the Human Rights Council or to the UN General Assembly affirm the continued application of human rights based standards, and the continued jurisdiction of human rights mechanisms in this context. Although one should not assume that the protections afforded by IHRL are automatically greater than those afforded by IHL, the co-application of these regimes in armed conflicts, and the monitoring of the protection of civilians from both perspectives, must surely enhance the chances for oversight, international pressure, and positive changes in the protection of the right to life.

Within the Human Rights Council, the value added by Special Procedures is that of an independent expert in a political body. Given the advances in information communication, international bodies (and international publics) have more information available to them than ever about the conduct of armed hostilities. To a certain extent, Special Procedures act as a filter to this political body – with their reports treated as independent evaluations of the significance of a problem in any given situation, offered without politicised bias or agenda.

The type of protection typically afforded is at best that of a non-judicial investigation (and often no more than a call for a national investigation). In circumstances in which it is possible for a Special Rapporteur to travel to situations of armed conflict (requiring both the invitation of the state and understandably onerous security provisions), he or she may be able to meet with, and act as a conduit for, local advocacy groups or the families of victims. However, Special Rapporteurs are not designed to be individual fact-finding missions or inquiries.

Special Procedures should not be seen as a panacea for the problems of monitoring the protection of the right to life, especially in situations of armed conflict. As the example of Sri Lanka demonstrates, Special Rapporteurs are only one actor among a cast of interested parties, all of whom are able to exert pressure in different ways. The use of Special Rapporteurs' reports by other actors, however, is an indication of the important facilitative role they can play in fostering accountability. In this connection, it is interesting to note that Channel 4 waited for several months so that the airing of their documentary, *Killing Fields,* would

coincide with Heyns' presentation of his report to the Human Rights Council in 2011.

It should be noted that one significant limitation of the process is that Special Procedures require an invitation from the state (or states) in question before individuals or groups can organise a visit. The interest of states in issuing such invitations varies over time. For example, in the case of Sri Lanka, Alston was invited in 2005, but Heyns, despite asking for invitation, was not at all. However, the Human Rights Council has not been deterred from creating mandates concerning states or situations where physical access is problematic. The Special Rapporteur on the Situation of Human Rights in Eritrea, and the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea are cases in point.

There is a necessary structural preference among Special Procedure mandate holders toward recommendations for thorough, independent and credible investigations or accountability *at the national level*. This often runs counter to the desire of activists or advocacy organisations that often call – at an early stage – for international oversight. As the example of Sri Lanka has recently demonstrated, the two are not mutually exclusive, but the principle of subsidiarity applies to non-judicial investigations as much as it does to juridical precedence.

Insisting on accountability, including a right to remedy, is a fundamental part of the protection of civilians in armed conflict (including within the framework of the responsibility to protect). As both the African Commission's recent General Comment on the right to life and the UN's Minnesota Protocol make clear, accountability should principally take place at the national level, and a failure to pursue accountability for potential violations of the right to life, including during armed conflict, amounts in itself to a violation by the state of that right. Special Procedures can in certain circumstances directly support that process of accountability: as an entry point to international mechanisms, a source of international pressure, a stimulus for future investigation (at both national and international level), or as a guardian of and commentator upon the relevant international standards.

CHAPTER 14

THE ROLE OF COURTS IN PROTECTION OF CIVILIANS

John-Mark Iyi

Abstract: *The protection of civilians has been a dominant theme in the United Nations (UN) peace keeping operations, most of which have had robust mandates presenting new responsibilities and challenges. Despite robust mandates, however, atrocities in armed conflicts remain pervasive, giving rise to questions about the efficacy of the means to deal with atrocities, for example, judicial mechanisms. Since the 1990s, attention has shifted to international criminal tribunals to hold accountable those responsible for perpetrating atrocity crimes, and in doing so, protect civilians during armed conflicts. However, the use of judicial mechanisms to deal with atrocities have produced mixed results in countries like Rwanda, Sierra Leone, Côte d'Ivoire and the Central African Republic. This Chapter notes that judicial mechanisms are blunt tools for protecting civilians during armed conflicts. However, if judicial mechanisms are to be effective, particularly in Africa, there is need for a paradigm shift in current institutional arrangements from the 'global' to the 'regional' whereby judicial mechanisms are located within regional institutions at an intermediate level. For many reasons, regional judicial mechanisms hold better prospects for the effective protection of civilians in armed conflicts in Africa than global judicial mechanisms.*

> The strongest direct legal weapon to employ against those initiating unlawful violence, and in particular threatening or perpetrating mass atrocity crimes, is to arrest, try, and, if properly convicted, punish them in a competent criminal court.[1]

Introduction

It is pertinent to point out from the outset that this contribution is limited to the judicial protection of civilians from the four atrocity crimes – genocide, war crimes, ethnic cleansing and crimes against humanity – during a non-international armed conflict.[2] It might seem unusual to speak

1 See G Evans *The responsibility to protect: Ending mass atrocities once and for all* (2008) 115.

2 These crimes are the main focus of the responsibility to protect, article 4(h) of the AU Constitutive Act and (though with a much broader scope), the protection of civilians. These crimes are considered to be the most serious international crimes now covered by the major international human rights and international humanitarian law instruments and being focused upon by the international community.

of judicial protection of civilians during an armed conflict because judicial mechanisms are usually employed as part of the instruments of structural reforms in conflict prevention strategies.[3] These preventive tools would range from promoting the rule of law and protecting minority rights to the enforcement of human rights. Similarly, when a state has emerged from conflict, judicial mechanisms would normally form part of structural reforms to be undertaken as part of post-conflict peacebuilding and reconstruction efforts to prevent reprisals and recurrence of mass atrocities, and ensure stability and sustainable peace.[4] This may come as part of transitional justice processes or other reconciliatory and accountability arrangements to end impunity.

For obvious reasons, hardly ever are judicial mechanisms viewed as a tool of priority for civilian protection during an armed conflict.[5] This is because the prosecution of war crimes was traditionally carried out by national governments in national courts and usually by the victor against the vanquished or, in exceptional cases, against what William Schabas calls 'rogue combatants' in the victor's army.[6] Yet, one of the results of the view that sovereignty is no longer absolute is the mainstreaming of the idea of protection of civilians within the territory of a sovereign state – notwithstanding the jurisdiction of the territorial state – during an armed conflict.[7]

Since the end of the Cold War and amidst the mass atrocities that characterised the 1990s, the protection of civilians (PoC) principle within

3 Judicial tools such as constitutional and justice sector reforms are part of preventive and post-conflict reconstruction tools. See Evans (n 1 above) 87, 107. Judicial mechanism such as criminal prosecution can also be used as a reactive tool during an ongoing conflict (being part of the direct measures that could be employed in an R2P situation). See Evans (n 1 above) 150. However, as will be argued below, judicial mechanism is most effective when deployed either at the preventive or peacebuilding and reconstruction stages.

4 See ND White 'Empowering peace operations to protect civilians: Form over substance?' (2009) 13 *Journal of International Peacekeeping* 327-355 336.

5 According to the International Criminal Tribunal for the former Yugoslavia, 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring State or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.' See *Prosecutor v Duško Tadić* also known as 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 70 available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed 12 July 2014).

6 See W Schabas *Introduction to International Criminal Court* (2007) 1.

7 See generally M Deng, IW Zartman, S Simaro & T Lyons *Sovereignty as Responsibility: Conflict Management in Africa* (1996) Brookings Institution: Washington DC.

the territory of sovereign states gradually found its way into UN-mandated missions.[8] The concept of PoC further gained traction with the adoption of the responsibility to protect (R2P) principle by world leaders at the United Nations World Summit in 2005, and today, the protection of civilians is fast becoming the *leitmotif* of UN missions around the world.[9] In Africa, the protection of civilians from mass atrocities in an internal conflict arguably received its first recognition in a sub-regional treaty, the ECOWAS Protocol on Conflict Prevention.[10]

The idea of PoC further gained traction at the continental level with the adoption of article 4(h) of the African Union Constitutive Act.[11] This recognition and focus on the protection of civilians is a product of a shift in thinking about the essence of international peace and security, which was made possible by the shift in understanding that protection is ultimately about people rather than regimes. It is therefore easy to see why the protection of civilians now forms a core element of the mandates of different types of missions and why some of these missions are requiring, and in the near future will be relying on more coercive and intrusive

8 Legal and normative developments in international humanitarian law, international human rights law, peace and conflict studies, UN Security Council practice, the emergence of the R2P principle, have all contributed to the consolidation of protection of civilians in armed conflict as a major thematic area and objective particularly in Africa. Through a series of UN Security Council resolutions, the protection of civilians has emerged as the dominant thematic focus in many UN Security Council -mandated missions. In resolution 1270 of 1999, the UN Security Council stated 'Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate, UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG'. See S/RES/1270/1999, 22 October 1999. As more and more UN missions focus on civilian protection mandates, the UN Security Council is developing a range of tools to give effect to the norm of civilian protection – targeted sanctions, the work of the Expert Group on protection issues, use of commissions of inquiry and fact-finding missions, and referrals to the International Criminal Court (ICC). See A Jackson 'Protecting civilians: The gap between norms and practice' (2014) 56 *Humanitarian Policy Group* Policy Brief 2.

9 See United Nations General Assembly 2005 World Summit Outcome A/RES/60/1, para 138 & 139. In the case of R2P, it goes beyond merely reacting to halt mass atrocities, it entails ensuring accountability by those responsible for mass atrocities, reconstruction, and preventing relapse into conflict. See ICR to P*A Toolkit on the Responsibility to Protect* available at http://www.responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf (accessed 19 August 2014) 20. See for example, *Report of the Secretary General on the Protection of Civilians in Armed Conflicts* S/2012/376, 22 May 2012.

10 See art 25 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, adopted at Lome, Togo on 10 December 1999, available at http://www.comm.ecowas.int/sec/?id=ap101299 (accessed 21 July 2014), which provides for the invocation of the Article where, as a result of an internal conflict, there is a threat of humanitarian disaster, and massive violations of human rights and the rule of law.

11 The Constitutive Act of the African Union was adopted on 7 November 2000 and came into force on 26 May 2001. Available at http://www.au.int/en/content/constitutive-act-affrican-union (accessed on 21 July 2014) (the AU Act).

instruments to implement their mandates.[12] Yet, the idea of the protection of civilians has been more successful in name than in practice, and it has been argued in several studies that the challenge lies in translating theory into practice.[13] Consequently, it has become imperative for research to focus on how to implement the PoC mandate in conflict situations and this necessitates an examination of the different tools available for the task of protecting civilians.[14] This Chapter contributes to the literature on the subject by focusing on the range of judicial tools available to actors for the protection of civilians in internal armed conflicts in Africa.

The Chapter is divided into five parts. The first part gives an introductory background and outlines the central argument of the Chapter. The second part sets the context for subsequent analyses by locating it within the African frame of reference. Part three then examines the judicial means of civilian protection in non-international armed conflict (NIAC) which is now the commonest type of conflict on the African continent. Part four examines some of the challenges this approach could face and concludes by proposing how these challenges could be addressed for the effective protection of civilians during armed conflicts. It further examines international judicial mechanisms for the protection of civilians. Here, the argument is that for purposes of judicial protection of civilians during an armed conflict, the current arrangement of global governance institutions, of which the International Criminal Court is now a dominant part, is too skewed and controversial to be an effective instrument of PoC during an armed conflict and there is need to rethink the approach. In the fifth part, I assesses the potential of regional and judicial mechanisms to protect civilians and I argue that having laid the normative and institutional framework to end mass atrocities in the African peace and security architecture, and the legal framework for the protection of civilians from genocide, war crimes and crimes against humanity in its article 4(h), it is

12 See for example, UN Security Council S/RES/2098 (28 March 2013). At paragraph 9 of the Resolution, the UN Security Council established an 'Intervention Brigade' as part of the United Nations Mission in Democratic Republic of Congo (MONUSCO). Inserting an important caveat that the Resolution should not be taken as setting a precedence, the Security Council authorised the Intervention Brigade and the other military components of MONUSCO to use all necessary means to protect civilians. See S/RES/2098, para 12.

13 See for example, BB Ghali *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* A/47/277- S/24111, 17 June 1992, para 42-54*; Report of the Panel on United Nations Peace Operations* (The Brahimi Report) A/55/305 (2000) paras 48-64; VK Holt *et al Protecting civilians in the context of UN Peacekeeping Operations: Successes, setbacks and remaining challenges* (2009).

14 There is a growing volume of literature on the subject. See for example, UN DPKO/DFS *Civil Affairs Handbook* (2012); VK Holt & TC Berkman *The impossible mandate? Military preparedness, the responsibility to protect and modern peace Operations* (2006) The Henry L Stimson Centre: Washington DC; VK Holt *et al* (n 13 above); A Giffen 'Considerations for a new peacekeeping operation in South Sudan: Preventing conflict and protecting civilians' (2001) Stimson Centre; WJ Durch & A Giffen 'Challenges of strengthening the protection of civilians in multidimensional peace operations' Background Paper prepared for the 3rd International Forum on the Challenges of Peace Operations, 27-29 April 2010, Queenbeyan, Australia.

only logical that the AU should complete this normative and institutional edifice for PoC from mass atrocity crimes by establishing an African Court with jurisdiction over mass atrocity crimes. This is followed by concluding remarks.

Judicial protection of civilians in the context of article 4(h) and the responsibility to protect

As mentioned above, from a practical standpoint, it seems almost atypical to speak of judicial protection of civilians in armed conflicts, to the extent that judicial protection is understood to be a reactive tool deployed to prevent genocide, war crimes, ethnic cleansing and crimes against humanity; or to bring perpetrators to justice. Perhaps it is more appropriate to speak of judicial means of prevention and reconstruction – in the sense of judicial tools as part of the broader response of preventive mechanisms ranging from diplomacy to security sector reform, strengthening of the rule of law, judicial prosecution, law enforcement and accountability.[15] Also, as part of post-conflict reconstruction efforts, judicial instruments are vital to protecting civilians from mass atrocities especially where there is a likelihood of reprisals or revenge attacks as a consequence of unresolved grievances from previous conflicts. Except as tools of deterrence and accountability, it is much more difficult to utilise judicial means of protecting civilians during an armed conflict and the tools available for responding to the needs of different groups with vulnerabilities who face threats of imminent physical attacks under Pillar 3 of the responsibility to protect are quite few. This is because, depending on the intensity of the conflict, judicial institutions would likely have broken down and are usually among the first to collapse during an NIAC.

In fact, in many cases, it is often due to the ineffectiveness of judicial mechanisms or the inability of judicial institutions to address long-standing grievances and to provide redress to aggrieved parties or groups that become some of the remote causes of mass atrocity crimes. For whatever reason, lack of faith in the judicial system of a country as presenting any hope for remedy and redress for grievances easily precipitates violence that may result in mass atrocities. Therefore, as will be argued here, except in a few cases, the availability of judicial mechanisms as a tool for responding to mass atrocity crimes during an NIAC is quite tenuous especially given current global governance institutional arrangements. However, if this situation changes, judicial and quasi-judicial mechanisms might become effective tools for PoC during an armed conflict. Depending on the nature of the armed conflict, the type of judicial tool available for civilian protection and its effectiveness will vary. Whereas the doctrine of *habeas corpus,* for example, would be a veritable

15 See the items listed in R2P toolbox in Evans (n 1 above) 87, 107, 150, 253.

instrument for PoC in cases of extra-judicial killings and summary executions in a NIAC, it will not be readily available in an international armed conflict (IAC). The following section considers judicial mechanisms as deterrence to mass atrocity crimes.

Protection of civilians through national judicial mechanisms

Judicial mechanisms as deterrence

There is a direct relationship between the likelihood of arrest, prosecution and punishment, and the propensity of people to embark on criminal behaviour. The same is arguably true of the international system in relation to the protection of civilians through combating impunity.[16] Generally speaking, perpetrators of mass atrocity crimes would choose a different course of action if they believed that there is a reasonable prospect that attacking civilians during an armed conflict would result in criminal prosecution and severe punishment for perpetrators either at the national level or by an international criminal tribunal, regardless of the outcome of the armed conflict.[17] As a result, the UN Security Council is increasingly resorting to judicial and quasi-judicial mechanisms in its bid to curb mass atrocities and ensure the protection of civilians in armed conflicts.

There are several judicial and *quasi*-judicial mechanisms that could be deployed to protect civilians during armed conflicts. Depending on the nature of the conflict and the intensity, this would include all the apparatuses of the machinery of justice at the domestic and international levels including judicial panels of inquiry, commissions of inquiry, fact-finding missions, *ad hoc* international criminal tribunals, and permanent institutions such as the ICC. In its recent practice, the UN Security Council has invoked all these tools as part of its protection of civilians-framework during armed conflict. The effectiveness of any of these mechanisms in a particular conflict situation depends on a variety of factors and more importantly, the stage at which it was deployed during the conflict. Hence, being a peaceful and preventive instrument by its very nature, judicial mechanisms are most effective if deployed by the territorial state early enough in the conflict when state institutions still command enough of citizens' fidelity to the rule of law to be able to secure obedience to such institutions, and enough state control of the monopoly of coercion to impose sanctions, guarantee compliance, deter perpetrators and punish violators. At this stage, judicial mechanisms would be effective as tools for the protection of civilians. It is no surprise, therefore, that most (regional and international) instruments on the protection of civilians in armed

16 See RJ Goldstone 'Bringing war criminals to justice during an ongoing war' in J Moore (ed) *Hard choices: Moral dilemmas in humanitarian intervention* (1998) 195-211 202.

17 As above.

conflicts begin with a recognition of the pivotal position the judicial institutions of the territorial state occupies in the protection of civilians-matrix, especially when they are employed to deter the commission of mass atrocity crimes.[18]

The primacy of national courts in the judicial protection of civilians

When judicial mechanisms are being employed for deterrence, it is useful to focus on national frameworks at this level for many reasons: first, the protection and guarantee of the safety of citizens is the primary responsibility of state authorities.[19] As the ICISS pointed out in its report, the

> prevention of deadly conflict and other forms of man-made catastrophe is, as with all other aspects of the responsibility to protect, *first and foremost the responsibility of sovereign states and the communities and institutions within them.*[20]

Similarly, the World Summit Outcome Document (WSOD) makes clear in paragraph 138 that the primary responsibility for the protection of civilians from mass atrocities rests with the territorial state.[21] In most instances that the UN Security Council has authorised the protection of civilians-mandate, it has taken care to word the resolutions in a way that emphasises the primacy of the territorial state and its institutions in the protection of civilians within the state.[22] As pointed out in the Brahimi report, attempting to take the responsibility of the protection of civilians from the territorial state would be tantamount to raising unrealistic expectations likely to meet with insurmountable challenges and issues of 'credibility and achievability'.[23] In reality, the huge size of UN missions

18 See UN S/RES/1970 (2011), para 1, 2. See United Nations Secretary-General Press Release 'On Responsible Sovereignty: International Cooperation for a Changed World' United Nations Secretary-General Defends, Clarifies Responsibility to Protect at Berlin Event' 15 July 2008 available at http://www.un.org/press/en/2008/sgsm11701.doc.htm (accessed 20 January 2015).

19 See the ICISS Report para 2.15. This is enshrined in the constitutions of most countries of the world.

20 See International Commission on Intervention and State Sovereignty: *The responsibility to protect* (2001) IDRC: Ottawa, para 3.2; see also, BG Ramcharan *Preventive human rights strategies* (2010) 33.

21 See United Nations General Assembly *2005 World Summit Outcome* A/RES/60/1, 24 October 2005, para 138

22 For example, Resolution 1769 granting PoC mandate to the hybrid UNAMID authorises the mission to take necessary measures 'to … support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan'. See UN S/RES/1769 (31 July 2007) establishing the UN/AU Hybrid Operation in Darfur.

23 See United Nations General Assembly 'Report of the Panel on United Nations Peace Operations' A/55/305/ 21 August 2000 (Brahimi report), para 63. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305 (accessed 20 January 2015).

involving civilians means that the organisation would require huge resources to be able to implement their protection of civilians-mandates.[24] Against this background, it is imperative that the protection of civilians efforts be geared towards strengthening the judicial mechanisms of territorial states, in the first place at the prevention stage as part of the primary responsibility of the territorial state.

The AU expressly recognises the territorial state as the primary duty-holder of this responsibility in article 4(g), and implicitly so, in article 4(j) of the AU Constitutive Act, both of which suggest that prior to the invocation of article 4(h), deference would be accorded to the institutions of the territorial state (where the government still has effective control) to take steps to protect civilians in an armed conflict.[25] Deployed by the state at an early stage, judicial mechanisms such as criminal prosecutions are pacific, the judicial institutions are on the ground to collect and preserve evidence, and provided there is an impartial and independent judiciary, they can easily procure and protect witnesses, and prosecution is likely to be quicker and justice swifter. All of these factors would contribute to the protection of civilians by deterring would-be perpetrators.

Furthermore, various legal tools exist in national jurisdictions across the world to prevent incitement to genocide, war crimes, ethnic cleansing and crimes against humanity.[26] National courts would therefore prove effective in curbing the incitement of the commission of the four mass atrocity crimes during an armed conflict. For example, it was the failure of the Rwandan authorities to utilise judicial mechanisms to prosecute and punish those responsible for inciting violence through hate speech preparatory to the genocide that eventually contributed to the genocide.[27] Although incitement to atrocity crimes features prominently in paragraphs 138 and 139 of the WSOD, it is an aspect that speaks to the preventive Pillar of the responsibility to protect and the protection of civilians that is yet to receive adequate attention in implementation. For judicial mechanisms to be more useful as effective deterrence other than as mere reactive *post hoc*-accountability instrument, its implementation must speak to incitement of these four crimes on the ground.

In Kenya, there was a failure to investigate and prosecute those who were responsible for inciting violence prior to and subsequent to the 2007 elections and this failure to effectively deploy judicial mechanisms created

24 See the Brahimi Report para 63.

25 See Constitutive Act of the African Union, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July, 2000, at Lome, Togo, available at http://www.au.int/en/sites/default/files/ConstituveAct_EN.pdf (accessed 20 January 2015).

26 Most national constitutions have provisions prohibiting hate speech. See for example, section 16(2) of the Constitution of the Republic of South African Act 108, 1996.

27 See DY Drott 'Propaganda and conflict: Evidence from the Rwandan genocide' (2014) 8, 9 available at http://www.hks.harvard.edu/fs/dyanagi/Research/RwamdaDYD.pdf (accessed 20 March 2015).

the climate for the spread of violence and the commission of the mass atrocities that followed.[28] Although the WSOD recognises that the responsibility of the international community to protect extends also to the 'incitement' of the four crimes (and the international community can enforce this through judicial mechanisms as well), it is arguable that the territorial state is better placed to discharge this responsibility.[29] Finally, the complementarity principle would also require that national judicial mechanisms continue to be prioritised when deploying criminal prosecution as part of judicial mechanisms for the protection of civilians.[30]

Where the justice system still works, there are different legal principles that courts could invoke to protect groups and individuals during a conflict especially where the state is a party to the conflict. For example, the doctrine of *habeas corpus* could be invoked during an armed conflict or widespread cases of disappearances to protect civilians especially in relation to detainees. Where there is suspicion that a person in the detention of the state has either been subjected to inhuman and degrading treatment, torture, or is likely to be a victim of extra-judicial killing or summary execution, this doctrine could be invoked to compel the relevant authorities to produce such detainee, whereupon the court would be able to ascertain and determine the detainee's rights, although this principle is of limited applicability in a theatre of war.[31]

Notwithstanding the unique position that state judicial institutions occupy in terms of responding to the protection of civilians needs, several factors often operate to limit their effectiveness. First, it is possible that in the run up to the armed conflict, the state's judicial institutions have either collapsed or have become so weak that they are ineffective. Where the courts are still functional and the law enforcement agencies are able to investigate suspected violations, public perception of independence and impartiality of the courts or tribunal as fundamental principles of the rule of law are even more critical but often missing in situations of armed conflict characterised by mutual distrust and suspicion as resulting from differences and competing claims and interests between belligerent groups.

28 The ICTY, ICTR, the SCSL and the ICC have handed down judgments punishing incitement to mass atrocity crimes. For a thorough examination of incitement and instigation to commit international crimes under the ICTY, see A Agbor *Instigation to crimes against humanity: The flawed jurisprudence of the trial and appeal chambers of the International Criminal Tribunal for Rwanda (ICTR)* (2013) 147.

29 See International Coalition for the Responsibility to Protect 'Domesticating RtoP and the Prevention of Atrocities: How can Civil Societies Engage with Existing National Initiatives' (April 20214) 1 available at http://www.responsibilitytoprotect.org/4%2010%2013%20National%20Impl.pdf (accessed 27 April 2015).

30 See Rome Statute, Preamble, art 1; see L Yang 'On the principle of complementarity in the Rome Statute of the ICC' (2005) 4:1 *Chinese Journal of International Law* 121-132 122.

31 See *Boumediene v Bush* 553 US 732 (2008); see JF Irias 'Wartime detention and the extraterritorial habeas corpus doctrine: Refining the Boumediene Framework in light of its goals and its failures' (2013) 88 *New York University Law Review* 1348 1377.

Where aggrieved victims have no confidence in the judicial process or entertain fear that they would not receive fair adjudication of their rights, the tendency to resort to self-help and crude means of seeking redress rises significantly and this limits the effectiveness of the instrument as a mechanism for the protection of civilians. The effectiveness of the judicial mechanism could also depend on the state's integrity and credibility. This was one of the root causes of the crisis in Côte d'Ivoire.[32] In some cases, local judicial institutions have been overwhelmed or have become partisan in the conflict particularly in elections-induced conflicts.[33] This was the case in both Kenya and Côte d'Ivoire, where post-election disputes assumed inter-ethnic dimensions resulting in atrocity crimes. Even though there were functional local judicial institutions in place in both cases, the institutions had become partisan, took sides in the conflict and ostensibly lacked the impartiality and integrity as credible state institutions capable of acting to protect civilians and punishing those inciting violence against civilians in the conflict.

For its part, the international community must act cautiously when employing judicial mechanisms to respond to threats against civilians in an ongoing armed conflict. Quite often, the tendency among international advocacy groups is to want to throw away the baby with the bathwater when responding to the territorial state's judicial mechanisms. This is problematic and has often proved counterproductive for the obvious reason that trying to supplant a state's judicial mechanisms however ineffective or compromised it might be, has created problems in Iraq, Afghanistan, Libya and so on and had only succeeded to further imperil the task of the protection of civilians. What is needed is to strengthen these institutions rather than taking their place through the ICC or other international judicial mechanisms. As a commentator puts it:[34]

> The protection gap first and foremost stems from the failure of belligerents to comply with IHL and the absence of political solutions to conflict […] it can also arise from unrealistic expectations and insufficient understanding of which approaches will effectively result in greater protection. This stems from a recognition that external interventions often fail to build upon local capacities and responses that are the first, and sometimes the only, line of defence in a crisis.

Sadly, despite the complementarity principle contained in article 17 of the Rome Statute, there has been a tendency for the ICC to interpret the condition of 'inaction, unwillingness, and inability' in a way that has

32 See F Akindes 'The roots of the military-political crisis in Cote d'Ivoire' (2004) Nordic Africa Institute Research paper 126 30.
33 TM Bah 'Addressing Cote d'Ivoire's deeper crisis' (2012) 19 *Africa Security Brief* 1.
34 See A Jackson 'Protecting civilians: The gap between norms and practice' (2014) Humanitarian Policy Group Overseas Development Institute: Policy Brief No 56 4.

effectively transformed the complementarity of the ICC to the primacy of the ICC.[35] Even in the best of circumstances, an international criminal tribunal would only be able to prosecute a handful of cases.[36] From a practical point of view, national courts are better placed to investigate and prosecute most of the international crimes in their jurisdiction because they are more closely connected to these cases and better qualified to exercise jurisdiction both on the basis of the principle of territoriality or nationality, and they are more likely to be able to collect evidence and arrest the accused.[37] International criminal tribunals are also too expensive and take far too long.[38] They are not as effective in deterring attacks against civilians as one would expect. This is because these tribunals have no police to enforce their orders and rely on the good will of states to execute arrest warrants.[39] For example, the ICC has not been able to apprehend Al Bashir of Sudan against whom it issued an arrest warrant in 2008; and even the arrest of suspects like Radovan Karadzic and Ratko Mladic took over a decade of manhunt.[40] Therefore, the effectiveness of international criminal tribunals as judicial mechanisms that could be used as direct response tools to protect civilians in an ongoing armed conflict should not be exaggerated.

Universal jurisdiction and the judicial protection of civilians

Universal jurisdiction refers to 'jurisdiction established without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting [s]tate'.[41] The principle permits national courts to exercise jurisdiction over international crimes committed outside the territory of the prosecuting state provided certain legal requirements are met.[42] It is one of the tools that national courts could resort to in order to hold perpetrators of mass atrocities accountable and ensure the protection of civilians by sending the right signals to belligerents that perpetrators of atrocity crimes would be held accountable for abuses, if not by their state, certainly by

35 C Jalloh 'Reflections on the indictment of sitting heads of state and governments and its consequences for peace and stability and reconciliation in Africa' (2014) 7 *African Journal of Legal Studies* 43-59 49.

36 See M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against impunity' (2003) *Max Planck United Nations Yearbook* 591 599-600.

37 See A Cassese *International criminal law* (2003) 351.

38 See D Wippman 'The costs of international justice' (2006) 100 *American Journal of International Law* 861-881.

39 See International Criminal Court-Assembly State Parties (2013) available at http://www.icc-cpii.int/iccdocs/asp_docs/ASP12?ICC-ASP-12-35-ENG.pdf (accessed 27 April 2015).

40 Evans (n 1 above) 117.

41 See R Cryer *et al An introduction to international criminal law and procedure* (2007) 44.

42 See I Brownlie *Principles of public international law* (2008) 593; Apart from the crime of piracy, universal jurisdiction is usually applicable to the other international crimes of genocide, war crimes, crime against humanity and torture. See Cryer *et al* (n 41 above) 44.

other state members of the international community. However, this principle has not always been invoked by states as a protection of civilians tool and even when invoked, it is sometimes mired in controversy and its effectiveness drowned in the murky waters of international politics especially where high profile political figures are involved.

For example, some Spanish citizens brought court action in Spain against former Chilean President, Augusto Pinochet, on allegations of genocide; some Palestinian refugees instituted court proceedings in Belgium to prosecute former Israeli Prime Minister Ariel Sharon for alleged massacre of Palestinians in 1982;[43] a group of survivors and victims of the United States of America (US)-led invasion of Iraq initiated action in Spain against former British Prime Ministers, ex-US Presidents George H Bush, George W Bush, Bill Clinton and Barack Obama, as well as other senior US officials for the invasion of Iraq.[44] In 2009, a Palestinian group also got a British court to issue an arrest warrant against former Israeli Foreign Minister, Tzipi Livni, on allegations of war crimes committed in Operation Cast Lead conducted by Israel in Palestine.[45] The furore that followed illustrates the controversial nature of the application of universal jurisdiction.[46] European countries like the United Kingdom (UK), Belgium, and the Netherlands have since amended their laws to narrow the scope of the application of universal jurisdiction in their courts.[47]

In some cases, there have been successful invocations of the principle especially in respect of not-so-politically powerful suspects.[48] As already noted above, although national courts are better placed to protect civilians through judicial mechanisms in a NIAC by investigating and prosecuting violators, it so often happens that state agents, military personnel, security operatives, and senior political party leaders are responsible for violations and so long as such government remains in power and the victims remain suppressed, the atrocities are likely to remain unaddressed further

43 See D Hoover 'Universal jurisdiction not so universal: A time to delegate to the International Criminal Court' (2011) Cornell Law School Inter-University Graduate Students Conference Papers available at http://www.scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=1ps_clacp (accessed 23 April 2015) 3.

44 As above.

45 As above.

46 See N Roht-Arriaza 'The Pinochet precedent and universal jurisdiction' (2001) 35 *New England Law Review* 311.

47 See D Hoover 'Universal jurisdiction not so universal: A time to delegate to the International Criminal Court' (2011) Cornell Law School Inter-University Graduate Students Conference Papers available at http://www.scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=1ps_clacp (accessed 23 April 2015) 3; RJ Goldstone & AM Smith *International judicial institutions: The architecture of international justice home and abroad* (2009) 115. Activists and lobbyists in South Africa failed when they tried to compel the South African authorities to arrest visiting former British Prime Minister Tony Blair on account of the violations that occurred during the Iraqi war.

48 The principle has been used by several European countries to prosecute many of the perpetrators of Rwandan genocide who sought refuge in Europe.

entrenching the culture of impunity to the detriment of the protection of civilians.[49] In this case, universal jurisdiction may be the most viable option where resource constraints hinder other efforts at regional and international levels – since it is a quicker and cheaper process than setting up an *ad hoc* international tribunal or pursuing a referral to the ICC.

The judgment of the South African Supreme Court of Appeal in *South African Litigation Centre and Another v National Director for Public Prosecutions and Others* illustrates the potential of universal jurisdiction. The Court held that the South African authorities were under obligation to invoke the principle of universal jurisdiction under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 to investigate allegations of torture perpetrated against Zimbabweans by Zimbabwean security agents in Zimbabwe.[50] Recently, the South African Supreme Court of Appeal held in *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* that the South African authorities violated the law by failing to arrest and surrender President Al Bashir of Sudan pursuant to the ICC arrest warrant and in compliance with the relevant South African legislation.[51] In the same vein, the former foreign minister of Israel, Tzipi Livni, had to cancel her proposed visit to South Africa for fear of being arrested on allegations of atrocities committed by Israeli forces during 'Operation Cast Lead'.[52] Thus, the practice of South Africa shows that where there is political will, universal jurisdiction could be a useful judicial tool both for holding perpetrators to account for violations and for deterring future atrocities against civilians in ongoing armed conflicts, all of which further the protection of civilians objectives.

Military tribunals and the protection of civilians

Armed conflicts usually take place in environments with a myriad of actors operating within the same space but often under different rules and pursuing different objectives: humanitarian agencies, armed non-state groups, regular armies, war lords, criminal gangs and other untoward elements that are not amenable to the ordinary rules of engagement.[53]

49 See FX Bangamwabo 'International criminal justice and the protection of human rights in Africa' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) 105; see Schabas (n 6 above) 1; PD Williams *Enhancing civilian protection in peace operations: Insights from Africa* (2010) African Centre for Strategic Studies Research Paper No 1 24.

50 See *South African Litigation Centre and Another v National Director for Public Prosecutions and Others* (judgment) available at http://www.saflii.org/za/cases/ZAGPPHC/2012/61.pdf (accessed 25 April 2015); See M du Plessis *et al* 'Africa and the International Criminal Court' (2013) *Chatham House: International Law* 1 8.

51 See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (*867/15) [2016] ZASCA 17.

52 See I Rawhoot & J Acuna 'Livni cancels SA trip after arrest threats' *Mail & Guardian* 21 January 2011, available at http://wwwmg.co.za/article/2011-01-21-livni-camcels-sa-trip-after-arrest-threats (accessed 23 April 2015).

53 See Schabas (n 6 above) 1; Williams (n 49 above) 24.

Sometimes, members of the armed forces engage in the commission of atrocity crimes. Being in the field, the prompt prosecution of such erring combatants would serve as deterrence to other soldiers. In the regular armies, such prosecutions would not normally pose problems since the structures exist within national militaries. However, problems arise with the effectiveness of courts-martial in the protection of civilians. During armed conflicts, national military authorities are sometimes reluctant to enforce IHL and IHRL through courts-martial because of the effect it could have on troop's morale. This is more so in cases of national contingents serving as part of multinational forces (whether UN, regional, or some other form of coalition).[54]

Despite the potential that military disciplinary mechanisms hold in ensuring that troops refrain from committing atrocities during an armed conflict, the multinational composition of peacekeeping operations (PKOs) means that the responsibility to discipline troops vests in national contingents commanders.[55] Status of Force Agreements often state that troops contributing countries retain ultimate authority and control over their troops and are therefore responsible for ensuring accountability in cases of violation of IHL and IHRL.[56] Since the field commanders do not exercise this authority, it is always up to the home government through the commander of the national contingent to ensure that disciplinary measures are taken against erring troops involved in violations. National contingents with whom legal authority lay for prosecuting erring troops and ensuring accountability are sometimes reluctant and also do not surrender their troops to the authority of force commanders.[57] Furthermore, national contingents sometimes have to wait for orders and responses from state capitals. Besides being functional, court-martials may also have several other advantages: They are quick and implementable since authority and jurisdiction are from the same source and this could produce immediate deterrent effect.

On the one hand, in the ongoing Boko Haram conflict in Nigeria, despite allegations of atrocities against Nigerian troops, there is as yet no indication that the military authorities have or are willing to prosecute those responsible for these crimes so as to serve as deterrence to others.[58] On the other hand, Nigerian military authorities have prosecuted scores of soldiers for various offences ranging from disobedience to lawful orders,

54 See generally M Zwanenburg *Accountability of peace support operations* (2005).
55 See Zwanenburg (n 54 above) 38.
56 As above.
57 See for example Ade Waal 'US war crimes in Somalia' (1998) 30 *New Left Review* 131 136.
58 See Amnesty International 'Nigeria: Gruesome footage implicates military in war crimes' 5 August 2014. Available at https://www.amnesty.org/en/latest/news/2014/08/nigeria-gruesome-footage-implicates-military-war-crimes/ (accessed 24 January 2017).

undermining the war effort, mutiny and so on because their conduct was construed as undermining the war efforts.[59] Another recent example is the withdrawal of the Chadian contingent to the Central African Republic by Chad, following allegations of the contingent's involvement in violations of IHL and IHRL.[60] This has contributed to the culture of impunity and violations of IHL and IHRL and undermined the protection of civilians in the armed conflict. So clearly, in a conflict situation, there is very limited use of courts-martial as a mechanism for the protection of civilians; even more so when courts-martial only have jurisdiction over military personnel and not over other actors within the theatre of armed conflict who might be also responsible for attacks on civilians such as non-state armed groups.

Non-state armed groups and the judicial protection of civilians

A much greater problem is posed by non-state armed groups and militias (NSAG). Lacking chain of command, members of these groups often show little respect for IHRL and IHL and are mostly responsible for most cases of widespread atrocities against civilians during armed conflicts.[61] The use of judicial mechanisms to ensure that NSAG observe rules of IHL and IHRL in the protection of civilians during armed conflict is always a challenge. Usually, these groups are no longer within state control (especially in cases where such groups control territory) even though the state is presumed, at least in theory, to still exercise jurisdiction and has the responsibility of ensuring the protection of civilians in territories controlled by these NSAG.[62]

For this reason, some argue that the acts of NSAGs is attributable to the state if the state failed to exercise due diligence to hold an NSAG accountable by investigating and prosecuting violations.[63] This type of attribution is difficult to sustain especially where the territorial state cannot

59 Voice of America '54 Nigerian Soldiers Sentenced to Death for Mutiny' 17 December 2014 available at http://wwwvoanews.com/content/nigerian-soldiers-sentenced-death-mutiny/2563715.html (accessed 27 April 2015) (This decision was overturned on appeal).

60 See S Sengupta & A Cowell 'Chad, amid criticism will pull troops from central Africa' *New York Times* 3 April 2014, available at http://www.nytimes.com/2014/04/04/world/africa/as-leaders-meet-report-describes-chaos-in-central-african-republic.html?_r=0 (accessed 27 April 2015).

61 See C Ryngaert & A Van de Meulebroucke 'Enhancing and enforcing compliance with international humanitarian law by non-state armed groups: An inquiry into some mechanisms' (2011) 16 *Journal of Conflict and Security Law* 443-472 465; A Clapham 'Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 6 *Journal of International Criminal Justice* 925.

62 See Ryngaert & Van de Meulebroucke (n 61 above) 463.

63 As above. See further SP Rosenberg 'Responsibility to protect: A framework for prevention' (2009) 1 *Global Responsibility to Protect* 442 454, 457, 361.

exercise effective control over areas under the control of NSAG or influence their conduct.[64] As a result, practitioners have sought to find a way around the huddle by extracting commitments through pre-agreement frameworks with NSAG undertaking to respect rules of IHL and IHRL during the conflict by protecting civilians and punishing violators. NSAG are eager to do this as it gives them some degree of recognition of authority over the territory they control whereas the territorial state always resists such agreements because it is viewed as conferring some form of 'legitimacy' on the NSAG. Consequently, some NSAGs even go on to set up their own 'courts' or some form of rudimentary judicial mechanisms to enforce laws that in some cases protect civilians during armed conflicts.[65]

However, due to the nature of many of these groups, they can hardly be realistically expected to use their 'courts' to enforce IHL in order to protect civilians. For one, NSAGs often lack knowledge of IHL and IHRL.[66] Second, they lack the organisational capacity, manpower, and other resources to manage a 'court' system that satisfy the minimum due process requirements under international law.[67] Third, even where NSAGs have basic knowledge of these requirements, there are serious concerns whether they would actually follow the rules in their 'courts' to enforce IHL and IHRL during a conflict.[68] For example, Boko Haram and Ansar Dine did enact their own 'legislation' which apparently did not comply with IHL.[69] In fact, with ideologically driven groups like Boko Haram, the contents of their 'legislation' and the nature of sanctions prescribed usually repudiate the state law that complies with basic norms of IHL and IHRL – describing them as 'Western and un-Islamic'. Therefore, the courts set up by such groups can hardly be expected to protect civilians in an armed conflict by punishing perpetrators of atrocities. In fact, the commission of atrocities in violation of IHL and IHRL is paradoxically the *modus operandi* of most NSAGs in their struggle against the state.

64 See *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment [2007] ICJ Rep 43 para 430.

65 See Human Rights Watch 'Mali: Islamist Groups Spread Fear in North' 25 September 2012, available at http://wwwhrw.org.news/2012/09/25/mali-slamist-armed-groups-spread-fear-north (accessed 20 April 2015). A Dine, the Movement for Unity and Jihad in West Africa, Al Qaeda in the Islamic Maghreb set up 'courts' to enforce strict sharia law in the areas under their control during the conflicts. However, these 'courts' were reported to impose sanctions that included chopping off arms, stoning and beheadings and such other sanctions that violate IHRL and IHL.The National Liberation Front Movement in El Salvador also set up their own courts during the 1980s.

66 n 61 above, 468.

67 As above.

68 Arguably, it seems permissible for NSAG to set up courts. See Common Article 3(1)(d) and Art 6(2) of the Additional Protocol II, if they comply with certain conditions laid down in Common Article 3 of Additional Protocols II. The forum must be a 'regularly constituted court' (CA 3) or a 'court' (AP II), and it must satisfy other fair hearing and due process guarantees in CA and AP II. See n 61 above, 498.

69 See Ryngaert & Van de Meulebroucke (n 61 above) 468.

Notwithstanding the shortcomings in NSAG 'courts' it has been argued that there could be some merits in the establishment of such courts because they could in fact expose members of the NSAG groups to IHL principles and the need to protect civilians during the conflict than any state or international tribunal is capable of doing through formal channels.[70] This could enhance greater protection for civilians as the fear of possible sanctions by these 'courts' could motivate NSAG members to comply with IHL and IHRL rules thereby protecting civilians.[71] Furthermore, since the state might not be in a position to enforce IHL and IHRL against the NSAG during the conflict, if the 'court' of the NSAG is able to impose adequate punishment on its own members who violate IHL and IHRL, this could lead to significant compliance with IHL by NSAG members because of the 'immediacy' and 'corrective' effect of the sanctions.[72] This is likely to result in greater protection of civilians in the areas under the control of the NSAG during the conflict.

Protection of civilians through quasi-judicial mechanisms

Increasingly, quasi-judicial mechanisms such as fact-finding missions, international commissions of inquiry, international investigating panels are being used by the international community in the protection of civilians during an armed conflict. Here I focus on one of such mechanisms: fact-finding missions. Fact-finding is a process of establishing the facts by collecting, accessing and assessing different sources of information.[73] Far from being a mere political instrument, article 90 of Additional Protocol I actually provides for the establishment of the International Humanitarian Fact-Finding Commission.[74] The purpose of fact-finding missions is to shed light on the surrounding 'circumstances, causes, consequences and aftermath of an event from a systematic collection of facts' in order to either confirm or refute allegations particularly allegations of human rights abuses and violations of IHL during an armed conflict.[75] This tool has been employed in the protection of civilians in recent armed conflicts with different degrees of success.[76] Fact-finding missions facilitate the protection of civilians in an armed conflict in several ways. For example, through the work of the mission, it brings clarity to the interpretation of IHL principles and the understanding of the belligerents and all those bound by IHL.[77] Secondly, facts collected

70 Ryngaert & Van de Meulebroucke (n 61 above) 468.
71 Ryngaert & Van de Meulebroucke (n 61 above) 470.
72 As above.
73 See T Boutruche 'Credible fact-finding and allegations of international humanitarian law violations' (2011) 16 *Journal of Conflict and Security Law* 105-140 106.
74 See Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), UNTS 1125, 8 June 1977.
75 See Boutruche (n 73 above) 106.
76 Lebanon, Syria, Georgia, Gaza and East Timor,
77 See n 73 above, 109.

in the process become useful materials and evidence in initiating criminal prosecutions and imposing criminal responsibility on perpetrators.[78] Thirdly, by helping to ascertain the facts and separating truth from falsehoods concerning claims of abuses and violations of IHL, fact-finding missions improve the atmosphere of animosity between communities and belligerents and mitigate the factors that sometimes drive revenge attacks against civilians in renewed conflicts.[79]

Fact-finding missions are usually composed of experts who are required to be unbiased, neutral, and having the technical expertise to provide informed advice to governments, officials of international and inter-governmental organisations on the situation of the protection of civilians in an ongoing armed conflict.[80] One of the major benefits of despatching a fact-finding mission to protect civilians in an ongoing armed conflict is that they are in a position to ascertain and assess the exact humanitarian situation on ground and provide reports to that effect. For example, the resolution creating the UN Independent, International Commission of Inquiry gives the commission the mandate

> to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, and on ways and means to protect civilians against any further assaults, and to report to the Council at its twenty-eighth session.[81]

This then forms the basis of evaluation and how to develop appropriate response by relevant organisations such as the UN Security Council, the UN Secretary-General, regional organisations like the AU and ECOWAS. If facts gathered from the fact-finding mission reveal ongoing abuses and violations of IHL, the response could then be escalated to higher levels including possible referral to the ICC for investigations or full criminal indictments. Furthermore, the establishment of a fact-finding mission usually increases the publicity on a conflict by bringing media attention to

78 As above; See SD Smet 'A structural analysis of the role of the pre-trial chamber in the fact-finding process of the ICC' in C Stahn & G Sluiter (eds) *The emerging practice of the International Criminal Court* (2009) 405-440.

79 See the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia vol. II (September 2009) 430; See also Boutruche (n 73 above) 110.

80 See D Mepham & A Ramsbotham *Safeguarding civilians: Delivering on the responsibility to protect in Africa* (2007) 35.

81 See UN Human Rights Council 'Ensuring respect for international law in the occupied Palestinian territory, including East Jerusalem: Resolution adopted by the Human Rights Council, 24 July 2014.

its work and therefore, exposing the humanitarian situation and mobilising for action to improve protection of civilians caught in the armed conflict.[82] For example, in the Darfur crisis, the United Nations International Commission of Inquiry on Darfur (ICID) detailed the widespread atrocities and those individuals most responsible and the evidence in the Commission's report persuaded the UN Security Council (some members of whom had hitherto been reluctant) on the urgent need for action in Darfur and to refer the matter to the ICC.[83]

Nevertheless, the work of the ICID illustrates the limitations of fact-finding missions as tools for the protection of civilians. Against the run of available evidence, the ICID found that war crimes and crimes against humanity, but not genocide, had been committed by the Sudanese government and Janjaweed militia in Darfur.[84] This finding was widely criticised and some scholars described the report of the commission as a 'shoddy or skewed analysis.'[85] Thus, the atrocities against civilians in Darfur continues even to this day.[86] A recent example is the ongoing Syrian conflict where the UN Fact-Finding Mission on Syria found that there have been systematic attacks against the civilian population both by the Syrian security forces and militia groups.[87] Despite the frequent use of fact-finding missions as a tool for the protection of civilians, the foregoing analysis shows that fact-finding mission should be used strategically during armed conflict because it is no silver bullet and there is a limit to its effectiveness. As Mepham and Ramsbotham point out,

> the mere fact of creating a Commission to investigate serious human rights abuses will not necessarily lead to action. In the case of Darfur, it was the

82 Mepham & Ramsbotham (n 80 above) 35. This was the case in the International Commission of Inquiry on Darfur which though concluded that genocide had not taken place in Darfur, found that there had been widespread violations of IHRL and IHL including killing of civilians, rape of women, disappearances, pillaging and so on.

83 As above.

84 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, 25 January 2005 para 518.

85 See S Totten 'The UN International Commission of Inquiry on Darfur: New and disturbing findings' (2005) 4 *Genocide Studies and Prevention: An International Journal* 360 367.

86 J Magdaleno 'As gold fuels Darfur conflicts, activists push for more Sudan sanctions' *Al Jazeera* 19 April 2015 available at http://www.america.aljazeera.com/articles/2015/4/19/sudan-gold-sanction-proposal-could-save-darfur.html (accessed 24 April 2015).

87 See UN Office of the High Commissioner for Human Rights *Report of the Fact-Finding Mission on Syria pursuant to Human Rights Council Resolution* S-16/1, August, 2011 5, 13. (Advanced unedited version). On 29 April 2014, the Organisation for the Prohibition of the use of Chemical Weapons created the Fact-Finding Mission on Syria to investigate allegations of use of chlorine in Syria. See OPWC *Note by the Technical Committee: Third Report of the OPWC-Fact Finding Mission in Syria* S/1230/2014 (December 2014); UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, 15 September 2011, A/HRC/18/53. The UN has set up other fact-finding missions in recent times. See UN Human Rights Council *Promoting Reconciliation, Accountability and Human Rights in Sri Lanka,* Resolution adopted by the Human Rights Council, 9 April 2014, A/HRC/RES/25/1;

> desperate state of affairs in the region, combined with strong pressure from the UN Secretary-General, the High Commissioner for Human Rights and countless international NGOs that gave such a boost to the recommendations of the Commission of Inquiry. But if a similar approach is taken with future high-level commissions, there is a real opportunity for them to force civilian protection measures further up the international agenda and to help galvanise more effective action.[88]

In Syria, despite the work of the fact-finding mission, as of 15 April 2015, more than 220 000 people have died in the conflict, most of them civilians.[89] This underscores the need to use the strategy more as preventive measure for the protection of civilians. However, where the tool is deployed in the middle of the conflict, it would have to rely on deterrence measures to protect civilians facing threats of violence and it would then need to draw on investigation of allegations of human rights violations and mediation strategies.[90] It would require working in close coordination with the law enforcement and judicial organs of the state where they are still functional. All of this would signal to would-be perpetrators that there would be consequences for violations.

Apart from the phases discussed above, judicial and quasi-judicial means could also be employed by a peacekeeping mission as part of its 'consolidation' process aimed at stabilising a post-conflict situation and returning the society to law and order.[91] In order to mitigate the chances of renewed violence, investigations into abuses is essential to restoring orderliness in civil life and building confidence in state institutions and governance while reassuring the civilian population of protection.[92] It is important to stress that the host nation continues to retain the duty to protect civilians. This is crucial because, in such cases, the host nation is most likely to be the only authority in a position to exercise judicial authority through state organs and to respond to imminent threats of physical attacks on civilians.

Protection of civilians through international judicial means

Since 1999, the UN Security Council has increasingly incorporated the protection of civilians mandates into its peacekeeping and peacebuilding missions as a way of protecting civilians in conflict and post-conflict situations. Due to the persistent gap between norm and practice, the 4th edition of the *Aide Memoire* for the protection of civilians in armed

88 Mepham & Ramsbotham (n 80 above), 36.
89 Al Jezeera News available at http://www.aljazeera.com/watch_now/ (accessed 15 March 2015).
90 See M Kelly & A Giffen *Military planning to protect civilians: Proposed guidance for United Nations peacekeeping operations* (2011) 27-8 28.
91 As above.
92 As above.

conflict[93] states that the UN Security Council missions should, in cooperation with the state, facilitate

> the establishment of effective arrangements for investigating and prosecuting violations of international humanitarian law or other serious violations of human rights law [and] to [c]onsider the establishment, in situations where local judicial mechanisms are overwhelmed, of ad hoc judicial mechanisms at the national or international level to investigate and prosecute war crimes and serious violations of human rights law [as well as] … the referral of situations involving genocide, crimes against humanity or war crimes to the International Criminal Court.[94]

Eradicating impunity is thus viewed to be one of the major strategies for achieving PoC objectives during an armed conflict.[95] Historically, perpetrators of mass atrocities are tried and prosecuted at the end of conflicts.[96] The reason for this is that, judicial mechanisms only have limited effectiveness in conflict situations involving fragile states or may have completely collapsed during the conflict in cases of failing or failed states such as Somalia, Liberia, Sierra Leone, Sudan, the DRC, Côte d'Ivoire and the Central African Republic. Secondly, some argue that initiating criminal prosecutions during the conflict jeopardises peace processes and negotiations aimed at ending the conflict for the greater good and protection of civilians.[97] Some commentators however hold the view that the peace versus justice dilemma is a false dichotomy and that ending impunity through accountability during a conflict is both possible and an effective way of protecting civilians.[98] They argue that the threat of criminal prosecution and actual criminal indictment would be effective judicial mechanisms of protecting civilians during the conflict because they not only deter would-be perpetrators, they also contribute to breaking the chain of instigators and perpetrators when the most senior and most responsible perpetrators of violations are either indicted or prosecuted. The debate is whether this actually ensures the protection of civilians in the long-term especially where there is amnesty for perpetrators as part of a transitional justice arrangement, in the context of the 'peace or justice'

93 United Nations Office of the Coordinator for Humanitarian Affairs *Aide Memoire* (2011) Policy and Studies Series Volume 1 No 4.

94 United Nations Office of the Coordinator for Humanitarian Affairs *Aide Memoire* (2011) Policy and Studies Series Volume 1 No 4 21.

95 See Holt & Berkman (n 14 above) 173.

96 For example, violators of IHL and IHRL during WW II, Rwanda, Sierra-Leone, Liberia, Cambodia, Argentina, Guatemala, Haiti, Lebanon, East Pakistan (now Bangladesh) and so on, were tried at different times after the conflict ended.

97 For a discussion of the different views, see a collection of essays in N Bigger *Burying the past: Making peace and doing justice after civil conflict* (2003).

98 See LM Keller 'The false dichotomy of peace versus justice and the International Criminal Court' (2008) 3 *Hague Justice Journal* 1.

conundrum and the risk of renewed violence. As the UN Secretary-General points out:[99]

> Investigation, of course, is not a substitute for 'timely and decisive' protective action […] but rather should be seen as an initial step towards it. If undertaken early in a crisis, at the first sign that a State is failing to meet its obligations relating to the responsibility to protect, such on-site missions can also provide opportunities for delivering messages directly to key decision makers on behalf of the larger international community, for example, by trying to dissuade them from destructive courses of action that could make them subject to prosecution by the International Criminal Court or ad hoc tribunals. Such candid messages have been voiced effectively by the United Nations High Commissioner for Human Rights, the United Nations High Commissioner for Refugees and the Special Adviser on the Prevention of Genocide, among others, as well as by the office of the Secretary-General.

Thus, effective use of judicial means lies in different aspects but is more effective with respect to detention of prisoners, deprivation of liberty and the right to life. There is consensus that investigations and criminal prosecution of perpetrators should be used for the PoC purposes but the disagreement is on the degree of effectiveness and whether such criminal prosecutions should be initiated during or after the cessation of hostilities.

Ad hoc tribunals and the protection of civilians

Since the establishment of the ICTY and ICTR by the UN Security Council, criminal prosecution as a tool of the protection of civilians has largely been invoked by the international community. The creation of the ICTY generated a lot of controversy because the Court was created during the armed conflict and many feared that rather than serve to deter atrocity crimes, this could actually endanger the peace process.[100] As pointed out above, quite often, it falls on the international community to use the international criminal law framework because local judicial institutions have become so ineffective as to be almost non-existent. Even where there is still semblance of functional judicial institutions domestically, there is the question of political will as we see in Darfur, and whether the state is indeed 'able and willing' to investigate, prosecute and punish those perpetrating mass atrocity crimes. This is what necessitates external intervention through judicial means. But which external judicial organ should intervene?

In the past, the tradition has been to establish *ad hoc* or hybrid international criminal tribunals. After creating the ICTY, the ICTR was established by the UN Security Council as an *ad hoc* criminal tribunal to

99 See UN General Assembly *Implementing the Responsibility to Protect:* Report of the Secretary General A/63/677 (12 January 2009) para 53.

100 Unlike the ICTY, the ICTR was created at the end of the conflict and genocide in Rwanda and was therefore not to protect civilians during that conflict.

prosecute perpetrators of the international crimes that took place in Rwanda in 1994. In 2000, the UN backed the creation of the Special Court for Sierra Leone, which was a hybrid court sitting in Sierra Leone. The relevance and perhaps, most significant contributions these Courts have made to the protection of civilians in armed conflict has been in the normative development and evolution of legal principles in the area of international criminal law, IHL and IHRL.[101] These developments have ensured that why it is not always possible to set up *ad hoc* criminal tribunals to prosecute those who deliberately attack civilians in an armed conflict, the legal principles developed by previous *ad hoc* tribunals have facilitated the *ex post facto* prosecution of violators of IHRL and IHL and enhanced the future deterrence and by extension, protection of civilians during armed conflicts.

For example, the ICTR decision in *Prosecutor v Akayesu*, set the precedent that now makes it possible to prosecute rape as a crime against humanity and to prosecute those who use rape as a weapon of genocide.[102] The Special Court for Sierra Leone indicted and convicted former Liberian President Charles Taylor in 2012 finding him guilty of aiding and abetting the crimes against humanity committed in Sierra Leone during the civil war in Sierra Leone, the first former head of state to be so convicted.[103] This will have prospective effect in terms of how sitting political leaders deal with IHL and IHRL particularly those relating to the protection of civilians during an armed conflict in Africa, knowing that there is a day of accountability ahead.

However, with the advent of the ICC, the approach has shifted from *ad hoc* to permanent judicial institution with jurisdiction to investigate and prosecute those responsible for mass atrocities against civilians when the affected state is either unwilling or unable to do so.[104] An assessment of the effectiveness of the ICC as a protection of civilians tool is outside the scope of this Chapter, however, it is debatable whether the ICC has been effective as an instrument for the protection of civilians during armed conflicts in Africa. It is my contention here that the ICC currently suffers from so many deficits that a principle of 'regional complementarity' in terms of regional criminal courts in Africa as a judicial mechanism for the protection of civilians in armed conflict is now imperative.

101 See *Prosecutor v Jean-Paul Akayesu* Case No ICTR-96-4-T, Judgment (2 September 1998); see also Mepham & Ramsbotham (n 80 above) 34.

102 See A Cassese 'International Criminal Law' in M D Evans (ed) *International law* (2006) 719-52 738-41.

103 See *Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T (26 April 2012).

104 See art 17 of the Rome Statute of the International Criminal Court which entered into force on 1 July 2002.

The International Criminal Court and the protection of civilians

There is a connection between the movement to end impunity for grave crimes, the responsibility to protect norm, and the protection of civilians. In many intra-state conflicts, usually, there would be opportunities on the spectrum for judicial mechanisms to protect civilians before the conflict reaches the threshold of armed conflict.[105] The establishment of the ICC was therefore expected to enhance this calibrated response to the protection of civilians. Thus, the ICC has become the main judicial mechanism for exerting pressure on actors in armed conflicts to refrain from attacking civilians or face prosecution. An ICC indictment could be employed at the preventive phase of the responsibility to protect to serve as deterrence to would-be perpetrators; or it may be deployed as a reactive tool under the responsibility to protect to ensure accountability and end impunity.[106] The effectiveness of the ICC as a mechanism or direct reaction to the protection of civilians in armed conflict under Pillar 3 of the responsibility to protect has been mixed to say the least. As a review of some of the cases show, in some cases, threats of international criminal prosecution did serve to deter or halt on-going mass atrocities. In other cases, it was not invoked at all, while in others, it was invoked without success.

In the DRC, for example, the indictment, arrest and prosecution of some of the perpetrators of mass atrocities has not necessarily led to better protection of civilians on the ground.[107] In the same vein, the ICC first indicted Al Bashir of Sudan in 2008.[108] This produced no reprieve for the civilians in Darfur as they continued to be subjected to mass atrocities.[109] In Kenya, both Kenyatta Uhuru and William Ruto were indicted by the ICC for their roles in the post-election violence in 2007-8. While this indictment seems to have served as deterrence in the subsequent election in 2013, the cases against the duo have had to be dropped by the ICC in controversial circumstances.[110] In Uganda, where the government referred the matter to the ICC, the court seems to have had little deterrent, if not counterproductive effects on the LRA.[111] The referral of Laurent

105 In some cases, these opportunities are seized, in others they are not. Human Rights Special Procedures, the African Court of Human and Peoples' Rights.

106 ICR to P *A Toolkit on the Responsibility to Protect* 33.

107 See M Adjani & G Mushiata 'The Democratic Republic of the Congo: Impact of the Rome Statute and the International Criminal Court' (2010) International Centre for Transitional Justice 4.

108 See *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02-05-09 (Warrant of Arrest for Omar Hassan Ahmad Al Bashir).

109 See BBC NEWS 'Darfur violence: UN troops failed to stop attacks' 9 April 2014 available at http://www.bbc.com/news/world-africa-26962187 (accessed 26 April 2015).

110 See *Prosecutor v Uhuru Muigai Kenyatta* ICC-01-09-02/11, 13 March 2015.

111 Ambiguous impacts: The effects of the International Criminal Court investigations in Northern Uganda (2012) Refugee Law Project: Working Paper No 2 12-13, available at http://www.refugeelawproject.org/files/working_papers/RLP.WP22.pdf (accessed 25 April 2015).

Gbagbo in Côte d'Ivoire to the ICC appears to have contributed to the protection of civilians efforts there in 2010-2011. In Sri Lanka, the mass atrocities committed by government troops and the Tamil Tigers in 2008-2009 has not been referred to the ICC.[112]

In the case of Libya, the referral of the matter to the ICC had little effect on the ground. Despite the scale of atrocities committed against civilians in the ongoing Syrian civil war, including the use of chemical weapons arguably by both sides to the conflict, the UN Security Council has been unable to refer the matter to the ICC.[113] Clearly, there is more to using ICC as a judicial mechanism for the protection of civilians purposes. The question is not just whether belligerents and their leaders should be indicted during the conflict and thereby risk jeopardising peace process and preventing further civilian casualties, or to refrain from indictment and risk encouraging a culture of impunity that could embolden violators and endanger civilians in the armed conflict, it is as much a question of timing as it is of the politics of using the ICC as a mechanism for the protection of civilians in ongoing armed conflicts.[114]

However, from a review of the cases, it is possible to argue that the investigations and indictment initiated by the ICC have at least, in some cases contributed to the protection of civilians in ongoing armed conflicts in Africa and actually facilitated peace negotiation processes. It is arguable that the indictment of President Omar Al Bashir perhaps contributed to the peaceful implementation of the Comprehensive Peace Agreement that resulted in the peaceful secession of South Sudan from Sudan in 2011 after a referendum. The successful completion of the process has to some degree, reduced the scale of the conflict and the civilian casualty in the conflict from what it was across Sudan in the early and mid-2000s. Similarly, while the indictment and conviction of Thomas Lubanga gave victims some measure of justice, it cannot be said to have jeopardised the peace efforts and the protection of civilians in the DRC in any significant way as some of the belligerents are now believed to be modifying their tactics for fear of ICC investigations and prosecution.[115] In the Ugandan crisis, the referral of the crisis in Northern Uganda to the ICC is believed

112 See G Boas 'What is international criminal justice?' in G Boas, W Schabas, MP Scharf (eds) *International criminal justice: Legitimacy and coherence* (2012) 1-24 18.

113 See UN Office of the High Commissioner for Human Rights 'Pillay Renews Call to Refer Syria to World Criminal Court' 13 February 2013 available at http://wwwohchr.org/ENG/NewsEvents/Pages/PillayToSecurityCouncil.aspx (accessed 23 April 2015).

114 See J Geis & A Mundt 'When to Indict? The impact of timing of international criminal indictment on peace processes and humanitarian action' February 2009, World Humanitarian Studies Conference, Groningen, Netherlands.

115 N Grono & A O'Brien 'Justice in conflict? The ICC and peace processes' in N Waddell & P Clark (eds) *Courting conflict: Justice, peace and the ICC in Africa* (2008) 13 15.

to have persuaded Joseph Kony, the leader of the LRA, to engage in the initial peace negotiations that subsequently collapsed.[116] Similarly, the referral of the Laurent Gbagbo case to the ICC illustrates the impact of the 'peace or justice' conundrum which sometimes pit the human rights community against conflict resolution actors is sometimes exaggerated.

Following the arrest of Gbagbo, the conflict in Côte d'Ivoire quickly de-escalated contrary to predictions that the arrest and extradition of Gbagbo to the ICC would exacerbate tensions or re-ignite the conflict, and jeopardise all prospects of peace with the attendant atrocities against civilians. This is not however to say that other factors were not at play in de-escalating the violence and the final outcome. The role of external actors was very significant here. Gbagbo had few powerful international allies having been abandoned by France the colonial master, rejected by his ECOWAS neighbours and the AU for his obduracy, Gbagbo was literally alone. But the same cannot be said of Bashir Al Assad or Omar al Bashir, who both have powerful backers and, as I have argued elsewhere, this is why the responsibility to protect is in a coma at the moment and its ability to protect civilians as a normative framework eroded.[117]

There is a limit to what the ICC can do in the protection of civilians especially where the country in armed conflict is not a party to the Rome Statute though such country would still be bound by IHL and IHRL. Hence, it has been suggested that the most effective way the ICC could protect civilians in ongoing conflicts in Africa is to exert maximum direct threats on would-be perpetrators of atrocity crimes by sending its investigating team to the theatre of the conflict.[118] Such field presence would strengthen the Court's work and enhance civilian protection on the ground during the armed conflict.[119] However, it might be impracticable to expect the ICC or any other *ad hoc* tribunal to act in the field as a means of the protection of civilians during armed conflict. Unlike the ICTY, ICTR, and the SCSL, the ICC as a permanent court has to inexorably deal with ongoing armed conflicts.[120] Given the number of ongoing armed conflicts in Africa and the world at the moment, the ICC can only do little in terms of the protection of civilians on the ground. The ICC simply does not have the scale of resources and manpower required.[121] Thus, it will turn on regional courts to bridge the gap.

116 See N Grono 'The deterrent effect of the ICC on the commission of international crimes by government leaders' (5 October 2012) Crisis Group, available at http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx (accessed 27 April 2015).

117 See J-M Iyi 'Emerging powers and the operationalisation of R2P in Africa: The role of South Africa in the UN Security Council' (2014) 7 *Journal of African Legal Studies* 147 167.

118 Mepham & Ramsbotham (n 80 above) 40.

119 As above.

120 See the Role of the ICC in the protection of civilians in armed conflict.

121 See n 80 above, 38; see L Arbour 'Situation in Darfur: Observations of the United Nations High Commissioner for Human Rights' (2006).

African regional judicial mechanisms for the protection of civilians

The rationale for a regional approach

Regional organisations may respond to the protection of civilians either by setting up regional judicial bodies or championing the referral of cases to the ICC.[122] As primary duty-bearers of the responsibility to protect, states need to ensure the protection of civilians by *inter alia* creating institutions necessary for the investigation and prosecution of perpetrators of mass atrocities against civilians, supporting regional courts in the prosecution of perpetrators as well as referring cases to the ICC.[123] Besides promoting the work of regional organisations in the protection of civilians by contributing troops to peacekeeping missions, states should support the establishment of regional courts and enhance local law enforcement and judicial mechanisms including the police and the courts. There should be support for domestic as well as regional judicial mechanisms aimed at compliance with IHRL and IHL for the protection of civilians objectives.[124] There are many advantages to a regional approach.[125]

First, even where national judicial institutions have collapsed or are ineffective, the regional mechanisms will still likely be functional. Second, regional courts occupy a unique temporal and spatial position in that they are far removed from the arena of conflict to be able to maintain a degree of independence compared to national courts, but with the proximity to the arena of conflict to be able to appraise the situation and underlying variables at play, which a court sitting in the Hague might not appreciate. Third, sitting close to the theatre of the conflict means a regional court is also likely to be better placed to collect evidence. Fourth, in the case of Africa, such court will not be a stand-alone organ but a component of the AU structure bound together through series of treaties and governance frameworks for the protection of civilians adopted by the AU states. The role of regional mechanisms in implementing international norms such as the protection of civilians and the responsibility to protect has been acknowledged by the UN Secretary-General stating the following:[126]

122 International Coalition for the Responsibility to Protect *A Toolkit on the Responsibility to Protect*, available at http://responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf (accessed 24 January 2017) 47.

123 ICRtoP*A Toolkit on the Responsibility to Protect* 45.

124 ICRtoP*A Toolkit on the Responsibility to Protect* 45.

125 See *The African Commission on Human and People's Rights v Great Socialist People's Libyan Arab Jamahiriya Order for Provisional Measures* ACHPR Application No 004/2007 para 25.

126 See UN General Assembly *Implementing the Responsibility to Protect:* Report of the Secretary General A/63/677 (12 January 2009) 53 51.

> The United Nations has a strong preference for dialogue and peaceful persuasion. Therefore, pillar three encompasses, in addition to more robust steps, a wide range of non-coercive and non-violent response measures under Chapters VI and VIII of the Charter. Under the Charter, many of these can be undertaken by the Secretary-General or by regional or subregional arrangements, without the explicit authorization of the Security Council. This was the case in Kenya in early 2008, when for the first time both regional actors and the United Nations viewed the crisis in part from the perspective of the responsibility to protect arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results.

Finally, it mitigates the current crisis of legitimacy currently facing the ICC, whereby the Rome Statute is being enforced by states who are not even party to the treaty but who use the platform of the UN Security Council to enforce the Rome Statute while they themselves remain outside ICC jurisdiction.[127] This state of affairs makes a regional approach imperative, as articulated in the African Union demand for an African Court with criminal jurisdiction.

Assessing the merit of establishing an African Criminal Court

The AU's Draft Guidelines for the protection of civilians by Peace Support Missions adopts a rights-based approach to the protection of civilians and the AU has proposed that its own conception of the protection of civilians would include all those activities aimed at obtaining full respect for the rights of the individual including the rights recognised under IHL and IHRL.[128] Where the state has collapsed, as in Somalia, CAR or Libya, or where the state is unwilling to act, as in Sri Lanka, and the UN Security Council is unable to act, as in Syria, it becomes imperative to resort to regional judicial mechanisms such as the proposed International Law Section of the proposed African Court of Justice and Human Rights.[129] Without necessarily going into the merits or demerits of the proposed Court, it is worth pointing out that it would find support in Chapter VIII of the UN Charter and paragraph 139 of the WSOD both of which acknowledge the role of regional organisations. The implication is that the use of regional criminal courts as part of the response to PoC under Pillar 3 of the responsibility to protect can be subsumed under this heading and

127 See A Mezyaev 'Progressive international law' Seminar delivered at the South African Research Chair in International Law on 18 March 2014.

128 See African Union *Draft Guidelines for the Protection of Civilians in African Union Peace Support Operations* (March 2010) African Union Commission, Addis Ababa. This would include the rights of the individual under relevant international treaties.

129 See art 28A of the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights, available at http://www.au.inten/en/sites/default/files/PROTOCOL%20ON%AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_0.Apdf (accessed 27 April 2015). Art 3 confers jurisdiction on the Court and art 9 creates the International Law Section of the Court. Art 28 gives the Court jurisdiction over a wide range of crimes.

supports the decision of the AU – as part of its broader responsibility to protect and the protection of civilians judicial mechanism – to confer criminal jurisdiction on the Court, notwithstanding the existence of the ICC. If the real object of the ICC is the protection of civilians through accountability and an end to impunity, then the ICC's response to the proposed court should not be one of a hostile competitor but one of a regional complementary partner in the task of the protection of civilians in armed conflicts in Africa. Finally, regional courts with criminal jurisdiction over international crimes would be particularly helpful to the African Union whenever it chooses it to invoke article 4(h).

Conclusion

At the normative level, significant progress has been made in the protection of civilians over the past one and a half decades, with the development of the protection of civilians as a key thematic area, the adoption of article 4(h) by the AU, and the global endorsement of the responsibility to protect, all of which are geared towards the protection of civilians in armed conflict. However, this progress in normative development has not translated to greater protection of civilians in armed conflicts in Africa. In fact, increasingly, more civilians are now casualties of violations of IHL and IHRL than ever before. This Chapter has argued that the reason for the inability to translate theory into practice partly lies in one of the instruments being used in the protection of civilians tasks, namely, judicial mechanisms. These instruments have become unsuitable for the task of the protection of civilians, not because they are blunt, but because they are undermined by the current structure and arrangement of global governance institutions within which they operate. This has compromised its legitimacy and undermined its utility and relevance as a tool for the protection of civilians in Africa. It is unfortunate that, just like the ICC (which was built on the fundamental principle and understanding of independence, impartiality, and complementarity), has been misinterpreted and misapplied 'from being a complementary body to a primacy organ', the principle of responsibility to protect is being misapplied to attempt to substitute the international community for the territorial state. In the end, the consequences have been so grave that today, while there are intermittent calls for the protection of civilians, no one even speaks of the responsibility to protect in Yemen, Syria, Iraq, Ukraine, and other parts of the globe anymore because these principles – especially R2P – has been so discredited as to render its invocation in any of these conflicts untenable.

The Chapter argues that the range of judicial mechanisms that currently exist at the national and international level will be inadequate for the protection of civilians and need to be complemented by a regional framework. If judicial means of protection is ever going to be effective, it must be deployed at the preventive phase of the responsibility to protect.

In this case, it could be part of the structural reforms. In cases of states emerging from conflicts, it should be one of the pillars and form part of the foundation of post-conflict reconstruction. The reason is because in the absence of conflict and where there is still some semblance of functional institutions such as the judiciary, the prisons, the police and other law enforcement agencies, judicial means of protection might still be effectively pursued and maintained with some degree of effectiveness and manageable cost with reasonable positive outcomes. Same might be said of post-conflict situations, perhaps, to a lesser degree and uncertainty. In case of armed conflicts, it is extremely difficult to effect arrest and prosecution, and it could also exacerbate the peace versus justice conundrum. Judicial mechanisms could only reasonably be used as 'threats of criminal prosecution' to serve as deterrence. In this sense, judicial means could only serve to prevent.

When the armed conflict is ongoing, it is unlikely that this could be brought to bear on combatants. This explains why most criminal prosecution for mass atrocity crimes committed in armed conflicts had always taken place post-conflict. If this is going to change, then there will be a need to expand the space and the actors who set norms and enforce institutional commitments and this is where regional actors come in. Such a regional court would be removed far enough from the influence of the territorial state to maintain its impartiality, independence, credibility and legitimacy, but close enough to be sensitive to the realities of the local circumstances in which the administration of justice has to take place. The same is true in respect of time, collection of evidence, and access to witnesses and overall cost of the process. Finally, such a regional court would form part of the overall AU Peace and Security Architecture put into place for the protection of civilians in particular and maintenance of peace and security in Africa in general.

CHAPTER 15 CONFLICT PREVENTION, PEACE BUILDING AND PREVENTION OF MASS ATROCITIES

Mphatso Boti-Phiri

Abstract: *The ambivalence to implement article 4(h)-intervention by the African Union (AU) and the inconsistencies in the enforcement of the responsibility to protect by the United Nations (UN) sparks an academic debate on the relevance of the concepts. Further, the minimal progress in the development of actual protection of civilians against atrocities calls for immediate action by the international community. Therefore, this discussion dwells on conflict prevention under the first pillar of the responsibility to protect and within article 4(h)-framework. The fundamental problem in conflict prevention in most African countries has been the lack of an institutional framework and coordinated approach to conflict management combined with a culture of impunity, lack of accountability and transparency. The discussion takes an institutional approach in the protection of civilians on the continent. The discussion recommends that strengthening democratic institutions and addressing root causes of internal conflicts that put populations at risk of mass atrocities is a more sustainable peace building effort and protection of civilian frameworks in the context of the responsibility to protect and article 4(h). Apart from ensuring accountability, long-term preventive efforts focused on reforming institutions within the security sector, judiciary and electoral commission, is one of the best routes to prevention of mass atrocities on the continent.*

Introduction

In 2005, the World Summit Outcome adopted the responsibility to protect concept that tries to strike a balance between sovereignty and the protection of human rights. It rests on three non-sequential pillars, set out by the United Nations (UN) Secretary-General in his 2009 report.[1] First, the World Summit Outcome document indicates that it is the responsibility of the state to protect its population from genocide, war

1 United Nations 2005 World Summit Outcome 24 October 2005 available at http://www.unrol.org/files/2005%20World%20Summit%20Outcome.pdf (accessed 30 July 2014). See also Ban Ki-moon *Report of the Secretary-General on Implementing the Responsibility to Protect* A/63/677, 12 January 2009. See also International Commission on Intervention and State Sovereignty (ICISS) 'The responsibility to protect report' (2001) 1 available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 30 July 2014).

crimes, and crimes against humanity, and from their incitement.[2] Second, it is the international community's responsibility to assist the state to fulfill its responsibility to protect.[3] Third, it is the international community's responsibility to take timely and decisive action through diplomatic, humanitarian and other peaceful means as stipulated in Chapters VI (peaceful measures) and VIII (regional arrangements) of the UN Charter. Should peaceful means be inadequate, in situations where the state had manifestly failed in its responsibility to protect, the international community is prepared to take collective action, through peace enforcement as stated in Chapter VII of the UN Charter.[4] In the same vein, article 4(h) of the Constitutive Act of the African Union (AU) provides for the right to intervene in a member state to protect populations at risk of war crimes, genocide and crimes against humanity.

While there have been ongoing debates on the national inconsistencies in the application of the responsibility to protect and relevance of the concept in different regions of the world, literature convincingly indicates that there has been minimal progress in the development of actual protection of individuals or groups against the worst human rights violations, such as genocide and crimes against humanity.[5] Although international human rights law (IHRL), international humanitarian law (IHL) and refugee law guarantee the protection of individuals from violence, 'civilians continue to be the main casualties of violence, often deliberately targeted rather than merely caught up in the midst of the fighting in contemporary armed conflicts.'[6]

This discussion dwells on conflict prevention under the first pillar of the responsibility to protect. By way of example, the discussion explores the conflict prevention strategies employed to prevent and stop the post-election violence in Kenya in 2007/8. The discussion also addresses the range of preventive measures that have been undertaken, in keeping with the responsibility to protect norm. It takes an institutional approach in the protection of civilians. In the final analysis, the discussion recommends that building democratic institutions and addressing root causes of internal conflicts that put populations at risk of genocide and mass atrocities is a more sustainable peace building effort within the responsibility to protect and protection of civilian frameworks.

2 United Nations (n 1 above) para 138.
3 n 1 above, para 139.
4 As above; see also Ban Ki-moon 'Report of the Secretary-General on Implementing the Responsibility to Protect.' A/63/677, 12 January 2009.
5 ICISS (n 1 above) 1.
6 D Kuwali 'Defending the defenceless: Questions of mandate and capability to protect civilians in the Democratic Republic of the Congo' in F Tibbitts *et al Improving the protection of civilians in situations of armed conflict* Carr Center Working Paper Series, Harvard Kennedy School of Government (2011) 17.

Conflict prevention conceptual framework

Conflict prevention entails any structural or interactive means to keep intrastate and interstate tensions and disputes from escalating into significant violence and to strengthen the capabilities to resolve such disputes peacefully as well as alleviating the underlying problems that produce them, including forestalling the spread of hostilities into new places. Conflict prevention comes into play both in places where conflicts have not occurred recently and where recent largely terminated conflicts could recur. Depending on how they are applied, it can include the particular methods and means of any policy sector, whether labeled prevention or not (for example, sanctions, conditional aid, mediation, structural adjustments, democratic institution building, among others), and they may be carried out by global, regional, national, or local levels by any governmental or nongovernmental actor.[7]

Conflict prevention is malleable as a concept and as a policy; it is multi-sectoral, and it can have application both at different phases of conflict and by a range of actors at different levels of analysis acting independently or in concert.[8] Conflict prevention, therefore, has a broad conceptual base whose merits can limit most political controversies in humanitarian operations. The concern, however, is on the real analytical gap that exists between academics and practitioners in conflict prevention techniques and methodologies. Academic approaches constitute a formidable and potentially useful tool kit for risk assessment and early warning, but must also be policy-relevant and operationally viable.[9] While much has been written about the merits of conflict prevention in its operational and structural forms, little has been said about capacity building issues on the actual prevention of mass atrocities.

Capacity building is the way in which outside actors provide the analysis for the potential conflict and means to address root causes through activities often associated with development, support for human rights, and good governance.[10] Several problems arise in translating analysis into action. There is need to know what to look for, and what specifically should be warned about. The UN has tried to develop its own assessment and evaluation tools to instill a culture of prevention within its own organisation, but also among regional organisations, states and non-state actors. For example, the UN Joint Office for Genocide Prevention and the Responsibility to Protect is charged with providing early warning and a convening mechanism to bring the system together in crisis situations in

7 M Lund 'Improving conflict prevention by learning from experience: Context, issues, approaches and findings' CPN Annual Conference 1999, 31 October 1999.
8 D Carment & A Schnabel 'Into the mainstream: Applied conflict prevention' in D Carment & A Schnabel (eds) *Conflict prevention from rhetoric to reality Vol 2* (2004).
9 As above.
10 As above.

order to provide timely and coherent advice to the UN Secretary-General. As provided in Chapter VIII of the UN Charter, the regional and sub-regional groups have a role to play in the maintenance of international peace and security while the UN Security Council retains the primary responsibility. In order to prevent mass violence and related atrocities in Africa, strategies must be put in place to identify and address the root causes of conflicts in the continent. Causes of conflicts in Africa are diverse and require accurate assessment and evaluation in order to develop useful indicators and identify appropriate conflict prevention interventions. It is, therefore, important that institutions, international organisations and development partners obtain a better understanding of long term, structural approaches to conflict prevention in Africa.

Major structural causes of mass atrocities in Africa

Several theories try to explain the causes of conflict and a brief literature review indicates that irreconcilable moral differences, high stakes distributional issues and domination are some of the major causes of conflicts that lead to genocide and mass atrocities.[11] The causes of conflicts are diverse but related; mostly the inter-related issues involve resources, values, power, and basic human needs. Usually these conflicts have 'an extensive past, a turbulent present, and a murky future.'[12] Many conflicts, especially at the inter-group and international levels are highlighted with hatred, fear, and often the history of past atrocities, that are embedded in a context of long-standing differences and inequalities. In the African context, they are rooted in a history of colonialism, ethnocentrism, racism, sexism, or human rights abuses which cause a large imbalance of power where the low-power groups are harmed by the basic social structure of society.

11 Irreconcilable moral differences are conflicts about right and wrong, good and evil. They may be rooted in different religions, different cultures, or different worldviews. High-stakes distributional issues are conflicts over 'who gets what' when the item in contention is very valuable often impossible to do without. People are unlikely to abandon continuing struggles over land, water, employment opportunities, and wealth, in general. When there is not enough to 'go around,' or when distribution is highly inequitable, these fights are likely to be especially bitter and destructive. Domination or 'pecking order' conflicts are conflicts over power and status: who is on top of the social and political hierarchy, and who is not. See H Burgess & GM Burgess 'What are intractable conflicts?' in G Burgess & H Burgess (eds) *Beyond intractability* (2003) available at http://www.beyondintractability.org/essay/meaning-intractability (accessed 3 August 2014).

12 P Coleman 'Intractable conflict' in M Deutsch & P Coleman (eds) *Handbook of conflict resolution* (2006) 432.

Identity conflicts

Identity conflicts divide many different ethnic, religious, classes, and national groups in African deadly spots.[13] Identity conflicts involve conflicts over social status and privilege and the distribution of scarce resources, along with a moral component, since each group tends to believe in its own moral superiority. The combination of all these aspects makes these conflicts especially difficult to resolve. Many other scholars including John Burton and Herbert Kelman, argue that deep-rooted conflicts are caused by the absence of the fundamental non-negotiable human needs such as security, identity, respect, safety, and control.[14] Identity, in particular, is a human need that is singled out as a fundamental driver of deadly conflicts such as genocide and other mass atrocities.[15] When identities are threatened, people respond very negatively and take either defensive or often also offensive action to protect what they see as the essence of themselves. The consequences of these conflicts are huge and negative as they mostly lead to genocide and mass atrocities.

The proliferation of defective democracies

Rational choice institutionalism emphasises that political action involves the management of uncertainty, and that the free flow of information is very important for the smooth management of power relations and stable political outcomes.[16] It emphasises effective and efficient democratic institutions and accountability of democratically elected governments.

One of the major challenges facing African countries and also a threat to the implementation of the responsibility to protect and article 4(h) is the consolidation of democracy. Africa still has the proliferation of defective democracies that do not adhere to the basic tenets of democracy including transparency and accountability. Democratic institutions remain weak in the face of unrestrained presidential/executive powers.[17] On the other hand, most African countries have constitutions that provide too much presidential/executive powers that control most lucrative government contracts such that politics is seen as the only way to gain access into

13 This was the case in Rwanda genocide in 1994, in Kenya post election violence in 2007, in the ongoing conflict in Democratic Republic of Congo, Sudan, Darfur, South Sudan just to mention a few.

14 J Burton *Conflict: Human needs theory* (1993). See also EH Kelman *International behavior: A social psychological analysis* (1980).

15 J Rothman *Resolving identity-based conflicts in nations, organizations, and communities* (1997). See also JP Lederach *Building peace: Sustainable reconciliation in divided societies* (1998).

16 P Hall & RCR Taylor 'Political science and the three new institutionalisms' (1996) 44 *Political Studies* 951.

17 M Bratton & E Masunungure 'Zimbabwe's long agony' (2008) 19 *Journal of Democracy* 41. See also MJB Phiri 'The dying democracy: Unrestrained presidential powers and weak democratic institutions in Malawi' Think Tank Discussion Paper, June 2013.

government economic confers.[18] This is further exacerbated by the unchecked presidential powers in chieftaincy administration and appointment of senior officials in the judiciary, security sector and treasury that further patronage politics, and tolerates little oversight of the executive.[19]

The presidential powers in chieftaincy administration push many traditional chiefs into partisan politics against a common perception that they should be politically neutral. For instance, in Malawi, the President enjoys 'excess of legal authority and discretion over chiefs that translates into coercive power and legitimizes a patrimonial logic that now characterizes the relationship between the President and chiefs.'[20] Under the Chiefs Act, the President is at liberty to alter territorial boundaries of any chieftaincy and to create new offices of paramount chief, chief or sub-chief; the President may appoint to the office of paramount chief or chief such person as he or she shall recognise as being entitled to that office.[21] The threat to political manipulation is that there are no guidelines anywhere on how the President must determine any of the issues over which he or she is granted authority and discretion. 'Ultimately, the survival of any chieftaincy depends on the incumbent chief becoming a personal retainer of the president which is a fundamental feature in patrimonial politics.'[22]

Politicisation of ethnicity, electoral management and bad governance

Another challenge facing many African countries including what happened in Kenya in 2007 and Rwanda in 1994 is that politics remains divided along ethnic lines that provide ethnic voting blocs; including politicisation of ethnicity that affects the allocation of government resources, lack of genuine land reforms, lack of credible elections management, corruption, non-adherence to the rule of law, a centralised and highly personalised form of governance, and a 'winner-takes-all' form of politics.[23] Ethnicity has been a key driver in elections with political leaders thrashing up ethnic emotions among the electorate, thus being the precursor to violence. Ethnic conflicts have played themselves in various forms in countries such as Kenya, Nigeria, the Democratic Republic of the Congo, Ghana, Rwanda, Sierra Leone, Uganda, Malawi and Sudan.[24]

18 As above.
19 Bratton & Masunungure (n 17 above); see also H Chingaipe *Reflections on democracy in Malawi* (2012) 1.
20 Chingaipe (n 19 above).
21 Chiefs Act, Chapter 22:03 of the Laws of Malawi.
22 Chingaipe (n 19 above).
23 AB Halakhe 'R2P in practice: Ethnic violence, elections and atrocity prevention in Kenya' (2013) *Global Centre for the Responsibility to Protect Occasional Paper Series No 4*.
24 J Mapuva 'Elections and electoral processes in Africa: A gimmick or a curse?' (2013) 5 *African Journal of History and Culture* 87.

The Kriegler Commission in Kenya found that what triggered the 2007 violence was the perceived rigging of election results.[25] In Zimbabwe, militarised electoral authoritarianism has always guaranteed a Zimbabwe African National Union – Patriotic Front (ZANU PF) win where the electoral process has been fraught with complexities such as voter intimidation, allegations of rigging as well as electoral violence.[26] Most importantly, with the recent peaceful elections in Nigeria in 2015 as an outstanding exception, the period of elections on the African continent has mostly been one of uncertainty, threats, and possible death, and it is often characterised by harassment and intimidation of political opponents by politicians who seek to legitimise the illegitimate practice of coercing citizens into voting for them on the backdrop of rampant electoral rigging.[27]

Urban youth unemployment

Urban youth unemployment in Africa remains one of the most visible contemporary problems that perpetuate mass atrocities and need immediate attention. The developing world continues to feature the fastest growing numbers of youth unemployment and persistent rural-to-urban migration.[28] According to the 2013 United Nations Development Programme (UNDP) report, about 60 per cent of the African population is living below the US$2 a day income poverty line, and 21 per cent below the US$1 a day poverty line, and youth poverty is very high with most of them belonging to the 'working poor' category with unskilled and insecure jobs. The youth bulge in African urban areas presents a unique opportunity for economic growth. However, it also provides a fertile ground for recruitment of the youth that further violence.[29] The paramilitary wings of most ruling political parties are dominated by the urban unemployed youth who are used to instigate political fear and intimidation among the populace.[30] Most mass atrocities in Africa have developed as a result of a

25 For example, the 2007 voter lists reportedly had over one-million 'ghost' voters on them, delays in the announcement of results, a proliferation of unofficial results from different media houses coupled with ambiguous statements by officials from the Electoral Commission contributed to a dramatic rise in tensions in Kenya in 2007 and Malawi in 2014 elections. See B Muindi '2007 register had 1.2m dead voters: IEBC' *Daily Nation* 16 January 2013 available at http://elections.nation.co.ke/news/2007-register-had-1-2m-dead-voters/-/1631868/1667512/-/e1nv84z/-/index.html. (accessed 30 May 2014).

26 Bratton & Masunugure (n 17 above).

27 Mapuva (n 24 above).

28 United Nations Habitat State of urban youth report 2012-2013: *Youth in the prosperity of cities:* Nairobi (2013).

29 These youths are manipulated for a mere packet of beer. See TC Kumwenda 'Mzuzu city youth told to be disciplined during 2014 polls' *The Nation Newspaper* 12 September 2013. http://www.africanelections.org/malawi/news/page. (accessed 6 June 2014). See also '5 DPP Cadets out on bail' *The Online Nation Newspaper* (27 July 2012).

30 Halakhe (n 23 above) 5; see also '5 DPP Cadets out on bail' *The Online Nation Newspaper* 27 July 2012.

combination of these structural factors and failure to address these key factors will make conflict prevention difficult to attain.

Conflict prevention and protection of civilians: The case of 2007 post-electoral violence in Kenya

Institutional weaknesses

The Kenyan deadly post election violence in 2007 rose to the level of crimes against humanity according to the International Criminal Court (ICC).[31] It exposed some generic African institutional weaknesses that need to be examined to prevent further recurrence of mass atrocities in Africa. It is argued that

> the very institutions charged with managing the 2007 elections, adjudicating disputes and providing security, contributed to a potentially violent environment. Weak governmental institutions that were susceptible to [political] interference, coupled with a culture of impunity for past electoral violence and incitement, created conditions under which widespread mass atrocities could occur.[32]

'All forms of media were implicated in creating an environment of violence including short message service (SMS) urging violence were widely circulated.'[33]

Quoting the Report of the Waki Commission, Abdullahi Boru Halakhe indicates that

> some police refused to intervene to protect victims of ethnic attacks, resorted to disproportionate force when they did disperse crowds and sometimes carried out extra-judicial killings. The police reportedly killed one third of the victims who died in the post-election violence.[34]

He further observes that the police in Kenya had a history of being used by senior government officials to intimidate opponents. As a result, many Kenyans viewed the police as corrupt, ineffective and unable to protect

31 Halakhe (n 23 above).
32 Halakhe (n 23 above) 5.
33 Halakhe (n 23 above) 10.
34 CIPEV 'Report of the Commission of Inquiry into the Post-Election Violence' 55, 345. According to the Commission, 'gunshots accounted for 962 casualties out of whom 405 died. This represented 35.7 per cent of the total deaths, making gunshot the single most frequent cause of deaths during post-election violence.' The Commission received no evidence to suggest that the gunshots came from a source other than the police.

them.[35] Similar observation is made in such countries like Malawi, Zimbabwe, Nigeria, Uganda and Sudan.[36]

Inefficient and ineffective judiciary

According to Halakhe: 'A functioning judiciary that respects the rule of law, ensures accountability and serves as a mechanism for peaceful dispute resolution is a critical component of a state's infrastructure for preventing mass atrocities and upholding the responsibility to protect. In Kenya, prior to 2013, the judiciary failed to fulfill this role.'[37] Prior to 2007, the President controlled the appointment of senior judges. As a result, this had made questionable the impartiality of the judges.[38] Abdullahi Ahmednassir indicates that 'corruption and the ritual selling of justice as an economic commodity to the highest bidder had, in the process, became a defining feature of the Kenyan judiciary.'[39] As a result, when the opposition candidate Raila Odinga and his party, the Orange Democratic Movement (ODM), disputed the outcome of the 2007 election, they did not turn to the courts. Instead, they encouraged their supporters to take to the streets to voice their displeasure.

The Kriegler Report indicates that ODM leaders distrusted the judiciary because they did not believe that judges appointed by the then President Mwai Kibaki could be impartial towards Odinga.[40] Statistics indicate that following the 2007 unrest, public confidence in the judicial system had declined from 55 per cent in 2007 to 36 per cent by 2008. By April 2009 public trust had further eroded, with only 27 per cent of Kenyans expressing confidence in the judicial system.[41] 'A key component of upholding the responsibility to protect is ensuring that those who aid, incite or perpetrate mass atrocities are held accountable for their actions. The Kenyan government had failed to fulfill this responsibility.'[42] Halakhe argues that failures to confront impunity for past crimes served as a catalyst for electoral violence in Kenya since the introduction of multi-party

35 The Kenya National Dialogue and Reconciliation Monitoring Project, 'Kenya's 2013 general election: A review of preparedness' February 2013. Amnesty International 'Police reform in Kenya: "A drop in the ocean."'

36 Mapuva (n 24 above).

37 Halakhe (n 23 above) 12.

38 As above.

39 A Abdullahi 'Restoring public confidence in Kenya's discredited, corrupt, inefficient and overburdened judiciary: The Judicial Service Commission's agenda for reform' (2011) 11 *Kenya Law Journal,* available at http://www.kenyalaw.org/kl/index.php ?id=1930 (accessed 30 June 2014).

40 Government of Kenya, Independent Review Commission (IREC/Kriegler Commission) 'The 2007 elections in Kenya: Independent Review Commission report.'

41 S Crabtree & B Tortora 'Lacking faith in judiciary, Kenyans lean toward The Hague' Gallup 5 August 2009, available at http://www.gallup. com/poll/122051/lacking-faith-judiciarykenyans-lean-toward-hague.aspx (accessed 20 May 2014).

42 n 23 above, 14. See also Human Rights Watch 'Turning pebbles: Evading accountability for postelection violence in Kenya' 2011 25 http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf (accessed 10 June 2014).

elections in 1991, and since 2007, there has been little attempt to prosecute those who allegedly bear the greatest responsibility for mass atrocity crimes perpetrated after the elections.[43] Several factors that have contributed to this include lack of detective and policing skills in gathering evidence and finding witnesses.[44] The former UN Secretary-General, Kofi Annan, highlighted the important role that accountability plays in preventing mass atrocities noting that, 'the people of Kenya want to see concrete progress on impunity. Without such progress, the reconciliation between ethnic groups and the long-term stability of Kenya is in jeopardy'.[45]

The Kenyan case shares significant identical characteristics with Malawi and Zimbabwe in Southern African Development Community (SADC) and so many other countries outside the region:[46]

> The criminal justice systems have failed or are unwilling to apply the laws of the countries fully and impartially in bringing all perpetrators of politically motivated violence to book. To date perpetrators of [electoral violence] and human rights violations walk scot free … [and] this perpetuation of the culture of impunity has seen people losing confidence in the criminal justice system and political processes.

Conflict prevention mechanisms within the framework of the responsibility to protect

There have been many generic calls for strengthening the prevention of genocide, war crimes, and mass atrocities. For example, Jentleson argues that conflict prevention has four principal bases. The first is the purposive nature of conflict interactions. The second is the availability of early warning. The third is the availability of opportunities for meaningful

43 See Human Rights Watch 'Turning pebbles: Evading accountability for postelection violence in Kenya' 2011 25, available at http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf. (accessed 10 June 2014). Human Rights Watch reported in April 2013 that they were aware of only seven convictions for crimes perpetrated during the 2007 post-election violence. See also n 23 above, 14.

44 For instance, in an infamous case, lack of evidence resulted in the acquittal of a policeman charged with killing two unarmed protesters even though the killings were filmed and broadcast on national television. See Human Rights Watch 'Kenya Q&A on the ICC trial of Kenya's Deputy President' 2 September 2013, available at http://www.hrw.org/news/2013/09/01/kenya-qa-icc-trial-kenya-s-deputy-president (accessed 15 June 2014). See also n 23 above, 14.

45 X Rice 'Annan hands ICC list of perpetrators of post-election violence in Kenya' *The Guardian*, 9 July 2009.

46 The Zimbabwe Europe Network (ZEN) and its National Reference Group; Crisis in Zimbabwe Coalition, National Association of Non Governmental Organisations (NANGO), Zimbabwe Human Rights NGO Forum and Zimbabwe Congress of Trade Unions (ZCTU) 'Zimbabwe's Global Political Agreement Implementation: 4 Years on at Best Faltering ... at Worst Failing …' *Report Marking 4th Anniversary of the signing of the Global Political Agreement,* 15 September 2012 4. See also Mapuva (n 24 above).

response strategies. The fourth is the unavoidability of international action.[47] Institutions are, therefore, lead actors in specific activities that advance human security, alleviate poverty, increase respect for human rights, foster good and stable governance, and contribute in one way or another to long term stabilisation and the prevention of breakdown and violence.

Conflict prevention approaches within the African context requires a country specific approach through national peace architecture framework and constitutional reforms aimed at strengthening democratic institutions, and building a culture of peace. A stronger focus on prevention requires commitment and provision of resources to strengthen preventive capabilities and facilitate the development of strategies for prevention. Prevention of crisis eruption requires willingness to act earlier through diplomatic, humanitarian and other peaceful means. The question that remains is on how to prevent violence before it erupts. There is no easy solution to this; therefore, the appropriate combination of different measures is important.

Reinforcing conflict early-warning system and its implementation

Strengthening the country's capacity for early warning

There is a consensus in literature that an effective and interconnected global and regional early-warning system leading to early action is still missing in the prevention of mass atrocities. For example, Neubert observes that 'the establishment of an effective early-warning system constitutes a structural necessity as well as a fundamental challenge to swift responses to R2P situations.'[48] Strengthening the country's capacity for early warning cannot be over-emphasised in conflict prevention. In his contribution, Bellamy notes that '[s]tates cannot resist early action and then complain when situations get so bad that they require external intervention.'[49] Unfortunately, in too many cases only extremely urgent and dire humanitarian situations have led to decisive action, while lower-scale conflicts or less dramatic humanitarian situations usually do not create enough political momentum for concerted action.[50]

47 BW Jentleson 'The realism of preventive statecraft' in A Schnabel & D Carment (eds) *Conflict prevention: Path to peace or grand illusion*? (2003).

48 C-W Neubert 'Preventive R2P measures' in M Brosig (ed) *The responsibility to protect – From evasive to reluctant action? The role of global middle powers* Hanns Seidel Foundation, Konrad-Adenauer-Stiftung, Institute for Security Studies, South African Institute of International Affairs, Johannesburg, South Africa (2012) 116.

49 A Bellamy 'R2P dead or alive?' in Brosig (ed) *The responsibility to protect – From evasive to reluctant action? The role of global middle powers* 22.

50 Neubert (n 48 above). See also Bellamy (n 49 above).

Access to real-time information and assessment

The challenge in many conflict scenarios is that the period between detecting a potential conflict and its eventual outbreak is brief; hence, the window of opportunity for preventive measures is usually short. Early warning requires access to real-time information and assessment. The creation of the national Conflict Early Warning and Response Unit (CEWERU), designed to improve the government's capacity to respond in a timely and effective way to prevent imminent violence is one plausible strategy implemented by Kenya in the prevention of mass atrocities following the 2007/8 post-election violence. Through its national peace architecture, the country established district peace councils and CEWERU's 'Amani Kenya @ 108' website for the public to report any conflict indicator elements on social media and short messaging service (SMS) behaviour.[51] The local non-governmental organisations (NGOs) like PeaceNet, a coalition of grassroots organisations, launched the 'Uwiano platform for peace'[52] which is aimed at improving early warning information sharing, sensitising the media on conflict reporting, and strengthening local mediation capacities.[53]

The Kenyan experience indicates that state and civil society efforts that were undertaken to strengthen the capacity of civil society and district peace councils in early warning contributed to the prevention of violence during the 2013 elections.[54] However, the likely challenges that will be met in most African countries will be developing effective early-warning and information gathering instruments and access to real-time information. With the proliferation of mobile phones in Africa today, the use of short message service (SMS) can be implemented to effectively generate an early warning system through national peace and security structures. This can reinforce the traditional sources of information such as cultural, economic, political and military. This would also ensure that the regional security apparatus are continuously made aware of any emerging conflict and that

51 Conflict Early Warning Response Mechanism 'Kenya launches a national early warning and response mechanism' 25 November 2010 available at http://cewarn.org/index.php?option=com_content&view=article&id=103:kenya-launches-its-national-early-warning-and-responsemechanism&catid=1:latest-news&Itemid=82 (accessed 22 July 2014).

52 United Nations Development Programme 'Uwiano platform: A multistakeholder strategy for peaceful elections' available at http://www.undp.org/content/kenya/en/home/operations/projects/peacebuilding/uwiano-peace-platform-project.html. (accessed 22 July 2014) 1.

53 JH Ndeta 'Uwiano: 2012 elections conflict prevention strategy unveiled' Peacenet Kenya available at http://www.peacenetkenya.or.ke/index.php?option=com_content&view=article&id=208:uwiano-2012-elections-conflict-prevention-strategyunveiled&catid=3:newsflash# (accessed 30 June 2014).

54 United Nations Development Programme 'Consolidating the peace processes and establishing foundations for a successful political transition in Kenya: 2010-2013' available at http://www.undp.org/content/kenya/en/home/operations/projects/peacebuilding/consolidating-the-peace-processes-and-establishing-foundations-f/ (accessed 20 June 2014).

the situation is promptly brought to the attention of the international community.

The early-warning system requires strong institutional and political allies if it is to achieve its goals. It must be noted that the same SMS have been used in Kenya to perpetuate violence and to tackle this problem the Kenyan government partnered with mobile service providers to monitor SMS and block offensive material.[55] Recognising that hate speech had migrated online to social platforms like Twitter, Facebook and internet message boards, the National Cohesion and Integration Commission (NCIC) also developed guidelines for social media use and closely monitored various platforms. The success of the government's effort was enhanced by civil society and the donor community. For instance, *Umati* established by the Nairobi-based Ushahidi online early warning organisation was created in September 2012 to monitor hate speech online and find strategies for countering it.[56] Through its partner organisation, *Nipe Ukweli* (give me truth) outreach was done to counter incitement messages.

Preventive responsibility to protect (R2P): Strengthening democratic institutions

Professionalisation of the police and procurement of right policing equipment

Strengthening democratic institutions that punish atrocity crimes and promote accountability and transparency is one way of ensuring prevention of mass atrocities in Africa. In the years between the 2007 and 2013 elections, the Kenyan government, with the assistance of international donors, took steps to address institutional deficits and uphold its responsibility to protect. This is in contrast to the Zimbabwean case, where its Global Political Agreement (GPA) has achieved minimal democratic reforms.[57] Apart from ensuring accountability, long-term preventive efforts focused on reforming institutions within the security sector, judiciary and electoral commission, is one of the best routes to preventive R2P. The Kenyan 2010 Constitutional review has demonstrated that institutional review can mitigate the structural drivers of

55 The ability to monitor SMS was facilitated by the Communications Commission of Kenya requiring all mobile phone users to register their SIM cards between June 2010 and November 2012.

56 United Nations Development Programme,'Consolidating the peace processes and establishing foundations for a successful political transition in Kenya: 2010-2013' http://www.undp.org/content/kenya/en/home/operations/projects/peacebuilding/consolidating-the-peace-processes-and-establishing-foundations-f/ (accessed 20 June 2014).

57 M Mutisi 'Beyond the signature: Appraisal of the Zimbabwe Global Political Agreement (GPA) and implications for intervention' *The African Centre for the Constructive Resolution of Disputes (ACCORD)*, issue 4 March 2011.

conflict and build trust of the broader public and further the implementation of the responsibility to protect.[58] Police reform was an essential means of strengthening the rule of law. The National Task Force on Police Reforms established in 2009 to audit the conduct of the police during the post-election violence led to the establishment of the legal and institutional framework for a more independent police.[59] However, professionalisation of the police must be coupled with procurement of right policing equipment to ensure that the government is able to uphold its responsibility to protect.[60]

Reform and independence for key governance institutions

Another significant step taken in the 2010 constitutional review in Kenya is the reduced power of the President while creating more independence for key institutions, including the judiciary and the police. It laid the foundation for good governance and moved away from inequitable development based on ethnicity.[61] The electoral reforms also helped lessen the risk of widespread violence in 2013. The 2010 Constitution removed control over the appointment of senior electoral officials from the Office of the President and established oversight mechanisms to counter concerns over corruption. Through judicial reforms, reviews to restore public confidence in the courts and the Judicial Service Commission were re-constituted to help provide oversight of the judiciary.[62] Kenyan experience demonstrates that improving access to the courts and the responsiveness of the judicial system, including building the capacity of the courts to adjudicate cases in a timely manner is another way of conflict prevention in Africa. The appointment of credible public officers in the justice system strengthened public confidence in the judiciary.[63]

58 Kenya Human Rights Commission 'Lest we forget: The faces of impunity in Kenya' August 2011, http://www.khrc.or.ke/ media-centre/news/98-the-faces-of-impunity-in-kenya.html (accessed 2 August 2014); See also Amnesty International 'Police reform in Kenya: "a drop in the ocean"' January 2013 8 https://doc.es.amnesty.org/cgi-in/ai/BRSCGI/Kenya_AFR_32_001_2013?CMD=VEROBJ&MLKOB=322054 0010 (accessed 12 August 2014). Human Rights Watch 'Kenya: End police use of excessive force' 13 January 2008 http://www.hrw.org/news/2008/01/12/kenya-end-police-use-excessive-force. (accessed 12 August 2014).

59 The laws were the National Police Service Bill, National Police Service Commission Bill, Independent Policing Oversight Authority Bill, National Coroners Bill and Private Security Industry Regulation Bill. See n 23 above, 11.

60 K Omeje & JM Githigaro 'The challenge of state policing in Kenya' (2012) 7 *The Peace and Conflict Review* 64.

61 Halakhe (n 23 above) 14.

62 Halakhe (n 23 above) 13.

63 A poll taken in 2012 indicated that 84 per cent of Kenyans had confidence in the judiciary, indicating that these measures helped to dramatically improve public perceptions. It is observed that the change of perception is further demonstrated by the Odinga's gesture of taking the 2013 electoral dispute to court instead of the streets and his respect of the court's decision. See 'Poll: Kenyans have confidence in CJ, judiciary' *Standard Digital* 3 October 2012, available at http://www.standardmedia.co.ke/?articleID=2000067533&story_title=poll-kenyans-have-confidencein-cj-judiciary&pageNo=2 (accessed 22 June 2014).

According to Halakhe, the judicial reforms undertaken by the Kenyan government were 'the most effective investment in preventing mass atrocities made in the period between the 2007 and 2013 elections. By strengthening the independence and impartiality of the highest courts in Kenya, the country established a viable peaceful dispute resolution mechanism and ... [n]o such credible institution existed in 2007'.[64] Reforms were also focused on managing Kenyans' perceptions of the election process and strengthening accountability of the electoral system in upholding the government's responsibility to protect. Yet, these reforms are only the first step in a longer process of preventive engagement that the Kenyan government and the wider African community can emulate to avoid future mass atrocities.

Reducing youth unemployment

Employment opportunities remain very minimal for the youth leaving educational institutions in most African countries and this creates social upheavals that are easily exploited to promote mass atrocities by selfish politicians. Thus, interventions must focus more on improving the overall economic and labour market performance. There is need for attracting Foreign Direct Investment and diversifying employment opportunities for youth and long-term investment in human capital through technical education to increase youth skills development. Hence, youth-specific interventions should be implemented for a smooth transition from school to the labour market, and to help the youth realise their full potential. These interventions would have long-term benefits to the economic growth of the country as they will lead to the expanded market base and create conflict prevention measures.

Similarly, the Kenyan government launched the '*Kazi Kwa Vijana*' (Work for Youth) program, which reportedly helped 200 000 to 300 000 people, mostly youths, in Kenya find employment between 2009 and 2010.[65] Another project, led by the UN in conjunction with the NCIC, Google Kenya, the Electoral Commission and Kenyan football leagues, involved a 'Sports 4 Peaceful Elections Campaign' to reach out to youth online, urging them to adopt a 'sportsmanship' approach to the elections. The *'Tia RwabeZi*' (Say No to 200 Kenyan shillings) project worked with youths in informal settlements to discourage them from taking bribes to

64 Halakhe (n 23 above) 14.

65 Organisation for Economic Co-operation and Development, Development Assistance Committee 'Kazi Kwa Vijana: Youth empowerment in Kenya' www.oecd.org/dac/povertyreduction/48869464.pdf (accessed 1 August 2014). See also J Omolo 'Youth employment in Kenya: Analysis of labour market and policy interventions' FES Kenya Occasional Paper No 1, October 2012 available at http://www.fes-kenya.org/media/publications/2012/FES%20Occasional%20paper%20no.1.pdf (accessed 1 August 2014).

attack opponents during the election.[66] These measures were aimed at engaging the youth and dissuade them from perpetrating violence.

Developing national peace architecture

Following the devastating post-election violence in 2007/2008, the Government of Kenya committed to developing a National Policy on Peace-building and Conflict Management (The Peace Architecture). The policy notes that 'whether responding to humanitarian needs or root causes of conflict, a fundamental problem in Kenya has been lack of an institutional framework and coordinated approach to conflict management.'[67] The intention of the Kenya National Policy Framework is to

> refocus peace-building and conflict management efforts and practices towards measures that increase the potential for peaceful coexistence and human security as precursors for sustainable development and a just and peaceful society.[68]

In Zimbabwean politics and society, it is noted that the violent conflicts both at community and national levels have festered and escalated in the absence of clear mitigation mechanisms supported by structures to deal with such occurrences, in a timely manner, before violence erupts.[69] The examples of Kenya and Zimbabwe cited above promote internal structural systems, programmes, and activities that result in impactful short-term outputs and long-term outcomes in peacebuilding and implementation of preventive R2P. Katharina Wolf argues that there is the absence of a localised and regionalised understanding of the responsibility to protect in local institutions and non-governmental organisations like universities, social agencies, and religious groupings.[70]

Norm-localisation points to the legitimate concern that internationally imposed solutions to local problems may face domestic resistance as they lack regional legitimacy and local competences to leave a lasting positive impact. A lack of local ownership can be counterproductive for conflict prevention strategies in Africa. The opportunities for local engagement can

66 M Gathigah 'Kenya: Slum dwellers say "no" to blood money' *Interpress Service* 10 January 2013, available at http://allafrica.com/stories/201301110766.html. (accessed 5 August 2014).

67 National Steering Committee on Peace Building and Conflict Management 'Peace forums' available at http://www.nscpeace.go.ke/nsc/index.php/peace-structures/peace-forums (accessed 10 June 2014).

68 As above.

69 Further, the Global Political Agreement, through the Section on the 'Promotion of Equality, National Healing, Cohesion and Unity' suggested a possible basis for developing an infrastructure for peace – and especially the clause 'shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post-independence political conflicts.'

70 K Wolf 'R2P – A case for norm localisation' in Brosig (ed) (n 49 above) 111-113.

be diverse, and include raising awareness, empowering individuals, strengthening resistance movements, engaging local authorities and devising strategies for civil defence instruments and local mediation.[71] All these remain under-explored at present. However, formalisation and institutionalisation of the responsibility to protect and article 4(h) is no guarantee of political action.

Conclusion

Protection of civilians against mass atrocities and conflict prevention in Africa require a thorough discussion that will address long term root causes of conflicts, address democratic institutional deficits, and overcome the culture of impunity where perpetrators of past violence are not held accountable for their actions. Governments, civil society, and international partners must reinforce these efforts with a deeper commitment to the consolidation of democracy. The Kenyan example reveals how investment in non-coercive measures like strengthening the rule of law and tackling country specific structural problems can help prevent atrocities when reforms are undertaken in a credible manner, with sufficient resources and international support. The reforms undertaken in Kenya between 2008 and 2013 were government-driven with financial and technical support from international partners, and also supported by civil society and the broader Kenyan population.[72] Conflict prevention efforts undertaken in Kenya are a successful example of the responsibility to protect in practice and must be emulated in the African continent. Attempts to strengthen the civil society ability to operate effectively in supporting preventive efforts will help to uphold African governments' primary responsibility to protect.

Policy recommendations

The following are some of the policy recommendations from this discussion:

(1) Strengthening democratic institutions and the rule of law; African governments must focus on reforming institutions within the security and judicial sectors, and electoral commissions in a credible manner so as to gain public confidence.

(2) Constitutional reviews that will reduce the presidential oversight powers over key institutions like security and judicial sectors, and

71 As above.
72 United Nations Development Programme 'District Peace Committees' available at http://www.undp.org/content/kenya/en/home/operations/projects/peacebuilding/districtpeace/ (accessed 22 June 2014).

electoral commissions, while increasing parliamentary oversight powers and other credible democratic institutions.

(3) Developing National Peace Architecture; this discussion acknowledges the diversity of root causes of conflicts in Africa and therefore, recommends for the country specific national peace architecture that will address country specific structural causes of conflict and promote the culture of peace.

(4) Strengthening the country's capacity for early warning; there is a need for effective and interconnected global, regional and national early-warning system leading to early action in the prevention of mass atrocities.

(5) Reducing youth unemployment through skills development and creating conducive conditions for youth entrepreneurship; at the same time there must be clear consequences for those politicians who recruit the youth and incite violence.

(6) Eradicating the culture of impunity within the political elites through credible criminal justice system and political processes.

CHAPTER 16

THE ROLE OF THE UNITED NATIONS SECURITY COUNCIL IN PROTECTION OF CIVILIANS

Neville Dastoor and Dan Kuwali

Abstract: *The exercise of the veto power by the permanent members (P5) of the United Nations Security Council shows that the veto is legally, politically and morally problematic. The (ab)use of the veto powers by some P5s in clear cases of responsibility to protect (R2P) interventions, have resulted in calls for revision of the UN Charter to limit its use. As a way out, some P5s themselves have advanced progressive suggestions that they should agree to a responsibility to protect interventions, have resulted in calls for revision of the UN Charter to limit its use. As a way out, termed 'responsibility not to veto' (RN2V) requires that the P5 should make a commitment not to exercise the veto power in clear situations of mass atrocities. In this discussion, it is argued that the UN Security Council is duty-bound by its role in the maintenance of international peace and security to put on the agenda the revision of the UN Charter, in order to limit the use of the P5's veto power. The Security Council should also improve the responsibility to protect-activation foundations by enhancing its early warning monitoring capabilities, information consolidating capacity, and institutional focus on burgeoning mass atrocities.*

Introduction

In 2009, Dastoor lamented the lack of focus on developing an activation mechanism for the laudable norm of responsibility to protect.[1] The argument centered on the obvious observation that the self-interest considerations of states – namely, of the Permanent Members of the United Nations (UN) Security Council (P5) – stalled, hobbled, or wholly prevented mass atrocity responses, and that this reality was 'astonishingly absent from discussions about institutionalising and operationalising international responses to mass atrocity situations.'[2] The article suggested that an effective activation mechanism must be based on five premises:

1 NF Dastoor 'The responsibility to refine: The need for a Security Council Committee on the responsibility to protect' (2009) 22 *Harvard Human Rights Journal* 25.

2 Dastoor (n 1 above) 27. See also '"Responsibility while protecting": Are we asking the wrong questions?' Stockholm International Peace Research Institute 13 January 2013 http://www.sipri.org/media/newsletter/essay/Avezov_Jan13 (accessed 20 December 2013).

First, the international community, including the P5, wants to prevent mass atrocities. Second, for legal, political, and operational reasons, the UN Security Council must play the central role in any mass atrocity activation scheme.[3] Third, P5 veto reform – formally or functionally – is a non-starter for P5 acceptance.[4] Fourth, any solution must minimise the self-interest considerations and fears which have delayed or blocked needed responses in the past.[5] Fifth, any solution should 'improve the [UN Security Council's] early warning monitoring capabilities, information consolidating capacity, and institutional focus on burgeoning mass atrocities'.[6] These procedures are loosely referred to in this Chapter as R2P-activation foundations.

Noting the limited influence of the Special Adviser of the Secretary-General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect, in a 2009 article, Dastoor proposed a Security Council Committee on the Responsibility to Protect (R2P-SCC),[7] globally and expertly representative, tasked with monitoring mass atrocity situations before they explode and beyond their termination; issuing tailored, non-binding response recommendations to the UN Security Council throughout the situation's life-cycle; and consequently galvanising international support for appropriate responses.[8] More generally (and more importantly) the article called for alternate R2P activation proposals that forge a clear and necessary path between states inhibiting self-interests and their demonstrated desire to end mass atrocities.[9]

Six years later, the call remains unanswered. Within that same time span in Syria, thousands have died as the result of mass atrocities committed during peaceful protest and an ensuing civil war. Since 2011, China and Russia have jointly vetoed four UN Security Council resolutions targeted at quelling those atrocities. In 2015, civilians are assaulted on a massive scale by the very security forces which are supposed

3 '[The UNSC] is the only body under the UN Charter that possess the legal authority to use non-self-defense related force; therefore, its use of force authorizations carry a level of political legitimacy and it holds 'strategic leverage] over governments.' Dastoor (n 1 above) 30-31.

4 'Any proposals to modify the Security Council's decision-making process.must necessarily avoid suggesting reform of the P5 veto power, as such proposals will never be accepted', n 1 above, 31.

5 See n 1 above, 31.

6 As above.

7 See generally Dastoor, n 1 above.

8 n 1 above, 32, 48-54.

9 'To date, there has been an insufficient amount of scholarship and advocacy focused on activating the global collective conscience in spite of states' self-interests … There will be plenty of time in the future to discuss alternatives to Security Council led responses. However, right now, resources must be devoted to and intellectual energy spent on practical solutions that will increase the likelihood of Security Council involvement … The specific and hard work of Security Council change is never tackled and, consequently, the world has yet to see what results would come from such a concerted effort. It is time to steer the conversation in that direction, if not with the R2P-SCC proposal, then with another.' Dastoor (n 1 above) 61-62.

to protect them, and they were buried in mass graves. Yet, the international community is ambivalent to act decisively despite a clear intent by governmental forces and other quarters to commit mass atrocity crimes. This stalemate has prompted renewed focus on UN Security Council activation mechanisms in the face of mass atrocities.

The concept of the P5's 'responsibility not to veto' (RN2V);[10] elsewhere referred to as veto restraint) in the face of an independently validated mass atrocity has emerged as a favourite. However, as this Chapter argues, the proposal, as currently constructed, has little chance for P5 adoption and, even if accepted, would not lead to more effective collective responses. The proposal does not incorporate most of the five R2P-activation foundations[11] and instead, focuses almost exclusively on the process of how best to independently validate a mass atrocity and then shaming the P5 to action. Of the R2P-activation foundations oversights, the disregard of the role that self-interest plays in motivating vetoes is the most damning, especially given the legacy of the 2011, UN Security Council mandated intervention in Libya within the framework of R2P. The regime change sparked by the intervention, and the seemingly lack of an effective post-intervention plan, invoked states' worst fears of unconstrained, inconsistent and disingenuous interventions harboured with ulterior motives.[12] However, the RN2V is not fashioned to mitigate these fears so as to render vetoes unnecessary. Rather, the proposal simply demands changed voting behaviour despite those fears. Additionally, beyond RN2V's conceptual shortcomings, the proposal is littered with numerous other deficiencies that render it an unappealing course of action to pursue.

This Chapter sets forth the RN2V proposal before analysing its shortcomings. The Chapter argues that the R2P-SCC proposal, or similar strategic solutions stand a far better chance of actually fostering more effective mass atrocity responses.

10 SM Patrick 'Limiting the veto in cases of mass atrocities: Is the proposed Code of Conduct workable?' Remarks offered at a Sciences Po/PSIA conference on Regulating the Use of Veto at the UN Security Council in Case of Mass Atrocities, available at http://www.cfr.org/france/limiting-veto-cases-mass-atrocities-proposed-code-conduct-workable/p36019 (accessed 20 March 2017).

11 As fleshed out in subsequent sections, the proposal does not assume the P5 want to prevent mass atrocities; it in essence calls for veto reform; it fails to account for the self-interested concerns and fears of the P5 cause vetoes; and it does not improve the UNSC's institutional capabilities regarding mass atrocities.

12 S Adams 'Failure to protect: Syria and the UN Security Council' Global Centre for the Responsibility to Protect, Occasional Paper Series, No. 5, March 2015 available http://www.globalr2p.org/media/files/syriapaper_final.pdf ('The eventual toppling of the government of Muammar Qaddafi by forces that were mandated to conduct a civilian protection operation ignited a fierce debate at the UN about the relationship between R2P and "regime change."').

The 'responsibility not to veto' (RN2V) proposal

In 2013, French President François Hollande and his Foreign Minister Laurent Fabius revitalised an existing proposal of P5 'veto restraint' for UN Security Council resolutions addressing mass atrocities.[13] The proposal was offered in the wake of Russia and China vetoes to four UNSCRs since 2011 that addressed mass atrocities in Syria. Minister Fabius argued: 'It has taken more than two years and 120 000 deaths in Syria for the United Nations Security Council to finally cease being paralysed by vetoes and make a decision.'[14]

Simply, the proposal calls for a UN Security Council 'code of conduct' (vice an amendment to the UN Charter) in which the P5 agree to suspend their right to veto if 'required to make a decision with regard to a mass crime.'[15] The self-imposed code of conduct would automatically trigger if 50 or more UN member states referred a situation for investigation to the UN Secretary-General and if the Secretary-General subsequently determines that mass atrocities are occurring.[16] In an attempt to make it more palatable, RN2V allows for an exception in which P5 members can veto mass atrocity-focused UN Security Council resolutions 'where the vital national interests of a permanent member of the Council were at stake.'[17] The proposal is not more formally fleshed out, and civil society has called for France to lead refinement of, and advocacy for, the proposal, including continued articulation of its moral foundation and further specification of the mechanism that would trigger veto restraint.[18] Regarding the triggering mechanism, civil society suggestions include coupling the French's more than fifty state concurrence with certifications from the UN Office of the Special Advisors for the Prevention of Genocide and the Responsibility to Protect as well as the UN High Commissioner for Human Rights.[19]

The core objective of the RN2V proposal is to 'increase the political cost' to any P5 member who uses its veto in a mass atrocity case.[20] In other words, the P5 member which flouts the agreed upon code of conduct and vetoes an UN Security Council resolution targeted at a validated mass atrocity situation will face heavy scrutiny, shaming, and potential political

13 L Fabius 'A call for self-restraint at the UN' *The New York Times* 4 October 2013; see also Panel Presentation by Gareth Evans to International Conference on Limiting the Use of Veto at the UN Security Council in the Case of Mass Atrocities, Sciences Po, Paris, 21 January 2015. The concept of UNSC veto restraint was first most prominently articulated in a one-paragraph, cursory plea within the original 85-page 2001 ICISS R2P report. See *ICISS Report* 51.
14 As above.
15 As above.
16 As above.
17 As above.
18 See Evans (n 13 above); see also Adams (n 12 above).
19 Evans (n 13 above); Adams (n 12 above).
20 See n 13 above; Adams (12 above).

consequences from a united international community. To persuade the P5 to accept the RN2V's imbalanced transaction, the RN2V adoption strategy entails consolidating international consensus 'that there is a strong ethical case for veto restraint, that the practical need for it is real, and that a voluntary agreement is worth having despite the risk of back-sliding,' and then using that consensus as 'international pressure' on the P5. Holdout P5 members 'will find [it] hard to completely ignore'[21] the pressure and will face the lonely position of articulating 'why they feel the need to reserve their right to veto a resolution designed to halt the commission of crimes which are forbidden under international law.'[22] Formally proposed incentives for adoption also include the 'vital national interest' exception; potentially a built-in RN2V review schedule; and consideration of coupling RN2V with some (undefined) version of the 'Responsibility While Protecting' proposal 'which would require at least informal agreement on the way use-of force mandates are initially agreed and then monitored and reviewed by the [UN Security Council] during their lifetime.'[23]

RN2V is not a new concept. French Foreign Minister Hubert Vedrine first proposed such a code of conduct in 2001, and it was briefly mentioned that same year in the originating R2P report.[24] Various high-level UN panels subsequently discussed the proposal, and it was also raised by the independent Genocide Prevention Task Force led by former United States of America (US) Secretary of State Madeline Albright.[25] In September 2013 at the 68th opening of the UN General Assembly and against the backdrop of 120 000 dead in Syria, French President Hollande formally proposed RN2V, soon followed by Foreign Minister Fabius in a newspaper article published in *New York Times*.[26]

The proposal has garnered significant support. During some 24 meetings in various UN fora since 2008, 67 states have supported the proposal.[27] The idea has also gained momentum in civil society. Key protagonists of R2P and NGOs have expressed their solidarity and spearheaded initiatives to galvanise additional support.[28] Kuwali has added weight to such reasoning by arguing that

21 See n 13 above; see also Adams (n 12 above).
22 n 12 above.
23 See n 13 above.
24 International Commission on Intervention and State Sovereignty (ICISS), Gareth Evans & Mohamed Sahnoun Co-chairs, The Responsibility to Protect (Ottawa: IDRC, 2001) paras 6.19-21.
25 United States Institute for peace, 'Genocide Prevention Task Force Providing a Blueprint for U.S. Policymakers' available at http://www.usip.org/publications/genocide-prevention-task-force (accessed 26 January 2017).
26 See n 13 above.
27 See Global Centre for the Responsibility to Protect available at http://www.globalr2p.org/media/files/veto-restraint-references-1.pdf (accessed 18 April 2017).
28 See Adams (n 12 above).

> members of the Security Council are severally and jointly under an obligation to promote and protect human rights and humanitarian norms under the human rights and IHL treaties they are party to. These types of treaties impose on the parties who are also UN Members, a legal obligation to take all possible steps to thwart such mass atrocity crimes, protect the victims of such atrocities, and prosecute and punish the perpetrators of the atrocities.[29]

According to Kuwali, '[i]t is unlikely that the Security Council would block such an Article 4(h) [and R2P] enforcement action that is supported by a majority of [...] States in the face of mass atrocities.' He argues that '[t]here seems to be a duty to authorise such action by the Council because denial in cases of mass atrocity crimes would presumably contradict the principles and purposes in Arts 1 and 2 of the UN Charter.'[30] The P4 (P5 minus France) is far less enthusiastic, especially with regards to the RN2V initiative. The United Kingdom (UK) and the US have neither accepted nor spurned the proposal, potentially attributed to concerns that RN2V would fail to guarantee effective responses to mass atrocity.[31] Russia and China have rejected the proposal outright. In public statements, Russia bluntly stated that its veto is needed to check authorisation on the use of force by the UN Security Council that either render ugly situations uglier, or that mask more nefarious purposes like regime change, as it believes occurred in Libya.[32]

The shortcomings of the responsibility not to veto

The P5's equivocation (United Kingdom (UK)/United States of America (US)) towards and rebuff (Russia and China) of RN2V is unsurprising. The UK and the US are noncommittal, apparently, based on skepticism of the proposal's effectiveness, even if adopted.[33] Those concerns are valid and addressed below.

More fundamentally, Russia and China would never agree to adopt the RN2V proposal in the first place. Not only does the proposal expressly seek to limit their use of the veto (a non-starter), but it fails to address some of the core reasons (read: their self-interested fears and considerations) that they believe makes their veto indispensable. Most recently, regarding their

29 See HG Schermers 'The obligation to intervene in the domestic affairs of states' in AJM Delissen & GJ Tanja (eds) *Humanitarian law of armed conflict: Challenges ahead: Essays in Honour of Frits Kalshoven* (1991) 583-93, 588-93; B Lepard *Rethinking humanitarian intervention: A fresh legal approach based on fundamental ethical principles in international law and world religions* (2002) 263.

30 D Kuwali *The responsibility to protect: Implementation of article 4(h) intervention* (2011) 288-305.

31 Patrick (n 10 above).

32 Russian Delegate, UN Ministerial meeting 'Regulating the Veto in the Event of Mass Atrocities' September 2014 (unofficial transcript). See also R Gowan 'An unlikely push for Security Council members to give up their veto power' 24 September 2014, available at http://america.aljazeera.com/articles/2014/9/24/un-security-council veto.html (accessed 20 December 2014).

33 See n 10 above.

devastating vetoes of Syria-focused action, Russia and China have articulated these reasons, citing the legacy of the Libya intervention. Scar tissue from that experience remains. Correctly or incorrectly, Russia, China, and other non-P5 countries believe that the R2P-focused resolution was exploited by the West to effectuate regime change.[34] Moreover, criticism abound that the UN Security Council-authorised, NATO-led intervention in Libya in 2011 was superficially planned, uncontrolled, and shirked the post-intervention responsibility to rebuild a rudderless and fractured state.[35] According to the Russian Foreign Minister Sergey Lavrov, Russia will 'not allow the Libya experience to be reproduced in Syria'.[36] Apart from the Libya legacy, fears exist that certain conflicts in which mass atrocity situations are occurring are so intractable and have reached a level of such complexity that a UN Security Council resolution would jeopardise the realisation of a necessary political solution to the problem.

Notwithstanding these articulated barriers to meaningful UN Security Council action, the RN2V proposal ignores them. Instead of acknowledging P5 member's fears at face value, the RN2V proposal myopically disregards them, condemns the vetoes they elicit, and simply insists that such vetoes not occur again. This is not a recipe for adoption.

Despite the Syrian stalemate, history shows that no P5 member is inexorably opposed to preventing or responding to mass atrocities. Since 2005, the UN Security Council passed over 28 resolutions that directly referenced the R2P.[37] Russia and China voted for the vast majority of

34 Russian Delegate, UN Ministerial meeting 'Regulating the veto in the event of mass atrocities' September 2014 (unofficial transcript) n 10 above; See also Gowan (n 32 above); See Evans (n 13 above); Y Singh 'Selective use of R2P to secure regime change: India, 22 February 2012, available at https://getpocket.com/a/read/915086489 (accessed 20 March 2017).

35 Interview of Romeo Dallaire 'Catastrophes and Refinement of the Thrust' Global Brief 20 June 2013 www.globalbrief.ca (accessed 19 December 2013)('But for the record, there was never an attempt in the NATO-led intervention to prevent catastrophic disintegration of the political-security situation on the ground. Moreover, once Gaddafi was out of the exercise, there was and remains no serious attempt to re-establish order such that the country may be rebuilt. And to be sure, the country must be rebuilt if we are to avoid further catastrophes. But for the record, there was never an attempt in the NATO-led intervention to prevent catastrophic disintegration of the political-security situation on the ground. Moreover, once Gaddafi was out of the exercise, there was and remains no serious attempt to re-establish order such that the country may be rebuilt. And to be sure, the country must be rebuilt if we are to avoid further catastrophes'); Comments of EC Luck 'The evolution of humanitarian intervention' Session I: The State of Humanitarian Intervention, Council on Foreign Relations 24 October 24 2014 available at www.cfr.org (accessed 26 January 2017).

36 Lavrov quoted in A Bagdonas 'Russia's interests in the Syrian conflict: Power, prestige and profit' (2012) 5 *European Journal of Economic and Political Studies* 58 and 68, available at http://ejeps. fatih.edu.tr/docs/articles/159.pdf (accessed 19 December 2013).

37 Reference on the Need for Veto Restraint by the UN Security Council in Mass Atrocity Situations, Global Centre for the Responsibility to Protect available at http://www.globalr2p.org/media/files/veto-restraint-references-1.pdf (accessed 19 May 2016).

those. UN Security Council-authorised peacekeeping forces, including the unprecedented Force Intervention Brigade in the Democratic Republic of the Congo, have saved lives otherwise threatened.[38] The simple reality is that in some situations, P5 members allow issuance of the R2P-focused resolutions and in other situations, one or more member(s) of the P5 vetoes such resolutions. The goal for the R2P activation proponents is obviously to encourage the P5 to issue less R2P-related vetoes in the future.

The challenge of course is that P5 members veto particular resolutions due to specific fears and concerns (indeed, what they consider to be *legitimate* concerns) that in their estimation overrides any associated political costs. The Libya legacy crystallised those fears of mission creep and ruinous interventions: a UN Security Council-authorised intervention ended in the murder of a sovereign leader; the intervenors ended a bombing campaign, returned home, and an already deteriorating country descended into chaos and provided fertile ground for extremist organisations. Accordingly, P5 members will not freely adopt a R2P activation mechanism – the sole purpose of which is to escalate the existing political costs of the veto – if that mechanism does nothing to allay these actualised fears. Bluntly, the P5 members will need to believe that they are purchasing some assurances for voluntarily agreeing to pay more for their veto (that is, tacit agreement to veto less). Otherwise, they have no reason to agree to pay that cost.

The RN2V proposal does not offer a fair transaction. It is not designed to mitigate against mission creep, not fashioned to ensure sustained, comprehensive UNSCR-authorised responses that prevent bad situations from becoming worse. Indeed, in exchange for the P5 adopting a more expensive veto, the proposal offers nothing of value in return. The foundation for the proposal is essentially, nobly, and fatally, a moral one. RN2V stands on the basis that the P5 should agree to the veto restraint code of conduct because it is the right thing to do. It asks the P5 members, after much international persuasion and pressure and in a moment of great clarity (or shame), to admit that voting their conscious in the past has improperly blocked meaningful responses, and to consequently agree to accept a system that overtly is designed to make voting their conscious more difficult. For this increased price to exercise their legal right, the P5 receive nothing. Instead, the hiked cost is punishment for their past veto sins.

This proposal asks too much. It demands that the P5 disregard their real concerns simply because they *should*. In the Syrian context for

38 United Nations, 'Security Council Authorizes Mandate Renewal for United Nations Organization Stabilization Mission in Democratic Republic of Congo Security Council Authorizes Mandate Renewal for United Nations Organization Stabilization Mission in Democratic Republic of Congo', United Nations Security Council, 7659th Meeting, UN Doc SC/12307 available at https://www.un.org/press/en/2016/sc12307.doc.htm (accessed 26 January 2017).

example, the proposal's proponents likely foresee the following scenario: first, Russia and China veto Security Council resolutions authorising interventions under R2P (at least in part) on concerns flowing from the much-criticised intervention in Libya; second, the international community subsequently reaches consensus on RN2V and insists that such vetoes are always wrong and that they impede meaningful action; third, this international consensus exerts pressure on Russia and China; fourth, that pressure becomes so great that it causes Russia and China to agree to a blanket commitment not to veto future R2P-resolutions despite their continuing concerns stemming from the intervention in Libya; fifth, a validated R2P situation is presented to the UN Security Council; sixth, Russia and China honour their commitment and do not veto the corresponding resolution, despite their continued concerns stemming from the intervention in Libya.[39]

The hypothetical highlights the infeasibility of RN2V and its lack of strategic focus on affecting its desired outcome. Remarkably, its means and ends are nearly identical: P5 members agreeing to not use their veto in validated situations of mass atrocity (the means) will lead to the P5 members not using their veto in clear situations of mass atrocity (the ends).

Conclusion

The UN Security Council remains the only body with the mandate to decide on interventions into a sovereign state pursuant to articles 2(4), 2(7), 42 and 53 of the UN Charter. As the world's only multilaterally universal political body, the UN possesses a monumental role in providing collective legitimisation. Yet, by its very nature, the UN Security Council is often constrained from acting in ways that best serve those global norms.[40] Although the UN Security Council is the only organ mandated to authorise enforcement action under the Charter, it has failed to take adequate action in dire straits cases like Somalia in 1992-93, in Rwanda in 1994, in Bosnia-Herzegovina to prevent the Srebrenica massacre in 1995 and in relation to indecisive action in Darfur, and now in Syria.[41] In so doing, the UN Security Council has failed to, and is still failing to unite around the aim of confronting mass atrocity crimes against humanity on the scale of Syria.[42] By failing to act in time of need, the UN Security Council is 'betray[ing] the very ideals that inspired the founding of the

39 This means that if countries such as Russia China vetoes a R2P-UNSCR for a vital national interest, they may suffer some sort of tangible negative impact in terms of increased political cost.

40 See United Nations 'General Assembly supports Ban Ki-Moon's reform proposals for stronger UN' Press Release, 5 April 2007, available at http://www.un.org/apps/news/story.asp?NewsID=21883#.WIj4h49OJPY (accessed 26 January 2017).

41 Kuwali (n 30 above) 288-305.

42 See United Nations 'Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must be Cornerstone of Efforts to Promote International Peace in the Next Century' (Press Release SG/SM/6997, 18 May 1999).

[UN]'.[43] The international community's preference for some large-scale tragedies over others attests to the weakness in the UN Security Council.

The apparent use and abuse of the veto power by the P5 makes it clear that the veto is morally problematic and its use has resulted in calls for the revision of the Charter to limit its use, particularly in deciding on enforcement action to protect populations at risk of mass atrocities.[44] According to Kuwali, 'calling for amendment of the UN Charter in relation to the veto power is utopian in *lex lata* given that any UN Charter amendment is itself subject to the veto power.'[45] As a way out, therefore, some P5 members themselves have advanced progressive suggestions that the P5 may agree to a 'code of conduct' for using the veto with respect to actions needed to stop or avert significant humanitarian crises. This concept, termed RN2V, requires that the P5 should make a commitment not to exercise the veto power in clear situations of mass atrocities. The idea of what is termed 'constructive abstention' is that, in matters where their vital national interests are not involved, the P5 would not use their veto to obstruct the passage of what would otherwise be a majority resolution.[46] RN2V stands on the basis that the P5 should agree to the veto restraint code of conduct because it is the right thing to do. The UN Security Council is entitled to intervene, or to authorise intervention, in order to prevent or stop mass atrocity crimes.[47] It can be argued that the UN Security Council is duty-bound by its role in the maintenance of international peace and security, to put on the agenda – and then deal with – those crises that have been referred to it by the Secretariat as urgent. The UN member states, in particular the veto-holders, have a responsibility to enable the UN to fulfil its purposes under the UN Charter.[48]

Against this backdrop, therefore, it can be deduced that members of the UN Security Council are legally obligated to take some reasonable measures to prevent or stop mass atrocity crimes to the extent of, and within the boundaries of, their lawful powers under the UN Charter.[49] As a consequence of the political commitment to R2P and the legal obligation of article 4(h), the political costs of casting a veto in the UN Security Council in cases of emerging mass atrocity crimes are now significantly increased, and the international community generally appears to pay more

43 As above.
44 Lepard (n 29 above) 362-363.
45 Kuwali (n 30 above) 306.
46 International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Ottawa: International Development Research Council, 2001['ICISS Report] 51-3, See also JI Levitt 'The responsibility to protect: A beaver without a dam' (2003) 25 *Michigan Journal of International and Comparative Law* 153-77, 156, 170.
47 See WA Schabas 'The Genocide Convention at fifty' (1999) 6-7. See generally UNSC Res 688/1991, UN Doc S/RES/688/1991, 5 April 1991.
48 M Banda 'The responsibility to protect: Moving the agenda forward' United Nations Association in Canada (2007) 37, available at www.unac.org/en/library/unacresearch/2007R2P_Banda_e.pdf (accessed 17 May 2013).
49 See Lepard (n 29 above) 256-83.

attention to such situations than in the past. In endorsing the R2P and article 4(h)-intervention, UN member states have placed a significant responsibility on the UN Security Council and on its individual members, to take action to save humanity, and not political interests.[50]

50 See Kuwali (n 30 above) 291-292.

PART IV: LESSONS LEARNT IN PROTECTION OF CIVILIANS IN ARMED CONFLICTS

CHAPTER 17

PROTECTION OF CIVILIANS IN ARMED CONFLICTS IN WEST AFRICA

Buba Bojang

Abstract: *The Economic Community of West African States (ECOWAS) has all the necessary pillars; from legal framework and political will, to the institutional structures, to be able to translate the civilian protection doctrine into reality. However, there is a need to close some gaps in order to effectively protect civilians in the region from the scourge of armed conflicts. For example, by employing a progressive assessment method of a conflict with a comprehensive report of the situation and constantly updating such information; continually engaging the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) on the implementation of the key components of the civilian protection mechanism; adopting tailored programmes towards enhancing the capacity of militaries in the region on the protection of civilians that should include conducting mobile sessions in all participating countries; and establishing an effective civilian oversight mechanism to supervise and monitor troops to ensure accountability, especially where there is a failure to perform a specific legal duty to protect civilians.*

Introduction

Protection of civilians in times of armed conflicts (also in West Africa) can only be achieved where relevant international commitments are effectively translated into tangible outcomes. This is no doubt a process that *a fortiori* requires a comprehensive strategy for success. West Africa's image has been marred by numerous armed conflicts resulting in exceedingly brutal and shameful circumstances. The most notable conflicts in the sub-region have been in Côte d'Ivoire, Guinea Bissau, Liberia, Mali and Sierra Leone. In some of these conflicts, there have been serious human rights violations, such as hardship related to displacement due to the conflicts, sexual violence against women, recruitment of child soldiers, and the destruction of civilian property. Therefore, the sub-region has been and continued to be inundated with conflicts, thus making civilian protection an imperative, if lasting peace, stability and economic growth are to be achieved. With the exception of Mali, the Economic Community of West African States (ECOWAS) has intervened in all the above-mentioned conflicts, including the most recent intervention in the Gambia, presumably for the protection of civilians among other responsibilities,

through the instrumentality of its peace and security arm, ECOWAS Monitoring Group (ECOMOG).

This discussion explores the involvement of ECOWAS in the past and present, in order to make concrete recommendations on how to achieve efficient civilian protection in future armed conflicts in West Africa. To this end, the discussion investigates how ECOWAS has used or intends to use its military and other security and civilian apparatus for the protection of civilians in times of armed conflicts. The discussion also looks at the mechanisms through which such a lofty goal could be translated into action and how to overcome the challenges posed by such a task. To do so, the concept of civilian protection under international humanitarian law (IHL), the concept of the responsibility to protect, and humanitarian intervention are examined in order to determine their development and current status under international law. The discussion further analyses the concept of civilian protection with the right to intervene under article 4(h) of the Constitutive Act of the African Union (AU), the Revised Treaty of the Economic Community of West African States 1993 and the Protocol on the Mechanism for Conflict Prevention Management, Resolution, Peacekeeping and Security, 1999. The focus of this Chapter is on how ECOWAS has transposed this mandate into tangible outcomes for the protection of civilians in West Africa. Furthermore, the analysis exposes the challenges confronting this process and offers guidance, by drawing lessons and best practices from other regions or organisations, as appropriate.

Thus, the issues forming the basis of this discussion looks at the ECOWAS interventions in armed conflicts, from Liberia to Mali. The focus on the reasons for such intervention in terms of 'mandate', in order to determine the place of civilian protection in such mandates. The discussion also dwells on the imperative of intelligence and information gathering concerning the atrocities committed against civilians, prior to the formulation of mandate and intervention. Further, the discussion will determine whether the ECOWAS has the necessary framework to engage in the civilian protection arena and how, if any, such structures could be utilised to successfully translate the concept of civilian protection into tangible results for the peoples of West Africa. The Chapter concludes with some recommendations in order to enhance the protection of civilians in the sub-region in particular, and on the continent as a whole.

Protection of civilians is usually carried out in form of intervention where a state or for this purpose, a regional body intervenes in another state (member state) and is willing and able to use or threatened to use such force as necessary, and deploys its military force in that regard, to protect the civilian population from the scourge of armed conflict, where there has

been a large scale erosion of fundamental human rights including grave breaches of IHL and refugee law or an imminent threat thereof.[1] Protection of civilians has featured prominently in many international legal instruments, such as the Additional protocols to Geneva Conventions,[2] numerous resolutions of the United Nations General Assembly[3] and the Security Council,[4] and the AU Constitutive Act,[5] among others.

The concept of the protection of civilians gained momentum, through the adoption of the notion of responsibility to protect (R2P) in the World Summit Outcome Document, where the heads of state and government of the United Nations (UN) member states agreed that they have the primary responsibility to protect their respective populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and will take all necessary measures to do so.[6] Where a state is unable or unwilling to protect its populations under the first tier, the international community, through the UN and in cooperation with the relevant regional organisations, has agreed to assume the responsibility to protect such populations and will use appropriate means, including those under Chapter VII of the UN Charter.[7]

With the UN at its limit of elasticity in terms of its ability to deal with emerging challenges of financial constraints, political impasses, and lack of coordination among its various agencies, regional organisations must be ready to take charge of regional problems.[8] This is more so, considering the fact that homogeneity, awareness of collective problems, common identity, and proximity to conflict theatre are factors that augur well for regional management to regional crisis.[9]

Under the UN Charter, appropriate regional enforcement action is triggered at the instance of the UN Security Council.[10] Notwithstanding,

1 J Levitt 'Humanitarian intervention by regional actors in internal conflicts: The cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International & Comparative Law Journal* 335.
2 International Committee of the Red Cross *Protocols Additional to the Geneva Conventions of 12 August 1949* (ICRC 2010) art 51 of AD 1.
3 General Assembly Resolution 60/1 2005 World Summit Outcome 2005, A/RES/60/1 (2005 World Summit Outcome).
4 One such resolution is that which condemns the widespread attack on the civilian population in Libya and call for action against those responsible. See further, United Nations 'Security Council Resolution 1973 (2011)' available at http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf (accessed 4 March 2015).
5 Constitutive Act of the African Union (2000) art 4(h).
6 General Assembly Resolution 60/1 2005 World Summit Outcome (n 3 above).
7 n 3 above, para 139.
8 M Hert 'Regional governance' in TG Weiss & R Wilkinson (eds) *International organization and global governance* (2014) 244.
9 Hert (n 8 above) 241.
10 Charter of the United Nations and Statute of the International Court of Justice 1945 art 53.

the former UN Secretary-General Boutros-Boutros Ghali acknowledged in his *Agenda for Peace* (1991) that, while the Security Council would keep its primary function in the maintenance of international peace and security, regional actors can be utilised through decentralisation, delegation and cooperation, to lighten the burden of the former.[11] Under the World Summit Outcome Document, the UN General Assembly recognised the important contribution of regional organisations in the protection of civilians during armed conflict.[12]

Further, the Security Council expressed its desire to cooperate with regional and sub-regional organisations in maintaining international peace and security and to invite such organisations with the requisite capacity for peacekeeping to place such capacities within the framework of the UN standby arrangements and to deploy rapidly in support of the UN or Security Council mandated operations.[13] Therefore, the role of regional and sub-regional organisations are complementary to that of the UN. These organisations are gaining an ever growing relevance in the maintenance of international (regional) peace and security and the protection of civilians.

The Organisation of African Unity (OAU)/African Union (AU) interventions in Africa

The AU, formerly the Organisation of African Unity (OAU), continued to play pivotal role in the civilian protection arena, by undertaking peacekeeping operations in some of the trouble spots on the continent. However, the mandates of such missions are sometimes clothed in ambiguity to the extent that civilian protection is hardly ever explicitly mentioned. A classical example is the OAU's first ever intervention, namely, in the peacekeeping mission in Chad in 1980. The mandate of that mission was not clear enough to determine whether it was meant to support the Government, be neutral or even protect civilians from imminent threat.[14] Pursuant to its Mechanism for Conflict Prevention, Management and Resolution, which was adopted in Cairo in June 1993,[15] the OAU established a peacekeeping mission in Burundi.[16] This mechanism has been subjected to the Organisation's long standing principle of non-interference in the internal affairs of a member state. Thus, the OAU could not have intervened in a member state to protect civilians

11 CD Gray *International law and the use of force* (2008) 371.
12 UN S/RES/1674 (2006) (United Nations).
13 United Nations 'Security Council Resolution 1631' (2005).
14 R May & S Massey 'The OAU interventions in Chad: Mission impossible or mission evaded?' (2007) 14 *International Peacekeeping* 51-53.
15 Organisation of African Unity 'Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution' (1993) available at http://www.peaceau.org/uploads/ahg-decl-3-xxix-e.pdf (accessed 9 March 2015).
16 Gray (n 11 above) 375.

in grave circumstances of violence, except with the express invitation of the Government, as was the case in Burundi.

The re-hatting of the OAU to become the AU coincided with a more proactive approach to civilian protection. The latter's Constitutive Act gives it the right to intervene in a member state where crimes of genocide, war crimes and crimes against humanity are being committed.[17] The AU intervened in Sudan in 2004, pursuant to the N'Djamena Humanitarian Ceasefire Agreement. The Mission's (African Union Mission in Sudan – AMIS) mandate was, among others, to monitor and ensure compliance with the Agreement and to protect civilians (only those it encountered) from imminent threat, leaving the entire responsibility of civilian protection to the government of Sudan.[18]

In 2007, the African Union's Peace and Security Council established the African Union Mission in Somalia (AMISOM) as a regional peacekeeping mission, with the approval of the UN.[19] The mandate of this mission, as authorised by the UN Security Council, is to 'take all measures, as appropriate, to carry out support for dialogue and reconciliation by assisting with free movement, safe passage and protection of all those involved in a national reconciliation congress involving all stakeholders, including political leaders, clan leaders, religious leaders and representatives of civil society.'[20]

In line with the intervention provision in its Constitutive Act, the AU adopted the Responsibility to Protect in the Ezulwini Consensus, and argued that it is imperative that regional organisations intervene in conflict situations in areas of proximity on the basis that both the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to appreciate the nature and development of such conflicts.[21] Taking this argument further, it may equally be argued that sub-regional organisations, such as ECOWAS, also have the right to intervene in conflict situations close to them.

17 n 5 above, art 4.
18 Gray (n 11 above) 380.
19 African Union Mission in Somalia 'AMISOM Background' available at http://amisom-au.org/amisom-background/ (accessed 9 March 2015).
20 As above.
21 African Union 'The Common African Position on the Proposed Reform of the Uunited Nations: The Ezulwini Consensus' (2005) 6 available at http://www.responsibilitytoprotect.org/AU_Ezulwini%20Consensus.pdf (accessed 10 March 2015).

Protection of civilians by the ECOWAS in West Africa

The ECOWAS is one of the nine sub-regional organisations recognised by the African Union (AU), and it has a territorial definition and limitation.[22] It is a sub-regional economic integration organisation, established and constituted in 1975, for the purpose of promoting economic integration and development for the peoples of West Africa.[23] There was, thus, no clear nexus between the vision of economic integration and self-reliance and that of security, let alone the contemplation of peacekeeping and the protection of civilians in armed conflicts. When major threats to the internal stability and security of the sub-region began to manifest, the ECOWAS adopted two Protocols on Non-Aggression and Mutual Assistance in Defence Matters in 1978 and 1981 respectively, both intended to address external threat and aggression, and to pull resources together for mutual assistance against such threats.[24]

The violent civil war and insurrection that broke out in Liberia in 1989 and in Sierra Leone in 1991 were the awakening calls that made the ECOWAS realise not just the changing nature of threats to regional stability, but also that the organisation as it was then constituted, lacked the wherewithal to deal with such emerging challenges.[25] The conflicts in the sub-region placed the ECOWAS between a rock and a hard place, leaving it to contend reconciling the principles of sovereignty and territorial integrity, which are deeply enshrined in the Treaty, and the necessity for intervention and protection of civilians.[26]

The legal basis (mandate) for intervention under ECOWAS framework

A successful forceful (military) intervention for the protection of civilians must, *a fortiori*, be predicated on some basic legal grounds. These would include the legality of the intervention itself and the legality of what is sought to be done or the reasons of such intervention, which in law enforcement parlance is called 'the mandate'. These two basic norms may be akin to *jus ad bellum* in the former and *jus in bello* in the latter. This discussion does not intend to explore the former, except to identify the lessons learnt, since that question has been extensively dealt with elsewhere. Thus, this part analyses whether or not the ECOWAS interventions in conflicts in West Africa (Guinea Bissau, Côte d'Ivoire, Liberia, Mali, Sierra Leone and The Gambia) were to protect the civilian

22 Hert (n 8 above) 243.
23 EK Aning, E Birikorang & T Jaye *Compendium of ECOWAS Peace and Security Decisions: Protocol, Declaration and Peace Agreements* (2010) 7.
24 As above.
25 As above.
26 P Arthur 'ECOWAS and Regional Peacekeeping Integration in West Africa: Lessons for the Future' (2010) 57 *Africa Today* 9.

population within the meaning of the term. This has become necessary in order to determine the practice in West Africa and also due to the fact that protection of civilians continues to be discussed under, or confused with other concepts, such as the responsibility to protect; humanitarian intervention; peacekeeping; restoration of democracy and good governance, and restoration of law and order.

Fighting brutality in Liberia

Having found itself in a dilemma of intervention or otherwise and having been frustrated by numerous attempts at peaceful settlement of the civil war through diplomacy, and without any prospect of intervention by the UN or the international community, the ECOWAS Standing Committee on Mediation, agreed to establish an ECOWAS Ceasefire Monitoring Group (ECOMOG) in Liberia, in August 1990. This decision was approved by the Authority of the Heads of State and Government, three months later. What actually triggered that bold decision may merit some other research. However, in early August 1990, following the massacre of defenceless civilians, women and children, seeking refuge in the premises of St Peter's church, by the members of the Armed Forces of Liberia (AFL), the Catholic Hospital and *Medécins Sans Frontièrs* (MSF) wrote to the ECOWAS, requesting for military intervention to protect civilians.[27] This incident was referred to as a mini genocide, where a segment of the population, the Mandingo and Krahn tribes were the victims.[28] If this were not the trigger, then it must have at least pricked the conscience of the ECOWAS to act.

Under Decision A/DEC.2/11/90 relating to the adoption of an ECOWAS Peace Plan for Liberia and the entire West African Sub-Region, the mandate of ECOMOG was: keeping the peace; restoration of law and order, and to ensure respect for the ceasefire.[29] The questions that beg for answers, among others, are: what informed this mandate, and whether this mandate could qualify or come within the realm of civilian protection. Notwithstanding, what was clear and incontestable at the time of the above decision, was the commission of mass atrocities against the civilian population on an alarming scale, with ethnic-based killings and brutality, more evident in the letter addressed to the ECOWAS.[30]

Therefore, the ECOWAS knew or reasonably ought to have known about the dire need to protect the civilian population of Liberia, not just Monrovia and its immediate surroundings. Further, one cardinal principle

27 Human Rights Watch 'Waging war to keep the peace: The ECOMOG intervention and human rights' (1993) 5 available at http://www.hrw.org/legacy/reports/1993/liberia/ (accessed 2 August 2014).
28 C Adibe *Managing arms in peace processes: Liberia* (1996) 10.
29 Aning, Birikorang & Jaye (n 23 above) 212.
30 Human Rights Watch (n 27 above).

of peacekeeping is consent on the part of all warring factions. In this case, Charles Taylor's National Patriotic Front of Liberia (NPFL) consistently and conscientiously objected to ECOMOG intervention. To adopt a peacekeeping style mandate, in the face of Taylor's unwavering stance could not be said to be a decisive response, reflecting the circumstances on the ground. This manifested itself, no sooner than ECOMOG landed in Monrovia. Taylor did not swallow his words. He considered ECOMOG as an invading force and attacked them immediately. The response of ECOMOG was best captured in the words of its Field Commander Major General Olurin, as follows:[31]

> If a faction decides to take us on and challenge the peacekeepers, then the enforcement role comes in. We must make all factions comply with the collective wisdom of others – ECOWAS, the OAU or the UN. One faction cannot be an obstacle to peace. Then, we will return to our peacekeeping posture.

Taylor's incessant attacks on ECOMOG and the latter's response thereto meant that, on the one hand, there was no peace to keep, whilst on the other, ECOMOG was willing to shift from peacekeeping to peace enforcement, as and when attacked or so long as one faction refused to keep the peace. By a reasonable stretch, it may be argued that outside this realm, ECOMOG kept to their original mandate of keeping the peace; restoring law and order, and ensuring respect for the ceasefire. For this mandate to have included protection of civilians, it must be said that ECOMOG was under a positive legal duty to protect civilians and was ready and willing to use or threaten to use force to achieve same. The Chief of Staff of ECOMOG, General Victor Malu, explained that ECOMOG's mission was to

> enforce disarmament and encampment and, with the U.N., to supervise elections. When a government is in place, we have fully achieved our mission. Human rights is not a mission for a military service. Other organisations can be tasked with that.[32]

ECOMOG was thus dragged into war, adopted more aggressive rules of engagement beyond self defence, and began to arm certain factions,[33] thereby jettisoning its neutrality.[34] The air strikes and use of other weapons to hit objects of purely civilian character, such as hospitals, ambulance, international relief activities and vehicles, which caused many civilian

31 n 27 above, 2.
32 n 27 above, 3.
33 It was reported that ECOMOG further damaged its credibility as neutral peacekeepers by aiding ULIMO in its efforts against the NPFL. ULIMO occasionally received intelligence, ammunition, and transportation from ECOMOG. See, JE Maraia, Policy Paper: Peace Implementation in Liberia, 1997, 5 available at https://www.researchgate.net/publication/235172060_POLICY_PAPER_Peace_Implementation_in_Liberia (accessed 5 March 2017).
34 As above.

casualties, put in question the intended purpose(s) of its rules of engagement, and most importantly, whether it has a civilian protection mandate at all.[35] The ECOWAS was drawn into the issue of mandate when it ordered all humanitarian relief supplies to cease except those transported under the supervision of ECOMOG. This was in clear contradiction of the UN embargo, which exempted humanitarian aid. MSF's failure to inform ECOMOG about its convoy, carrying medicines and vaccines, prompted the latter to attack the convoy.[36] After that incident, ECOMOG warned that no relief agency or non-governmental organisations (NGOs) will be allowed to impede their peace enforcement mission.[37] This violent attack against a clearly identified relief convoy was considered a serious threat to humanitarian operations in Liberia.[38]

The worst incident that questioned the civilian protection mandate of ECOMOG, if any, was the Harbel massacre. In June 1993, about 600 civilians were killed in an internally displaced persons' camp, situated behind ECOMOG's lines and under the purview of AFL soldiers for protection.[39] The UN Inquiry concluded, contrary to the AFL explanation, that the massacre was in fact committed by AFL soldiers.[40] The fact that ECOMOG supported AFL and supplied them with arms may be the reasons why it was associated with and implicated in this and other atrocities committed against civilians by AFL and other factions. ECOMOG did not protect the camp and subsequently failed to take necessary steps against the perpetrators. The UN inquiry was critical about ECOMOG's failure to take action, after it learnt about the incident, even though it was not clear whether civilian protection was part of its mandate. There seems to be a semblance between the above omission and that of the Dutch contingent, during the Bosnian civil war. They turned away the victims who sought refuge in the UN premises resulting to the massacre of 300 Muslims at Srebrenica.

Notwithstanding, the initial intervention of ECOMOG was laudable in that it registered important accomplishments. It stopped the ethnic cleansing in Monrovia and achieved the restoration of peace and order in that city and its immediate surroundings. Its efforts enabled the installation of the interim Government and the attainment of a ceasefire. However, these successes may be seen as incidental to its peace enforcement mandate. This is so because the other very serious allegations of human rights abuses and civilian casualties from ECOMOG operations or the operations of other warring factions with ECOMOG support cannot sit

35 See generally Human Rights Watch (n 27 above).
36 n 27 above, 16.
37 As above.
38 n 27 above, 12.
39 INS Resource Information Center 'Disintegration of the Liberia Nation since the 1989 Civil War' (1993) 36 available at http://www1.umn.edu/humanrts/ins/libera94.pdf (accessed 11 August 2014).
40 As above.

squarely with any civilian protection mandate. In total, ECOMOG mission in Liberia was a peacekeeping one that graduated to peace enforcement as and when the circumstances required. Furthermore, the ECOWAS consistently tried to justify that its intervention in Liberia was, among other reasons, humanitarian, that is, 'stopping the senseless killing of innocent civilians … and to help the Liberian people to restore their democratic institutions.'[41] This justification was contained in a statement issued in August 1990, when such intervention had already taken place. Thus, from the onset, ECOMOG was essentially a peacekeeping force set up to monitor the ceasefire, but instead found itself pursuing a peace-enforcement strategy without the necessary equipment or mandate for the protection of civilians.[42]

Engaging rebels: Restoration of a constitutional government in Sierra Leone

The Sierra Leonean civil war began on 23 March 1991, when a rebel group, the Revolutionary United Front (RUF), led by Corporal Foday Sankoh invaded eastern Sierra Leone with the assistance from Charles Taylor and his NPFL fighters and mercenaries and soldiers, believed to be from Burkina Faso.[43] Just like Liberia, the conflict in Sierra Leone also represented another serious challenge for the ECOWAS, having to reconcile the principles of sovereignty with the idea of intervention in the internal affairs of a member state. But, unlike Liberia, there appears to be no specific decision taken by the ECOWAS to intervene in Sierra Leone. ECOMOG intervention in Sierra Leone could, therefore, be seen as an extension of the territorial jurisdiction of its mandate, taken initially for intervention in Liberia. In fact, most of the soldiers who had served in Liberia were the same soldiers who also served in Sierra Leone. This may be explained in terms of the geographic proximity of the two countries, the similarities of the nature of the conflicts and the likelihood of a spill over and graduation into a regional conflict. It was believed that the fighting around the Sierra Leone-Liberia border by forces loyal to Charles Taylor, coupled with the civil war in that country, may have informed ECOMOG's decision to deploy troops at the border of both countries in 1991.[44] Eventually, ECOMOG extended its operations to cover Sierra

41 C Ero 'ECOWAS and the Sub-regional Peacekeeping in Liberia' (1995) *The Journal of Humanitarian Assistance* available at http://sites.tufts.edu/jha/archives/66 (accessed 8 September 2014).

42 This has been a problem with some of the UN peacekeeping operations too. For example, the mandate of the UN Protection Force (UNPROFOR) in Yugoslavia frequently changes from peacekeeping to peace enforcement. See Gray (n 11 above) 310.

43 C Ero 'ECOMOG: A model for Africa?' (2000) available at http://www.iss.co.za/pubs/monographs/No46/Ecomog.html (accessed 15 August 2014).

44 As above.

Leone in 1993, presumably under the same mandate of peacekeeping/ peace enforcement.[45]

The election of February 1996 lit the skies of Sierra Leone with the hope of attaining a lasting peace. This jubilation, for a new dawn was short lived. The conflict grew in intensity and culminated in a violent overthrow of the elected government of Ahmed Tejan Kabbah on 25 May 1997.[46] What followed was a total chaos, rape, torture, looting, murder, intimidation and all forms of brutality committed by the junta and its RUF Alliances, on the civilian population.

In response, the ECOWAS adopted a three-phase strategy to include dialogue, sanctions, and the use of military force. It also adopted a peace plan for Sierra Leone with a six month timetable for its implementation, effective 23 October 1997.[47] This called for the reinstatement of the deposed president and a provision of humanitarian assistance, among others.[48] When the Junta failed to abide by the peace plan, ECOWAS graduated its strategy from dialogue and sanction, to the use of military force to restore the democratic government. In February 1998, ECOMOG launched an offensive operation, 'Sandstorm', to restore the Kabbah government to power immediately. The fleeing Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF) fighters unleashed untold atrocities on the civilian population.[49]

It is obvious that when ECOMOG intervened in Sierra Leone, it had a single mandate: the restoration of the constitutional government. This is not the same as 'protection of civilians', even though, it may be argued that the restoration of constitutional order has a nexus with civilian protection. However, it is interesting to note that just like Liberia, the ECOWAS knew or ought to have known about the level of atrocities committed against the civilians of Sierra Leone, not just Freetown. Notwithstanding, ECOMOG's mandate failed to explicitly include the protection of civilians. In fact, ECOMOG soldiers were accused of using excessive force against civilians in order to control the situation.[50] Further, ECOMOG was only deployed in the capital, Freetown and its immediate surroundings. Civilians in other parts of the country were left in the hands of the junta and its RUF Alliance, who, angry at their defeat, started a campaign of terror against the civilians, brutally killing or mutilating thousands, whilst hundreds of others were abducted from their villages and forced to join the Alliance.[51] Even where accepted that ECOMOG had a

45 As above.
46 As above.
47 LJ Woods & TR Reese *Military interventions in Sierra Leone: Lessons from a failed state* (2008) 41.
48 Aning, Birikorang & Jaye (n 23 above) 302.
49 Woods & Reese (n 47 above) 44.
50 As above.
51 As above.

civilian protection mandate for Sierra Leone, it could be argued that such a mandate, in reality, was not exercised to protect civilians outside Freetown.

In the most ruthless come back operation, (Operation No Living Thing) led by RUF Deputy Commander, Sam Bockarie, unprecedented atrocities, such as rape, amputation and killing, were meted out on civilians.[52] Again, ECOMOG was also accused of committing similar atrocities against civilians.[53] President Kabbah was evacuated to the Lungi airport and the UN Observer Mission left for obvious reasons: There was no peace to observe. ECOMOG reinforced its capacity under a new leadership, went on the offensive and once again successfully restored constitutional order, but with heavy civilian casualties and displacement.[54] After successfully liberating Freetown and reinstating the Administration of Kabbah, ECOMOG halted its operations and did not have the mandate to extend their operations beyond. The imminent withdrawal of ECOMOG and its likely consequences of civilians suffering jolted the UN to act. The UN Security Council adopted Resolution 1270, establishing UN Assistance Mission in Sierra Leone (UNAMSIL) with the mandate to

> take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG.[55]

Unlike ECOMOG, UNAMSIL had a mandate, in certain circumstances, to protect civilians who were in dire need of such protection, though not at the level of 'all means necessary'. It could be reasonably gleaned from the above UNAMSIL mandate that suggestively, ECOMOG too had similar mandate. However, neither the ECOWAS Peace Plan for Sierra Leone, nor the Final Communiqué of the Special Meeting of the ECOWAS Foreign Ministers contained wordings to the effect, as seen in the above UNAMSIL mandate as it regards the protection of civilians.[56]

52 As above.
53 As above.
54 As above.
55 UN S/RES/1270 (1999).
56 The final communique of ECOWAS Foreign Ministers held on the 26 June 1997 and the ECOWAS Six Month Peace Plan for Sierra Leone of 23 October 1997 (all done in Conakry, Republic of Guinea) stressed on the need to immediately restore the constitutional government of Sierra Leone. While the former deplored the bloodshed and other loss of human life and warned the junta to refrain from violence against Sierra Leonean citizens, foreigners and ECOMOG personnel, none explicitly mentioned the need to give ECOMOG a civilian protection mandate. See generally the above 2 documents available at http://www.sierra-leone.org/Other-Conflict/ECOWAS-062697.html; http://www.sierra-leone.org/conakryaccord.html. (accessed 7 August 2014).

ECOWAS revised its Treaty in July 1993. The new article 58(2) of the Revised Treaty obligates member states to cooperate in re-enforcing appropriate mechanisms for timely intervention in all types of conflict, be it inter-state or intrastate.[57] This new provision does not seem to have changed ECOWAS's approach to intervention. It does not explicitly state the purpose of such interventions. It merely requested member states to cooperate in establishing mechanisms for rapid intervention. In a nutshell, nothing has fundamentally changed in terms of civilian protection after the Treaty has been revised.

Guaranteeing humanitarian access in Guinea-Bissau

The conflict in Guinea-Bissau started on 6 June 1998, when President Nino Viera sacked and subsequently ordered the arrest of his erstwhile army chief, General Ansumane Mane. The latter was accused of selling arms to the rebels of the Cassamance region of Senegal; he too accused the former of the same crime.[58] Mane and his loyalists quickly formed themselves into a junta. Senegal and Guinea intervened on the side of President Viera. In the ensuing battle, involving the use of heavy weaponry, hundreds of civilians were killed and many fled the city of Bissau.[59]

The ECOWAS, pursuant to the Abuja Agreement of November 1998, ordered the withdrawal of all foreign troops and deployed ECOMOG as an interposition force, with a specific mandate, to guarantee security along the Guinea Bissau/Senegal border; to keep the warring parties apart and guarantee free access to humanitarian organisations and agencies to reach the affected civilian population. Nothing in this mandate suggests that ECOMOG could use force when necessary, to protect civilians under imminent threat of physical violence or death.

Further, the intervention in Bissau exposed ECOMOG's military weakness, as it was unable to launch the necessary attack to quell the tide of violence it found. In fact, this incapacity was affirmed in the ECOWAS' request to the UN for a provision of logistics such as helicopters. This is to say that even where there was a clear mandate to protect civilians, such would have been impossible in the face of this apparent weakness.

In response to the above shortcomings, exposed in its previous interventions, the ECOWAS adopted a Protocol on the Mechanism for Conflict Prevention Management, Resolution, Peacekeeping and Security (the ECOWAS Protocol) in 1999, to the effect that in the event of conflict,

57 'Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (ECOWAS)' (1993) available at http://www.refworld.org/docid/492182d92.htm (accessed 7 August 2014).
58 Ero (n 43 above) 6.
59 As above.

it can intervene in a member country to alleviate the suffering of the population and to restore life to normalcy.[60] Under article 17 of the ECOWAS Protocol, the Defence and Security Commission and ECOWAS Cease-fire Monitoring Group (ECOMOG) were formally established,[61] and charged with, among others, the responsibility of peacekeeping and restoration of peace, and humanitarian intervention in support of humanitarian disaster.[62]

On the applicability of the Mechanism, article 25 of the ECOWAS Protocol outlines six situations, including, situations of internal conflict that threaten to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region, and in the event of serious and massive violation of human rights and the rule of law.[63] Nothing can be more instructive than the following responsive statement captured under regulation MSC/REG.1/01/08 of the ECOWAS Conflict Prevention Framework:[64]

> ECOWAS Member States bear primary responsibility for peace and security. However, as steps are taken under the new ECOWAS Strategic Vision to transform the region from an 'ECOWAS of States? into an COWAS of the Peoples?', the tensions between sovereignty and supranationality, and between regime security and human security, shall be progressively resolved in [favour] of supranationality and human security respectively. Consequently, civil society shall play an increasingly critical role alongside Member States in the maintenance and promotion of peace and security. In this order of things, the principal role of ECOWAS shall be to facilitate creative conflict transformation interventions by Member States and civil society.

One would assume that the adoption of this Protocol was the centripetal shift on the part of the ECOWAS, from one sphere of interaction as an economic bloc, to another of humanitarian intervention and protection of civilians in armed conflict. It may also be indicative that the ECOWAS must have learnt a bitter lesson from its previous interventions in Liberia, Sierra Leone and Guinea Bissau, thus the adoption of this Protocol.

Restoration of peace and stability in Côte d'Ivoire

The armed insurgence that eventually spiralled into an outbreak of conflict in Côte d'Ivoire, in September 2002 with grave violence against the civilian population. Hundreds were killed, wounded and many internally displaced.[65] In response to this conflict, the ECOWAS, for the first time triggered its Protocol on the Mechanism for Conflict Prevention,

60 Aning, Birikorang & Jaye (n 23 above) 49.
61 n 23 above, 50
62 n 23 above, 79.
63 n 23 above, 81.
64 n 23 above, 116.
65 Arthur (n 26 above) 17.

Management and Resolution, Peacekeeping and Security at its extraordinary summit in Accra, on 29 September 2002. The Heads of State and Government condemned the attempt to overthrow the constitutional rule in Cote d'Ivoire and the extensive loss of human life and other needless destructions, and further expressed concern that the situation may deteriorate and pose a threat to the peace and stability of the region, and consequently, a major humanitarian disaster.[66]

Sequel thereto, ECOWAS intervened to help bring peace to the country in compliance with the relevant provisions of the Protocol on the Mechanism. It established a peacekeeping mission in Côte d'Ivoire, known as the ECOWAS Mission in Côte d'Ivoire (ECOMICI), and deployed about 1 500 soldiers. The mandate of this mission was to assist the French contingent (Licorne Force) maintain the cease-fire. They were positioned in what is known as the Zone of Confidence, which divided the country into North and South.[67]

As in Guinea Bissau, ECOMICI was deployed as an inter-positioned force, stationed in between two warring factions to monitor the ceasefire. The responsibility here is to ensure that the opposing forces do not fire at each other. The fate of the civilian population in the respective ends of the divide does not seem to be within the mandate of the peacekeepers. In April 2004 ECOMICI was integrated into the UN Mission and became part of the UN Operations in Côte d'Ivoire (UNOCI), with a civilian protection mandate that included, among others, 'all means necessary.'[68]

The intervention in Côte d'Ivoire was a response to a conflict through one of the trigger mechanisms outlined under article 25 of the Protocol on the Mechanism for Conflict Prevention Management, Resolution, Peacekeeping and Security, that is, situations of internal conflict that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region, and in the event of serious and massive violation of human rights and the rule of law. These situations were concerns expressed by the Heads of State and Government of the ECOWAS, prelude to intervention and which were to subsequently form the basis for intervention. This Mechanism could, therefore, be regarded as both the political and legal framework that can explain the ECOWAS's right to intervene in member state's internal affairs. It may also defeat the argument based on the Treaty of ECOWAS that it lacks the legal authority for such intervention, since the relationship between a treaty and a subsequent Protocol is that the latter either supplements or amends the former.[69]

66 n 23 above, 332.
67 Arthur (n 26 above).
68 PD Williams *Enhancing civilian protection in peace operations: Insights from Africa* (2010) 16.
69 A Aust *Modern treaty law and practice* (2007) 41.

Ending extremism in Mali

The conflict in Mali gained international attention in March 2012 when Islamist extremist Tuareg rebels began an armed rebellion in the North, attacking towns and villages.[70] The government and the armed forces were overwhelmed by this situation and were unable to put up a decisive military response necessary to put the rebellion to an end. As a result, the soldiers became dissatisfied with their government's response to the insurgency, and in a show of that dissatisfaction, overthrew the Government and suspended the Constitution, on 22 March 2012.[71] The ECOWAS reacted with a strong condemnation of the military take over and further mobilised the international community, including the African Union, not to recognise the junta.[72] In addition, the ECOWAS announced its intention to activate its standby force to be used against the rebels in the North of Mali, if they failed to accept a peaceful solution to the conflict.

The military *coup* gave the rebel insurgents an opportunity for rapid military advances as they formed an alliance with other Islamist terrorist groups like Ansar Al-Din and al-Qaeda. In April 2012, they were able to capture the entire Northern Mali, including the major cities of Timbuktu, Gao and Kidal. They declared Northern Mali as an independent Islamic state, known as the 'Islamic State of Azawad', and imposed Sharia law throughout the North.[73] At its extraordinary session in Abuja in November 2012, the ECOWAS Authority adopted the following decision:[74]

> Authority decides to adopt the harmonized Concept of Operations for the deployment of the African-led international force in Mali and requests the Peace and Security Council of the African Union to endorse the Concept and ensure its transmission, together with the Strategic Concept, to the United Nations Secretary General within the deadline stipulated in Resolution 2071. It urges the UN Security Council to examine the Concept with a view to authorizing the deployment of the international military force in Mali in conformity with chapter VII of the UN Chapter.

The Communiqué further urged member states to finalise their commitments to provide military and other relevant contributions to the ECOWAS military efforts. This contemplated deployment received the

70 DJ Francis 'The regional impact of the armed conflict and French intervention in Mali' (2013) 2 available at http://peacebuilding.no/var/ezflow_site/storage/original/application/f18726c3338e39049bd4d554d4a22c36.pdf (accessed 18 August 2014).
71 As above.
72 ECOWAS 'ECOWAS reaction to the coup d'etat in Mali' (2012) available at http://news.ecowas.int/ (accessed 18 August 2014).
73 Francis (n 70 above).
74 ECOWAS 'Extraordinary Session of the Authority of ECOWAS Heads of State and Government' (2012) para 9 availbale at http://www.ecowas.int/publications/en/communique_final/session_extra/comfinal11112012.pd (accessed 18 August 2014).

support of the AU and the UN, but was only scheduled for September 2013.[75] At the time that the above decision was taken, the UN Secretary-General also briefed the UN on the dire and hopeless situation in Northern Mali, especially on human rights and the protection of civilians, using the following words:

> The human rights situation in Mali, especially in the north, has continued to deteriorate since January. Extremist Islamist groups have reportedly committed gross human rights abuses, including summary and extrajudicial executions, sexual and gender-based violence, recruitment and use of child soldiers, torture and looting of hospitals. It appears that there have been changes in the pattern, character and prevalence of the abuses since the beginning of the crisis. [76]

According to the UN Secretary-General:

> Serious abuses, including sexual violence, summary executions and pillaging, … other types of abuses are being witnessed, mostly relating to the implementation of an extremely strict interpretation of sharia law. Executions, floggings and stonings, among other cruel and inhuman punishments, have been reported. While the figures are not high, they are of concern inasmuch as they might be indicative of an evolving pattern. Freedom of speech and assembly and the rights of women and children are also being curtailed. [77]

The report further highlights the prevalence of conflict-related sexual and gender-based violence and other grave violations against women and girls in northern Mali. It also revealed the salient characteristics of grave violations against children and that armed groups, including National Movement for the Liberation of Azawad (MNLA), Ansar al-Dine**,** Movement for Unity and Jihad in West Africa **(**MUJAO) and Al-Qaeda in the Islamic Maghreb (AQIM), are reported to have targeted children, resulting in the recruitment of hundreds of minors into their ranks.[78]

Reacting to the chilling account of massive human rights violation and other atrocities committed against civilians, especially against women and children, the UN Security Council, on 20 December 2012, adopted resolution 2085, authorising the deployment of an African-led International Support Mission in Mali (AFISMA).[79] The mandate of AFISMA was, with the exception of protecting its personnel, facilities, premises, equipment and mission and to ensure the security and movement of its personnel, to support the Malian authorities fulfil their obligation to protect their civilian population and to institute law and order. This was a typical tier two R2P intervention, which relates to the use

75 DJ Francis (n 70 above) 3.
76 UN Security Council Report of the Secretary-General on the situation in Mali 2012, S/2012/894 (United Nations) para 21.
77 As above.
78 As above.
79 UN S/RES/2085 (2012) para 9.

of military force to protect populations at risk. Under the above mentioned resolution, Africa, particularly the ECOWAS was to lead the Mission.

Frustrated by the failure of a swift intervention coupled with the gains registered by the advancing terrorist group and having made several requests for immediate intervention to both the ECOWAS and the UN, the Malian authorities turned to France for military assistance.[80] President Hollande responded that France had no option but to act in order to prevent the emergence of a terrorist state that posed a serious security threat to France and the West.[81] Hollande further stated that the inability of the Malian armed forces to defend their country and stop the military advances of the rebels and their Islamist allies, coupled with the failure in the deployment of troops from African countries, forced France to act unilaterally.[82] French troops launched a successful 'Operation Serval' in support of the Malian armed forces against the advances of aggressive terrorist groups. Encouraged by the French first shot, the ECOWAS immediately deployed the AFISMA. Nigeria took the lead on 17 January 2013, followed by troops from Burkina Faso. The ECOWAS endorsed Major General Abdulkadir Shehu of Nigeria as Force Commander and Brigadier General Yaye Garba of Niger as Deputy Force Commander.[83]

On 18 January 2013, a month after the UN resolution authorising deployment, and after the French offensive, the ECOWAS, pursuant to its Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, recommended to the Authority of Heads of State and Government to request member states to deploy troops in support of the operations of AFISMA within the framework of the UN Resolution 2085. With the major threats now taken out by the French operation and subsequent AFISMA deployment, UN Security Council noted the restoration of the territorial integrity of Mali, the absence of major security incidents and the undeniable progress in the political process after the signing of the Ouagadougou Agreement. With request from the ECOWAS, the AU and the Malian authorities, on the re-hatting of AFISMA to a stabilisation force, UN Security Council established the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA), and requested the Secretary General to subsume the United Nations Office in Mali (UNOM) into MINUSMA and that the authority of AFISMA be transferred to MINUSMA on 1 July 2013.[84]

80 The President of Mali triggered into force the Defence Agreement between Mali and France, and pursuant thereto Mali requested for French intervention. See generally, 'France at the United Nations' available at http://www.franceonu.org/france-at-the-united-nations/ (accessed 18 August 2014).
81 As above.
82 As above.
83 Francis (n 71 above) 7.
84 UN S/RES/2100 (2013) para 7.

MINUSMA assumed a new mandate, which includes, among others, the protection of civilians under imminent threat of physical violence, within its capacities and areas of deployment,[85] 'by all means necessary.'[86] The mandate further authorised French troops, within the limits of their capacities and areas of deployment, to use all necessary means, to intervene in support of MINUSMA, when under imminent and serious threat, upon request of the Secretary-General.[87]

The involvement of the ECOWAS in the Malian conflict was fundamentally different from its earlier interventions in Liberia, Sierra Leone, Guinea Bissau and Ivory Coast. Although in partnership with key international actors like the AU, UN, France and its allies, the ECOWAS has demonstrated both political and diplomatic will and leadership to intervene in Mali. The ECOWAS has also worked with the international community to produce the AFISMA plan and its subsequent transformation to MINUSMA. It may be argued further that the ECOWAS's move to request for UN Security Council Chapter VII mandate before it could intervene in Mali was a new approach, not seen in its earlier interventions. Probably, ECOWAS has been sensitive to criticisms about the illegality of its unilateral interventions in Liberia and Sierra Leone, without the Security Council's authorisation. Thus, the hope that the ECOWAS was steadily developing a regional custom by its conduct in Liberia, Sierra Leone, Guinea and Ivory Coast has been dashed by this 'u-turn', as evidenced in the Abuja Decision.

Nevertheless, the ECOWAS was extremely slow to intervene and may not have done so in time, if not for the deployment of French troops in Mali. There were convincing evidence of systematic violations of human rights and all forms of atrocities against civilians, especially women and children. The Islamist rebels had controlled the entire North of Mali and made successive gains against the Malian army. The Malian authorities made known to the ECOWAS about the urgent need for immediate intervention. The situation in Mali had triggered intervention, in accordance with article 25 of the Protocol on the Mechanism for Conflict Prevention Management, Resolution, Peacekeeping and Security, with or without chapter VII mandate. There was a situation of internal conflict that witnessed a serious and massive violation of human rights and the rule of law and posed a serious threat to peace and security in the sub-region.

Operation Restore Democracy in the Gambia

The ECOWAS decided to intervene militarily in the Gambia's political impasse that occurred as a result of President Jammeh's refusal to step

85 n 84 above para 16.
86 n 84 above, para 17.
87 n 84 above, para 18.

down after losing the December 2016 presidential election and conceding defeat. The decision to intervene in the Gambia to resolve the political impasse could be seen as the most swift and effective intervention ever in the regional body's history. The military intervention was preceded by rounds of diplomatic negotiations (and at some point simultaneously with the presence of ECOWAS troops on Gambian soil), which finally convinced the former president to leave for exile in Equatorial Guinea.

The mandate of the Intervention Force (ECOWAS Standby Force) was to ensure the safety of the President-Elect, political leaders and the entire population of the Gambia; to uphold the results of the presidential election of 1st December 2016, and to ensure that the President-elect is sworn into office on 19 January 2017 in conformity with the Constitution of the Republic of the Gambia.[88] This is a typical civilian protection mandate, 'by all means necessary,' and the restoration of democracy, though the words 'by all means necessary' has not been specifically used.

ECOWAS intervention in the Gambia was fully supported by the African Union (AU) and the United Nations Security Council (UNSC). However, the UNSC resolution (Resolution 2337 (2017)) did not endorse the ECOWAS military intervention (use of force). Rather, it requested ECOWAS to pursue 'political means first' in its efforts to resolve the crisis in the Gambia, removing the stronger language earlier considered by the Council endorsing ECOWAS intervention and the use of 'all necessary measures,' which would have meant an outright military action.[89] Notwithstanding, ECOMIG (with ground forces, a naval blockade, and air support in a military intervention to compel Jammeh to leave) was already in the Gambia the same day the UNSC Resolution was passed, and following the swearing in of President Barrow in the Gambia Embassy in Dakar, Senegal.

Questions might be asked whether ECOWAS has intervened without permission from the Security Council, or whether President Barrow, who was recognised as the legitimate authority after being sworn in, did make a request for intervention by invitation to ECOWAS, will have to be determined in another research.

Lessons learnt from ECOWAS interventions

The ECOWAS has, by now, realised that protection of civilians has come to stay, for as long as a conflict-free Africa still remains to be achieved. It has also gained experience from the numerous interventions it has

88 Decision A/Dec.2/12/16 Mandating the ECOWAS Standby Force to Uphold the Results of the Presidential Election in the Republic of the Gambia.

89 See, UN Security Council resolution 2337 (2017) available at https://www.un.org/press/en/2017/sc12688.doc.htm (accessed 4 March 2017).

undertaken so far. The ECOWAS faced certain challenges, which perforce must be looked into, in order to build a strong and effective mechanism for civilian protection, conflict resolution and peace building in the sub-region.

Appropriate mandate

In all the interventions discussed above, the ECOWAS almost always has the perennial challenge of formulating the appropriate mandate for the protection of civilians. Protection of civilians must be a policy that must be included in all types of intervention, whether peacekeeping or peace enforcement. However, it is the level of protection that differs from mission to mission. Mandates must also be issued, devoid of ambiguity and must not be inscrutable. It must be realistic and tangible, reflecting the capacity and capability of the deployment. It must not render the forces helpless in the face of horrific atrocities against civilians. This imperative, for a successful peacekeeping mission, has also been reiterated in the famous Brahimi Report, where the issue of a clear, credible and achievable mandate is well discussed.[90] Further, a clear and achievable mandate is a *sine qua non* for a successful peacekeeping operation and in addition, such an intervention must have clear goals, a firm strategy and a timescale for withdrawal.[91] The ECOWAS is thus encouraged to consider subsuming the relevant aspects of the said report into its Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

Intervention strategies

If a mandate requires the protection of civilians, it must either come with or be followed immediately by a comprehensive protection strategy. This should not aim at just repositioning peacekeepers, or going on the offensive, but to further hold accountable the perpetrators of crimes against civilians. Under this strategy, the peacekeepers must police themselves to avoid impunity and inject confidence in the mission.

Information gathering and threat analysis

In every armed conflict, civilian protection is required on a case-by-case basis. This is because the type and nature of violence varies from conflict to conflict. What was done to the civilians in Mali was different from Sierra Leone or Liberia. This requires a specific response strategy that

90 United Nations 'General Assembly/Security Council: Report of the Panel on United Nations Peace Operations (the Brahimi Report)' (2000) para 56 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305 (accessed 12 March 2015).

91 May & Massey (n 14 above) 52.

answers the description of the violence. ECOWAS was unable to surmount this challenge in all its interventions, except Mali.

Translation of information to enhanced civilian protection

The lifeblood of every civilian protection mandate depends on the ability of the political/military leadership to intelligently translate the acquired information into action to enhance civilian protection. This process takes into account all levels of protection, including 'all means necessary' in order to determine the appropriate level of response. It also determines who should be protected, from whom, or from what? In the Liberian and Sierra Leonean conflicts, ECOMOG faced the difficulty of who was a civilian and as a result, it was also accused of committing atrocities against civilians.

Adequate resources

Maintaining regional peace and security may involve costly expenses, but it may cost twice that fold to restore peace and security in the region, as this requires the establishment and sustenance of peacekeeping operations. The ECOMOG experience from Liberia to Mali demonstrated the almost insurmountable challenge faced by the ECOWAS in terms of financing its peacekeeping operations. The importance of the availability of adequate resources to undertake humanitarian intervention has become more relevant today than ever, with the imperative of going beyond the traditional peacekeeping operations. This requires the establishment of all the components from military to civilian, the restoration of the institutions of governance, including accountability and the restoration of the social life of the population. ECOWAS' inability to do it alone came to light in all its missions. Jimmy Carter, a former President of the United States, queried, among other challenges of ECOWAS, the size of the ECOMOG contingent and the sophistication of armaments available to it to undertake its task.

In Guinea Bissau, the ECOWAS requested helicopters from the UN for the use of ECOMOG. In Mali, the French air strikes facilitated the deployment of the ECOWAS troops. Thus, the Malian conflict has showed that intervention is possible through international cooperation and partnership, not just with the UN or the AU, but also with the development partners and non-governmental organisations. This is important because recent armed conflicts have proven that instability somewhere may affect peace anywhere. The ECOWAS should request assistance from its development partners to establish a permanent fund for its missions and not to wait until the emergence of armed conflict. Mobilisation of funds through holding donor conferences is not the best approach to rapid intervention necessity. The Permanent Fund should be utilised to establish a logistics depot and a standby force as soon as possible. The fire brigade

approach to armed conflicts must cease, as the saying goes, '[p]repare for war in time of peace.' All these must begin in the region itself with the political will and military professionalism. Charity is said to always have begun at home.

Conclusion

ECOWAS has all the necessary pillars, from legal framework, political will to the institutional structures to be able to translate the civilian protection doctrine into reality. This discussion has observed some gaps that ought to be bridged in order to deliver the civilians of West Africa and other parts of the world from the scourge of armed conflict. To that end, a number of recommendations are made.

First, the ECOWAS Peace and Security Initiative must have a graduating assessment of a conflict with a comprehensive report of the situation and constantly updating such information. Second, the ECOWAS should continually engage the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) on the implementation of the key components of the civilian protection mechanism. Third, the peacekeeping training centers in West Africa, such as the Kofi Annan International Peacekeeping Training Centre (Ghana); the Peacekeeping School of Zambakro (Côte d'Ivoire); *Ecole de Maintien de la Paix de Bamako* (Mali), and Nigerian Army Peacekeeping Centre and National Defence College of Nigeria (Nigeria), must adopt a tailored programme towards enhancing the capacity of West African militaries in the protection of civilians. They must also include and conduct mobile sessions in all countries in West Africa.

Fourth, the ECOWAS should consider the institution of an effective civilian machinery to supervise troops in all its missions. This will check the conduct of peacekeepers to ensure accountability for violations of the crimes mentioned in the principles of the responsibility to protect, involving peacekeepers, either through commission or omission, where there is a failure to perform a specific legal duty (a clear mandate to protect civilians). This will be relevant to situations like the Harbel Massacre, where nearly 600 civilians, mainly displaced men, women, children and elderly, were killed in an armed attack near Harbel, Liberia, June 1993. The UN Inquiry found the AFL troops responsible for the massacre. It also blamed ECOMOG for treating the matter as if it were not its direct responsibility, soon after learning of the incident. It may also serve as a second tier or a complementary mechanism prior to International Criminal Court (ICC) jurisdiction trigger.

In the same vein, the ECOWAS must learn from the recent decision of the district court of The Hague, Netherlands and the earlier decision of the Supreme Court of that country, which could be considered as a significant

development in the arena of protection of civilians in armed conflict. These courts respectively hold The Netherlands responsible for the conduct of its peacekeepers, which resulted in the massacre of 300 Muslims at Srebrenica and the deaths of three Bosnian Muslim men during the Bosnian war. The Dutch contingent turned away the victims who sought refuge in the UN premises, into the hands of their killers. The District Court further held that Dutch soldiers could have known that refugees would be massacred if they did not help them. The Netherlands was ordered to pay compensation to the families of the victims. This verdict is important for showing that peacekeepers had both a moral and a legal responsibility to protect civilians. In fact, in 2002, the government of the then-prime minister, Wim Kok, resigned following a report that blamed Dutch authorities and the UN for sending ill-equipped troops without a strong enough mandate to prevent the slaughter. This decision is considered a *locus classicus,* where, for the first time, a government had been held liable for the actions of peacekeepers operating with a United Nations mandate.[92] The similarity between the above two incidents is that both ECOMOG and the Dutch Battalion (Dutchbat) were ill equipped and lack the appropriate mandate.

Fifthly, the ECOWAS is encouraged to develop a model Status of Forces Agreement (SOFA) and Status of Mission Agreement (SOMA) between the ECOWAS and all member states, to be used in case of rapid intervention, pending the conclusion of one. In this regard, the ECOWAS should study the possibility of a stationary standby force to be located under one command rather than the current regime of respective brigades or national armed forces stationed in their national jurisdictions. This will ensure loyalty to the community instead of respective nations. It will also augur well for the operational readiness of the troops and bridge the divide of Anglophone and Francophone. The lesson from Mali speaks volumes about this requirement.

92 See generally, The Guardian 'Dutch state liable for 300 Srebrenica massacre deaths' available at http://www.theguardian.com/world/2014/jul/16/dutch-liable-srebrenica-massacre-deaths (accessed 6 July 2014).

CHAPTER 18

NO PEACE, NO WAR: PROTECTION OF CIVILIANS IN THE GREAT LAKES REGION OF AFRICA

Bright Nkrumah and Godard Busingye

Abstract: *Africa's Great Lakes Region (GLR) has experienced protracted armed conflicts with severe humanitarian consequences. The dynamics of armed conflicts are often complex and their epicentre shifts from one locus to another, as they expand geographically. The brutality upon innocent civilians caused either by their government's forces or rebels include sexual violence, forced population displacement and extrajudicial, and summary or arbitrary executions. In a majority of cases, incumbent governments fail in their constitutional mandates and international obligations to protect civilians from such atrocities. While the principle of responsibility to protect (R2P) has been invoked by the United Nations Security Council to protect civilians from atrocities in Libya, it remains unclear as to the criteria used to invoke this process. That inevitably poses constraints on the operationlisation of protection of civilian mandates. The Chapter adopts a functionalist approach to probe the effectiveness of the responsibility to protect, by examining its role in the protection of civilians in the Great Lakes Region. Apart from identifying gaps between lack of clarity in conceptualization and operationalization; the discussion notes that there is need for clear normative standards on when and how responsibility to protect can be invoked for future protection missions.*

Introduction

The Great Lakes Region (GLR)[1] in Africa consists of countries that essentially coalesce around Lake Victoria, the largest lake in Africa and other smaller lakes in East and Central Africa. These countries are organised under a regional body, the International Conference of the Great Lakes Region (ICGLR). Within the region, there are also other organisations with more or less similar objectives as the ICGLR, such as the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of the Great Lakes Countries (CEPGL), the Intergovernmental Authority on Development (IGAD), and the Common Market for Eastern and Southern

1 For purposes of this paper, Great Lakes Region (GLR) refers to the member states of the International Conference of the Great Lakes Region (ICGLR).

Africa (COMESA). The ICGLR originally comprised only six countries, but it has expanded, and presently covers 12 states.[2]

Since the early 1960s, the sub-region has been the theatre of frequent armed conflicts and mass atrocities including genocide.[3] The nature of conflicts in the region has largely been of an intrastate character.[4] There have been cases, however, of inter-state hostilities, with the worst-case scenario being the involvement of several countries in the armed struggle in the Democratic Republic of the Congo (DRC).[5]

Occurrences of genocidal violence in the GLR are directly associated with illegal exploitation of natural resources, ethnicity, and state failure or collapse.[6] This situation is largely attributable to weak or repressive governments that fail to rationalise sharing and distribution of natural resources in their respective regimes.[7] There is also lack of willingness or ability on the part of the GLR leaders to hold those who previously violated the rights of civilians (during armed struggles) accountable. For example, despite the protracted hostilities coupled with sexual violence against women in the DRC, only one known perpetrator –Thomas Lubanga Dyilo – was arraigned before and tried by the International

2 Angola, Burundi, Central African Republic (CAR), Republic of the Congo, the Democratic Republic of the Congo (DRC), Kenya, Rwanda, Sudan, South Sudan, Tanzania, Uganda and Zambia, and Botswana, Egypt, Ethiopia, Malawi, Mozambique, Namibia and Zimbabwe as co-opted members. The International Conference on the Great Lakes Region (ICGLR) has been concerned with genocide prevention since its inception and has taken the lead in this area through the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All forms of Discrimination signed on 29 November 2006 by heads of state and government of the ICGLR member states.

3 P Marchak *No easy fix: Global responses to internal wars and crimes against humanity* (2008) 53; P Daley 'Challenges to peace: Conflict resolution in the Great Lakes Region of Africa' (2006) 27 *Third World Quarterly* 303-319 303. See UN Security Council Resolution 872 (1993) which established UNAMIR in October 1993 with a mandate limited to 'ensuring the security of the capital city of Kigali; monitoring the ceasefire agreement, including establishment of an expanded demilitarised zone and demobilisation procedures; monitoring the security situation during the final period of the Transitional Government's mandate leading up to elections; assisting with mine-clearance; and assisting in the coordination of humanitarian assistance activities in conjunction with relief operations.

4 Eg the armed conflict in the North-Eastern, Northern as well as South Western Uganda over the last period of approximately 30 years and the internal armed conflict in Burundi, which ended about 2009. The current spate of internal armed conflict and terrorist acts in the DRC and Kenya are key examples that support his assertion.

5 See the Lusaka Agreement, 1999 signed between Angola, the Democratic Republic of Congo, Namibia, Rwanda, Uganda and Zimbabwe all of which were parties to a single phase of armed conflict in the DRC.

6 Daley (n 3 above) 304; R Lemarchand 'Patterns of state collapse and reconstruction in Central Africa: Reflections on the crisis in the Great Lakes Region' (1997) 1 *Africa Spectrum Quarterly* 173-193 173. See G Evans *Responding to crises in the African Great Lakes* (2014) 32-33; H Musahara *et al* 'Conflict in the Great Lakes Region: How is it linked with land and migration' (2005) Overseas Development Institute 1; C Young 'The heart of the African conflict zone: Democratization, ethnicity, civil conflict, and the Great Lakes crisis' (2006) 9 *Annual Review of Political Science* 301-328.

7 K Beardsley 'Peacekeeping and the contagion of armed conflict 1' (2011) 73(4) *The Journal of Politics* 1051-1064, 1052.

Criminal Court (ICC), and sentenced for a total period of 14 years in March 2012.[8]

However, this setback does not cut across the board. In the case of Uganda, a number of Uganda Peoples' Defence Force (UPDF) soldiers who committed atrocities against the civilian population (right from the time of inception of the forces in 1981) were tried under the provisions of the Operational Code of Conduct, and later the National Resistance Army Statute, which was improved in 2005 and renamed the Uganda Peoples' Defences Forces Act; some convicts were publicly executed.[9] This ground-breaking retribution was successfully executed because the government has absolute control over the armed forces. The Ugandan government has also been able to arrest and prosecute a major leader of the Lord's Resistance Army (LRA) rebel leader, Thomas Kwoyelo, who is currently undergoing trial in the International Criminal Division (ICD) of the High Court in Uganda.[10] In countries where this is not the case, members of the government forces who violate the rights of the civilian population go unpunished.

On 24 February 2013, recognising the recurring cycle of conflicts and violence that permeate the region (the eastern DRC), eleven countries of the GLR signed a Peace, Security and Cooperation Framework.[11] The main objective of the Framework encompasses political commitment at the national, (sub)regional and international levels to restore peace and stability in the sub-region and further address the decades of political armed conflicts and political instability, humanitarian crises and porous borders as well as other potentially destabilising factors.[12] The Framework further sets out an ambitious agenda, which seeks to transform the region into a space of sustainable peace, political and social stability, as well as a space of cooperation based on convergent strategies.[13]

8 See *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06. ICC-PIDS-CIS-DRC-01-015. In this case, Thomas Lubanga Dyilo was found guilty of war crimes, enlisting and conscripting children under the age of 15 to participate in hostilities in the DRC. He was sentenced on 10 July 2012, to a total of 14 years of imprisonment.

9 See the Uganda Peoples' Defence Forces Act 7 of 2005 available at http://www.ulii.org/ug/legislation/consolidated-act/307 (accessed 21 January 2017). Sec 200 establishes a Field Court Martial to operate in circumstances where it is not possible to try suspects by any other courts of law.

10 In July 2011, Thomas Kwoyelo was arraigned on charges of 12 grave breaches of the fourth Geneva Convention (incorporated in domestic law through the Ugandan Geneva Conventions Act of 1964) and 53 alternative counts of penal code violations such as murder, kidnapping, and aggravated robbery, allegedly committed between 1996-2009.

11 The eleven signatories of the Framework are: Angola, Burundi, the Central Africa Republic, the Democratic Republic of Congo, Republic of the Congo, Rwanda, South Africa, South Sudan, Tanzania, Uganda and Zambia.

12 United Nations 'Great Lakes Region' available at http://www.un.org/wcm/content/site/undpa/main/activities_by_region/africa/pid/24261 (accessed 15 May 2015).

13 N Gal-Or *et al* 'Introduction' in N Gal-Or *et al* (eds) *Responsibilities of the non-state actor in armed conflict and the market place: Theoretical considerations and empirical findings* (2015) 2-3.

However, the operationlisation of this framework has been challenged by two specific constraints. First, it is soft law and as a consequence, does not impose any legal obligation on the signing parties to adhere to its provisions.[14] Second, its implementation has been entangled with slow decision-making processes, burdensome and prolonged conflicts, heavy dependence on donor funding, weak institutional capacity, the multiplicity of bodies with a lack of strategic harmonisation, a lack of accountability to civilians most impacted by conflicts, and lack of coherence in the understanding of, and approaches to, resolving conflicts in the region.[15] These challenges constrain the GLR in its endeavours to protect civilians during armed conflicts.

The responsibility of the state to protect its citizens

Within the UN system, the account of the notion of R2P seemingly sounds like a myth. In September 2000, the government of Canada, with the assistance of other governments and several major foundations, established the International Commission on Intervention and State Sovereignty (ICISS) with the mandate of addressing the humanitarian 'intervention dilemma'.[16] Informed by emerging conflicts, the ICISS in 2001 released its report titled 'The Responsibility to Protect',[17] which affirmed three central principles to guide the international community in the conduct of peace support operations (PSOs).

First, states have the primary obligation to protect their population, but if they fail, the international community may intervene. Second, under article 24 of the UN Charter, the UN Security Council must take the responsibility in maintaining international peace and security. Third, the protection of civilians should encompass the *responsibility to prevent* and *react* to atrocities, which may include coercive and non-coercive measures such as political dialogue, international prosecution and economic sanctions.

14 R Tavares 'Understanding regional peace and security: A framework for analysis' (2008) 14 *Contemporary Politics* 107-127; Daley (n 3 above).

15 CA Mumma 'The role of regional bodies in promoting sustainable peace in the Great Lakes Region' (2011) available at https://profiles.uonbi.ac.ke/conniem/publications/role-regional-bodies-promoting-sustainable-peace-great-lakes-region (accessed 18 May 2014). See Also R Lemarchand 'Patterns of state collapse and reconstruction in Central Africa: Reflections on the crisis in the Great Lakes region' (1997) 1 *Africa Spectrum* 173-193.

16 See G Evans 'The responsibility to protect: Rethinking humanitarian intervention' in Proceedings of the Annual Meeting (American Society of International Law) (2004) 78-89. The American Society of International Law 80. Also see International Commission on Intervention and States Sovereignty (ICISS) 'The responsibility to protect' available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 1 August 2014).

17 See ICISS (n 16 above).

According to the ICISS, the use of military intervention was to be invoked as a last resort, particularly after exhausting all diplomatic means, and where populations remain at the mercy of state repression or collapse, civil wars and insurgencies. Accordingly, in December 2004, pointing to international responses to the intractable conflicts in regimes such as Somalia, the DRC and the Darfur region of Sudan, the concept of the R2P was taken up in the context of the debate on the UN reform.[18]

The UN General Assembly, at the 2005 World Summit, adopted Resolution 60/1, which restates member states' individual duty to protect their populations, accompanied with the corresponding obligation of the international community to intervene in situations of *genocide, crimes against humanity including* ethnic cleansing, and *war crimes.*[19] The Resolution serves as a conduit through which any military intervention to protect civilians, including PSOs, can be exercised with clear mandate of the UN Security Council. This, therefore, means that any intervention outside the ambit of the UN Security Council would not be justified and may lead to serious repercussions against the intervening power.[20] R2P should not be used as a cloak by those who wish to plunder the natural resources in failed or collapsing states, and who end up violating the rights of citizens in such states.[21]

The primary duty to protect civilians during hostilities lies with the state where civilians are either citizens or temporary residents.[22] In cases where states fail or renegade on their responsibility to protect civilians, the UN or regional bodies may assume and undertake that responsibility. It is, however, not clear as to whether or not an individual state may exercise such a responsibility in another state. For example, the entrance of Ugandan armed forces into the territory of South Sudan following the crisis in December 2013, generated mixed reactions in South Sudan and Uganda. Some South Sudanese saw it as meddling in the internal affairs of a sovereign state or taking side. Others saw it as a stabilising force to

18 C Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm?' (2007) 101 *American Journal of International Law* 99.

19 UN General Assembly, Resolution 60/1. 2005 World Summit Outcome http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf (accessed 26 January 2017).

20 For example, illegal mineral exploitation under the guise of the responsibility to protect is condemned and even the minerals illegally mined during armed conflict under such circumstances are labelled 'blood diamonds' (also called a conflict diamonds, converted diamonds, hot diamonds, or war diamonds). The term is used to highlight the negative consequences of the diamond trade in certain areas, or to label an individual diamond as having come from such an area. Diamonds mined during the recent civil wars in Angola, Côte d'Ivoire, Sierra Leone, and other nations have been given the label.

21 Eg the former Liberian President, Charles Taylor in 2012 was convicted by the International Criminal Court (ICC) and sentenced to a 50 year jail term among others for exploitation of children during the Sierra Leone insurgency, which he supported.

22 See art 24 of the Constitution of Uganda, which provides: 'No person [within the territorial boundaries of Uganda] shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.'

prevent chaos and maintain peace and order especially inside Juba city and along Juba-Nimule road, which is the lifeline to South Sudan.[23]

It suffices to note that while exercising the responsibility to protect, the rights of any civilian entangled in the armed conflict must be observed. To this end, the 1949 Geneva Convention prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'[24] of civilians and further obliges all States to respect their personal dignity.[25] These guarantees are further reinforced with the Additional Protocol I and II to the Geneva Conventions on protection of civilians during armed conflicts. For instance, article four of the Additional Protocol II prohibits all forms of murder as well as violence to the life, health and physical or mental well-being of civilians during national or international armed conflicts.[26]

The codification of obligations to protect civilians during armed conflict came to be envisaged as an obligation owed by all states to protect their own populations in the first instance, 'but one that must be picked up by the international community of states if that first-tier responsibility is abdicated or cannot be exercised'.[27] R2P is, therefore, a full spectrum of *prevention*, *reaction* and *peace building*, with other related obligations.

The first express reference to the notion of the responsibility to protect was invoked by the International Court of Justice (ICJ) in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory'* Advisory Opinion in 2004 when it expressed the view that hostilities, even if confined to one contractual state can be regarded as threats to international peace and security, thereby providing grounds for collective protection of civilian persons during hostilities.[28] According to this jurisprudence, issues affecting the lives of subjects and citizens are perceived as matters of concern to the international community and not left to be determined under domestic legislation.[29]

The UN Security Council, in its 2006 Resolution 1674 equally interpreted the responsibility to protect as providing ethical, legal and political justifications for humanitarian intervention, particularly where

23 See AM Malou 'Understanding Museveni's intervention in South Sudan' *Sudan Tribune* 12 January 2014 available at http://www.sudantribune.com/spip.php?article49541 (accessed 8 October 2014).
24 Art 3(1)(a).
25 Art 3(1)(c).
26 Art 4(2)(a).
27 Evans (n 16 above) 81.
28 For the Advisory Opinion, see ICJ 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (9 July 2004) available at http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6 (accessed 20 August 2014).
29 Thus, where there is evidence of state negligence to protect its subjects, non-state actors, third states and multilateral organisations have an obligation to intervene to protect the lives of individuals.

the lives of civilian populations are threatened. This development demonstrates that there is a broader and systemic shift in international humanitarian law (IHL), as well as a growing tendency that human security places a limit on state sovereignty.

From a humanitarian point of view, the dictates of public conscience and principles of humanity derived from international law should serve as the basis for the protection of civilians in the event of inter and intra-state conflicts.[30] Observance of these dictates necessarily links the responsibility to protect to the protection of civilians during armed conflicts. The concept of the protection of civilians is rooted in the customary rules of IHL and reinforced by treaty provisions that are geared towards increased protection for populations under siege.[31]

Customary IHL norms and treaty provisions recognise that there are greater possibilities for violating rights of civilians during armed conflicts than in peace time; hence justification for more attention for their protection during armed conflicts.[32] These principles equally apply to military apparatus whilst acting on behalf of the state or the international community, are required to execute their mandate within the ambit of IHL and the domestic law of the host state as well as the sending state or organisation.[33]

The means and methods used while executing any directive should not negate the purpose for which the forces were deployed.[34] It is striking, however, to observe that in several hostilities such as the 1994 genocide in Rwanda, civilians have been abused by security apparatus, or even fellow civilians, with little or no international protection at all.[35] The gap created by the lack of intervention to protect civilians in such a case breeds impunity on the part of the violators of rights of civilians.

30 M Sassoli & MA Bouvier *et al* 'How does the law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law' (2006) 1 ICRC 249.

31 See rule 6 of the rules of customary international humanitarian law codified by the International Committee of the Red Cross (ICRC), which provides that 'civilians are protected against attack unless and for such time as they take a direct part in hostilities'; see also art 51(3) of Additional Protocol I to the Geneva Conventions, which is an affirmation of this rule.

32 See G Evans 'The responsibility to protect: ending mass atrocity crimes once and for all' (2009) 20 *Irish Studies in International Affairs* 7-13.

33 While the United Nations has intimated that its troops should observe the principles and spirit of humanitarian law, it has not been clear if this is a legal obligation or merely a voluntary undertaking. In order to help clarify the situation, the UN Secretary-General Kofi Annan through executive order of 6 August 1999 laid out guidelines for UN troops, which state that they must respect and observe the rules of international humanitarian law or face prosecution before their own national courts.

34 See art 35 of the 1977 Additional Protocol I to the Geneva Conventions.

35 See the case of the *Prosecutor v Jean-Paul Akayesu*, case No ICTR 96-4-T, where the charges against Akayesu included genocide, crimes against humanity, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity, accompanied by explicit threats of death or bodily harm.

It is worth noting, certainly, that though the concept of the responsibility to protect and the protection of civilians overlap and are sometimes used interchangeably, they differ. The principle of the protection of civilians, tabled by then Secretary General, Kofi Annan before the Security Council, has been developed (by the Council) and implemented through authorisation given to PSOs.[36] The Security Council's activities on the protection of civilians over the last decade have shifted this framework from being a mere political rhetoric (soft law) to ensuring accountability (through establishing institutional frameworks) and authorising UN peacekeeping missions.[37]

In summary, (i) while the protection of civilians is limited to situations of hostilities, the responsibility to protect can occur outside this circumstance; and (ii) whereas the protection of civilians narrows the capacity of the UN Security Council to more specific potential threats to peace and security, the responsibility to protect has a broad and more contested rubric of mass atrocities.[38] However, the responsibility to protect cannot be exercised, in total disregard of the obligation to protect civilians, which is a priority in any circumstance.

The operationalisation of protection of civilians in the Great Lakes Region

Building on the precedents set by the Economic Community of West African States (ECOWAS*)* and the Southern African Development Community (SADC),[39] the African Union (AU) adopted article 4(h) of the AU Constitutive Act to protect the fundamental freedoms and lives of the inhabitants of AU member states. By shifting from the ex-policy of non-interference of the then Organisation of African Unity (OAU) to the protection of civilians, it has been established by African states including those in the GRL that sovereignty is no more a safe haven for repressive states. With the entry into force of the AU Constitutive Act in 2001, the AU states ceded their right from external intervention and mandated the

36 United Nations General Assembly *Report of the Secretary-Genera: The Causes of conflict and the promotion of durable peace and sustainable development in Africa* A/52/871- S/1998/318, 13 April 1998.

37 J Welsh 'Civilian protection in Libya: Putting coercion and controversy back into RtoP' (2011) 25 *Ethics & International Affairs* 255-262.

38 B Deschamps Victims of violence: A review of the Protection of Civilians concept and its relevance to UNHCR's mandate (2009), available at http://www.unhcr.org/research/evalreports/4c99d0ba9/victims-violence-review-protection-civilians-concept-its-relevance-unhcrs.html?query=bryan%20protection%20of%20civilians (accessed 2 January 2017.

39 For further reading on ECOWAS military intervention, see B Nkrumah & F Viljoen 'Drawing lessons from ECOWAS in the implementation of Article 4(h)' in D Kuwali and F Viljoen (eds) (2014) *Africa and the responsibility to protect: Article 4 (h) of the African Union Constitutive Act*. For SADC 1998 military intervention in Lesotho, see generally FJ Likoti 'The 1998 military intervention in Lesotho: SADC peace mission or resource war?' (2007) 14 *International Peacekeeping* 251-263.

AU to intervene to save lives in cases of serious violations of human rights. Sovereignty was therefore re-characterised from 'sovereignty as control to sovereignty as a responsibility in both internal functions and external duties.'[40] Sovereignty and non-interference can no longer be invoked by violating states against external intervention, particularly where the lives of their citizens are at risk.[41]

Specifically, article 4(h) guarantees 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. The provision provides for a normative-based intervention in the AU member states. Article 4(h) therefore represents an evolving trend to recognise that the notion of state sovereignty finds its limit in the protection of 'human security'.[42] Thus far, interpretation of article 4(h) does not make PSOs a mere political ambition, but rather imposes a legal obligation on the AU member states.[43]

The right of the AU member states to 'request intervention' from the organisation to 'prevent and respond to humanitarian crisis is also set out under article 4(j) of the Act. In February 2003, the Protocol on the Amendments to the Constitutive Act,[44] not yet in force,[45] amends article 4(h) by incorporating 'serious threat to legitimate order' as an additional ground for collective PSOs.[46]

Apart from the AU Constitutive Act, provisions akin to the protection of civilians intervention are avowed under articles 6(d) and 7(1)(e) of the Protocol Relating to the Establishment of the AU Peace and Security Council (PSC Protocol). As is clear from the AU Constitutive Act (article 23) and the PSC Protocol (article 2), the AU Assembly and the PSC respectively are the two major decision-making organs responsible for the operationalisation of PSOs in Africa.

Thus, in December 2013, at the peak of an armed violence in the Republic of South Sudan, the President of the State requested the Ugandan government to render military assistance to his government in order to protect civilians who were at risk. Under the aegis of the protection of civilians, Uganda deployed its forces to South Sudan. The Ugandan force

40 See ICISS (n 16 above).
41 B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85(852) *International Review of the Red Cross* 809.
42 Stahn (n 18 above) 102.
43 Nkrumah & Viljoen (n 39 above) 255; S Dersso 'The role of the African human rights system in the operationlisation of Article 4(h)' in Kuwali & Viljoen (n 39 above) 196.
44 Available at http://www.au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf (accessed 31 January 2017).
45 The Protocol is not yet in force since the number of ratifications has not yet reached the required number.
46 D Kuwali 'The rationale for Article 4(h)' in Kuwali & Viljoen (n 39 above).

executed that mandate until it was withdrawn from South Sudan in 2015. Deployment of the Ugandan force to South Sudan was based on bilateral arrangements between the governments of the two countries. The continued stay of the Ugandan military force in South Sudan had to be authorised by either the AU Assembly or the PDC, especially since it clearly met the threshold of article 4(j) of the AU Constitutive Act, which demands such supranational authorisation.

Challenges of protection of civilians in the Great Lakes Region

Protection of civilian population in the GLR is undoubtedly an enormous and challenging task. Presently, the sub-region does not possess a binding treaty akin to the Economic Community of West African States (ECOWAS) Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping,[47] or the Southern African Development Community (SADC) Security or Protocol on Politics, Defence and Security Cooperation,[48] which can be invoked by the ICGRL to avert human atrocities. Consequently, the regional group has no statutory-base within which to approach the UN Security Council for authorisation for intervention purposes. Therefore, in light of the absence of a normative instrument and an enforcement mechanism such as a sub-regional standby force, the regional organisation has not been able to effectively and promptly prevent or halt commission of humanitarian crises in the GLR. Two of such cases are discussed below.

Ending massacre of civilians in the Democratic Republic of the Congo

The DRC has long been a case calling for the responsibility to protect and robust protection of civilians-mandate. For over two decades, armed struggles have continued at the regional, national and local levels, with the five eastern provinces of Katanga, Maniema, North-Kivu, South-Kivu and Orientale bearing the brunt of violence. The hostilities, which can be traced back to the 1990s, have claimed the lives of estimated 5 million civilians with foreign armed groups and Congolese security forces recorded as perpetrators.[49] The M23 insurgents committed widespread war crimes such as rape, torture; disappearances, and extrajudicial killings; while the transitional government undertook few actions to punish perpetrators.[50] Yet, as the M23 announced an end to its armed rebellion on 5 November 2013, and its commander Bosco Ntanganda is awaiting trial at the ICC,

47 Available at www.chr.up.ac.za/chr_old/hr_docs/african/docs/other/ecowas4.doc (accessed 31 January 2017).
48 Available at http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf (accessed 31 January 2017).
49 See Peace Direct 'DR Congo' available at http://www.insightonconflict.org/conflicts/dr-congo/ (accessed 31 January 2017).
50 See Human Rights Watch 'Democratic Republic of Congo' available at http://www.hrw.org/drc (accessed 31 January 2017).

many of its members and other factions who joined the Congolese army continue to perpetrate atrocities, with little resistance from government.[51] The country's ineffective internal mechanisms to address volatile situations in certain parts of the territory provide justifiable reasons for the responsibility to protect to ensure the protection of civilians and to deter any future violations.

Responding to a 'Holy War' in Kenya

For almost half a decade, Kenya has been the battling ground for the Islamist group Al-Shabab's 'Holy War'.[52] The terrorist group's activities, which date back to the abduction of two aid workers from the Dadaab refugee camp, the killing of a foreigner in a Kenyan resort on the east coast, the kidnapping of two foreigners, and the attacks on Kenyan troops in cross-border raids, have been cases of massive human insecurity in the country. However, the scale of atrocities committed by the group against unarmed civilians has escalated over the years. On 21 September 2013, the Islamist group attacked and killed 67 civilians in the high-class Westgate shopping mall in Nairobi.[53] Despite the arrest of dozens of people, the state has not confirmed any suspects directly connected to the siege. Again, almost two years down the line, on 2 April 2015, the armed group again stormed the campus of the Garissa University College killing 148 people.[54] Consequently, the ongoing atrocity clearly meets the threshold for collective PSO considering that the government of Kenya is seemingly unable (or unwilling) to confront the insurgents.

Constraints to protecting civilians

Despite the naked reality of the serious violations of human rights being committed in some of the regimes in the GLR, the REC (ICGRL), the AU and the UN have done very little in the case of DRC and remained apathetic in the case of Kenya. The lack of activism by these bodies towards the protection of civilians in the sub-region can be explained by the following factors.

51 Amnesty International 'Annual Report 2013' available at http://www.amnesty.org/en/region/democratic-republic-congo/report-2013 (accessed 31 January 2017).

52 H Vogt 'Al-Shabaab's Kenya Killings Fit Broader Strategy' The Wall Street Journal (8 April 2015) available at http://www.wsj.com/articles/al-shabaabs-kenya-killings-part-of-broader-strategy-1428523966 (accessed 25 August 2016).

53 *The Guardian* 'Terror in Nairobi: The full story behind al-Shabaab's mall attack' (4 October 3013) http://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya; BBC (22 September 2013) 'Somalia's al-Shabab claims Nairobi Westgate Kenya attack' http://www.bbc.com/news/world-africa-24191606.

54 International Business Times 'Kenya Garissa University attack: Aftermath of mass murder shown for first time' (7 April 2015) http://www.ibtimes.co.uk/kenya-garissa-university-attack-aftermath-mass-murder-shown-first-time-1495153; Aljazeera 'Kenya strikes al-Shabab in Somalia after Garissa attack' (06 April 2015) available at http://www.aljazeera.com/news/2015/04/kenya-air-strikes-al-shabab-somalia-garissa-attack-150406102547444.html (accessed 31 January 2017).

First, the major obstacle facing the protection of civilians in the GLR and Africa broadly relates to the lack of conceptual clarification of the responsibility to protect. For instance, the responsibility to protect encompasses the responsibility to *prevent and rebuild*, and above all, the *responsibility to react*, through coercive measures such as economic sanctions, judicial and *démarche*. It is only when all these stopgaps have failed to contain or resolve the situation, that military action will be taken. The use of force is, as a consequence, permissible, but only in exceptional and extreme circumstances. Yet, the responsibility to protect norm is silent on most critical and practical matters. For instance, what is an exceptional circumstance or the just cause? What is the threshold for determining when a military action is *prima facie* justifiable? Which state or institution has the final say to determine when the use of force is defensible, and what modalities should be applied? Again, the ICISS asserted that military action was justified on two grounds, namely; *large scale* loss of life, actual or apprehended, with or without genocidal intent; and large-scale *ethnic cleansing*, actual or *apprehended*, whether carried out by killing, expulsion, acts of terror or rape. While it is obvious that military actions may be defensible on grounds of anticipatory measure in response to obvious evidence of large-scale killing or ethnic cleansing, no attempt was made by the Commission to quantify, qualify, or provide the meaning of 'large-scale'.

Second, considering that every military intervention can be asserted as a matter of necessity and urgency, and due to the complex and bureaucratic nature of the UN Security Council decision-making system, timely approval is not at all times guaranteed. This creates practical constraints for consensus building and the operationlisation of humanitarian intervention in the GLR.[55] Even more so, the question whether the African Standby Force (ASF) can intervene in any AU member state with the sole authorisation of the AU Assembly or the PSC without the sanction of the UN Security Council remains a bone of contention.[56] It is therefore likely that resolutions on the operationlisation of offensives to save human lives will be enmeshed in complexities relating to their legality, which will pose enforcement challenges for the protection of civilians in the GLR region.

55 J Cilliers & K Sturman 'The right intervention: Enforcement challenges for the African Union' (2002) 11 *African Security Studies* 28-39; AJ Bellamy & PD Williams 'The UN Security Council and the question of humanitarian intervention in Darfur' (2006) 5 *Journal of Military Ethics* 144-160; K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97.

56 JI Levitt 'The Peace and Security Council of the African Union: the known unknowns' (2003) 13 *Transnational Law & Contemporary Problems*; Bellamy & Williams (n 53 above); PD Williams 'From non-intervention to non-indifference: the origins and development of the African Union's security culture' (2007) 106 *African Affairs* 253-279.

Third, at the AU and UN level, one major challenge in the drive to implement the protection of civilians has been the ancient lack of political will to take collective decision and 'exercise peer pressure on states that fail to live up to what they have committed'.[57] The AU's attempts, especially at resolving conflicts over the last decade has been marked with divisive opinions of its members and has often been hampered by tensions between the responsibility to protect and the custom of camaraderie among African elites.[58] There still exist a wide *lacuna* between political commitment during the AU/UN Assemblies' meetings and state practice. Considering that even though states are willing and enthusiastic to be parties to various international human rights and humanitarian instruments, there is no commitment to domesticate such principles in their national instruments. For instance, while many states from the GLR signed up on the responsibility to protect in 2005, most have still not incorporated its provisions in their domestic legislations, thus, hampering its 'rapid transition from principle to practice in the efforts to respond to mass atrocities.'[59] Moreover, the AU has not been able to inspire its member states, including members of the GLR, to integrate the provisions of the responsibility to protect into their domestic legislation.

Finally, the responsibility to protect as a norm is silent on fundamental agencies or actors needed to prevent atrocities and enhance its successful operationalisation. For instance, the principle lacks key mechanisms such as early warning and diplomatic capability, civilian structure, response system, and in exceptional circumstances, military set-up to enable the international organisation to intervene and avert any atrocity in a timely manner. Yet, even where institutions such as the AU Standby Force are in place, there is no sufficient financial and human resource to boost the operationalisation of any offensive. The fiasco is that the AU does not have its own army and even the RECs such as the GLR, which it heavily relies upon lack similar standby forces. Ultimately, the responsibility to protect rests on the inertia of individual member states to act.

Conclusion

The protection of civilians remains a key framework in IHL and human rights law that enables the UN, AU, RECs, third states and the concerned state to prevent and react to grave circumstances. Chapter VII of the UN Charter accords the UN Security Council the mandate for the protection of civilians.[60] The ejection of the LRA in Uganda, the disarmament of

57 M Killander & B Nkrumah 'Human rights developments in the African Union during 2012 and 2013: recent developments' (2014) 14 *African Human Rights Law Journal* 275-296.
58 F Okyere, K Anning & S Nelson 'Article 4(h): translating political commitment into collective action' in Kuwali & Viljoen (n 39 above).
59 As above.
60 G Evans (n 32 above) 13.

M23 in DRC; and the mass atrocities being committed in Kenya point to the level of success and failures of national and intergovernmental agencies to use *all necessary means* to protect civilians in the GRL.

In responding to atrocities, the UN should come up with clear guidelines on how and when the responsibility to protect can be exercised and by whom. The UN and its AU counterparts should, through the lens of the protection of civilians, find a clear criteria or scope of assessing early warning signs to avert or forestall conflict in the GRL. As emphasised by the ICISS, PSOs should not be limited to military operations, but should encompass other arbitrary and non-binding measures. For this reason, strategies such as political dialogue, economic sanctions and diplomatic engagement should be explored before or prior to the commencement of deployment of troops. For instance, the ECOWAS interventions in Togo and Côte d'Ivoire underscore how economic sanctions and 'diplomacy may be combined effectively to settle internal disputes'.[61]

As much as condemnations and sanctions are fundamental to the protection of civilians, current events in the DRC and Kenya have demonstrated that human rights abuses such as systematic rape, arbitrary executions, abductions of villagers and mass killings could still occur in spite of diplomatic measures. Consequently, when a state is considered to have openly failed to prevent, or is complicit in the commission of grave crimes against its citizens, then prompt and critical military engagement is inevitable. In order to effectively avert future atrocities and contain current violations in the GLR, leaders in the region should build a political consensus to adopt clear normative standard and functional institutional frameworks.

61 Nkrumah & Viljoen (n 39 above).

CHAPTER 19

PROTECTION OF CIVILIANS IN THE HORN OF AFRICA

Paul Phiri

Abstract: *The Horn of Africa (HoA) has faced internecine conflicts with unimaginable consequences on civilians. The military interventions in the HoA have exposed the challenges associated with the use of military force for the protection of human rights. This Chapter argues that where military interventions take place without the consent of those involved in the conflict, it becomes problematic for the belligerents to accept the interveners. Further, interventions are only meant to produce short term outcomes to assist the victims and end the conflict whereas long term outcomes tend to contribute to resolving the conflict and rebuilding initiatives. It is noted that despite several military interventions in the HoA, civilians continue to suffer and are still exposed to mass atrocities. This shows that the strategies employed by the military to execute their mission in the HoA are wanting. Therefore, drawing from the experience in the HoA, the military can hardly assist in conflict resolution processes, but rather only provides an environment conducive for conflict resolution. For this reason, military interventions should be conducted concurrently with conflict resolution processes for their assistance to be effective and in order to achieve both negative and positive peace.*

Introduction

The Horn of Africa (HoA) has been, and still is, experiencing violent conflicts of different types. These conflicts bring about human suffering including loss of life of innocent civilians. States in which such conflicts take place have the responsibility to prevent such occurrences and to protect their citizens from being exposed to such traumatic experiences. The inability or unwillingness by host states in such circumstances has, at times, brought other countries to intervene through the use of force in the name of humanitarianism to assist populations at risk. Interventions of such a nature have attracted debates on the use of the term 'humanitarian intervention' between those who advocate for it, and those against the militarisation of humanitarianism, resulting in the term 'military intervention for humanitarian purposes' being used to avoid such conflicting positions. Against this background, this discussion examines the use of military force in the context of the norm of the responsibility to

protect, focusing on the conflict scenarios of the HoA. The idea is to assess how military force can contribute to conflict resolution.

Conflicts in the Horn of Africa

The HoA is a geographical region that falls within the horn shaped part of Africa that protrudes into the Indian Ocean like a rhino horn from the continent's landmass in North-Eastern Africa.[1] In general, there is no consensus on the states that make up the region, but strictly speaking, only Djibouti, Eritrea, Ethiopia and Somalia fall within this geographical region; hence they comprise the core of the Horn. However, since the issues and problems associated with the Horn go beyond these geographical confines, one cannot seriously discuss them without bringing in the immediate neighbours of the core countries. In view of the inter-connectedness of the countries in the area, Mwagiru claims that all the countries belonging to the Inter-Governmental Authority on Development (IGAD), form the HoA – which means that Sudan, Kenya, and Uganda are considered as part of the area.[2] It can then be argued that determinants such as the history, demography, geography, culture and geopolitics shape the composition of the countries of the HoA. In supporting this position, Ayub states that attributes used to identify regional sub-systems tend to take into account geographic proximity, regularity and the intensity of interactions between actors of a particular area.

The Horn of Africa has been exposed to a number of conflicts for a very long time with tragic consequences on human lives and economic advancement. Salam notes that the conflicts in the region most specifically have their origins from the strategic position factor of the area which in turn attracted external actors who brought about external influences from the practice of imperialism, execution of the Cold War, and the post-Cold war adventures and internal factors which mostly include ethnic conflicts, territoriality and marginalisation of the pastoralist communities.[3] Conflicts in the HoA take place at the inter-state, intra-state and community levels and that due to the interconnectedness of the region, conflict is usually very difficult to manage and to resolve.

Conflicts in the HoA in general are intractable and closely interconnected in the sense that an unfolding conflict in one country easily spills over into the neighbouring states. In this context, Mwagiru

1 TB Herui 'The Eritrean-Ethiopian conflict and the security in the Horn of Africa' Paper presented at the conference on the current peace and security challenges in the Horn of Africa, 12-13 March 2007 Centre for Policy Research and Dialogue and Inter Africa Group, Addis-Ababa 77.

2 M Mwagiru (1997) The legal framework for conflict early warning and response mechanism CEWAR: Djibouti, IGAD 7.

3 EAA Salam 'Conflicts in the Horn of Africa and their consequences on Sudan's stability and security'(1995) 3 *Intellectual Discourse* 65-76.

introduced the concept of an interlinked conflict system with regard to the HoA area and emphasised that conflicts in the region are not only interconnected, but also form a region-wide conflict system.[4] The HoA sub-region is a conflict system and what might at first appear as isolated conflicts in fact are parts of a wider pattern of conflict regionally. The inter-state conflicts in the region have led to the formation of organic linkages with intra-state conflicts. Owing to a lack of internal legitimacy and political consensus and the problematic surrounding, the mode and manner in which state formation took shape, political regimes in the Horn more often seek to externalise their domestic problems to the extent of internationalising them. In addition to these factors, the arbitrary nature of drawing the borders during the colonial era resulted in the fragmentation of ethno-cultural formations and other trans-border ethnic identities, thereby blurring the distinction between intra and inter-states conflicts.

The relationships and their interconnectedness in the HoA have been noted to result in security deficits and lapses. Evans and Newham view security as the absence of threats to cherished values.[5] However, traditional conceptualisation of security emphasised regime or state security and never paid sufficient attention to other dimensions like human security. Dorn perceives human security as the protection of people from both violent and non-violent threats by laying ground for freedom from pervasive menace to rights, liberties and life.[6] Most states in the HoA take state security as more important than human security and as such, in most instances, the human rights of their citizens are violated. The causes and manifestations of most of the conflicts in the HoA include irredentism and boundary conflicts, access to and control over trans-boundary resources, proxy wars and mutual interventions, the influence of political Islam and wars on terror, fragile governance and state failure and fragility.

The factors that generate conflicts in the HoA are many and complex. However, the general view is that one crucial dimension relates to the socio-economic structures and institutional systems left behind by precolonial empires and the colonial state, which generally informs the characteristics of the current African state. Another factor is the ongoing influence by the global system, including economic, political and military interventions by external powers and finally, the rapidly deteriorating environmental conditions, which along with rapid population growth, have generated scarcity of resources and conflicts among communities.

4 M Mwagiru 'The great Horn of Africa conflict system: Conflict patterns, strategies and management practices' (1997) Paper presented for the USAID project on conflict and conflict management in the Greater Horn of Africa.

5 G Evans & J Newnham *The Penguin dictionary of international relations* (1998), available at http://rezadelavari.com/files/filebank/penguin_dictionary.pdf (accessed 24 March 2017).

6 W Dorn 'Of guns and goods: Small arms, development and human security' in MV Naidu (ed) *Perspectives of human security: National sovereignty and humanitarian intervention* (2001).

However, the core factors, as can be noted, refer to the nature of the post-colonial state and its governance systems. The governance system mainly includes domestic governance and regional governance that interestingly have been the helm of the HoA's conflicts problems. If peace has to be achieved in the HoA and its constituent countries, then the factors as articulated require addressing.

Applying Galtung's ABC theory to the protection of civilians in the Horn of Africa

The chapter is guided by the English school's theoretical ideas complemented by the conflict resolution concept using the liberal peace theory that resonates with liberalism in international relations and Galtung's ABC theory. The English school, which fits in the theory of social constructivism, assumes that states form a society of states that adheres to mutable shared norms and laws in the areas of sovereignty, non-intervention and the non-use of force.[7] Bull notes that the plurality of the states with a limited degree of interaction among themselves constitutes a system, whereas a society is characterised by a degree of acceptance of common rules and institutions whereby such societal rules – usually termed as norms – both constrain and enable actors and thus, at the end, limit states' decision-making.[8] While these norms may not constitute laws presided over by a judicial system with the power of enforcement analogous to that in the domestic systems, they determine a state's international status and its relationship with other states.

Solidarists and pluralists exist as the two strands of division in the English school. Pluralists stress the importance of the state, arguing that it provides for both order in the international sphere and depending on the particular internal composition, justice and the protection of human rights domestically and that through this position, the basic presumption of non-intervention should be maintained. Solidarists argue that states, though clearly important, are instrumental as a means which the individual's rights are upheld and if this normative duty is not fulfilled, collective military intervention is legitimate in response to extreme human suffering.[9] The arguments for and against military intervention provide a basis for decision-making for whosoever is supposed to be responsible for the authorisation or non-authorisation of military interventions hence the requirement for an international consensus on the best practice on such issues.

7 NJ Wheeler *Saving strangers: Humanitarian intervention in international society* (2000) 6.
8 H Bull *The anarchical society: A study of order in world politics* (2002) 2.
9 N Wheeler 'Pluralist or solidarist conceptions of international society: Bull and Vincent on humanitarian intervention' (1992) 21 *Journal on International Studies* 463.

Interventions are usually meant to protect people from gross violations of human rights, which are connected to large scale loss of life and large scale ethnic cleansing, and, as such, their outcomes are differentiated into short term effects (immediate alleviation of human suffering) and long term effects (conflict resolution and the reconstruction of societies and policies following intervention). The short term effects answer to the concept of conflict management (negative peace), while the long term effects require conflict resolution with a peacebuilding focus as part of achieving positive peace.

Conflict management is defined as the more limited way to the settlement and containment of violent conflict while conflict resolution is a process which implies that the deep rooted sources of conflict are addressed and transformed.[10] In the context of conflict resolution, Galtung's ABC theory posits for conflict to be viewed as a triangle, with angle 'A' representing attitudes which includes the parties' perceptions and misperceptions of each other and of themselves'. Angle 'B' represents cooperation or coercion gestures signifying conciliation or hostility and whereby in violent conflicts, behaviour is characterised by threats, coercion and destructive attacks. Angle 'C' represents contradiction of the conflict which refers to the underlying conflict situation which may be actualised by actual or perceived incompatibility goals between the conflict parties.[11] If a conflict has to be resolved, it can then be argued that behaviour has to no longer be violent, attitudes no longer hostile and the structure of the conflict being changed in addition to being approached through a track II diplomatic approach whereby private individuals, academics, professionals, international and local non-governmental organisations would be involved using non-official and non-coercive measures in the form of problem solving workshops and round table discussions (outcome usually process oriented). This scenario would ensure a conflict being ended and resolved with positive peace as an end product.

A single approach of conflict resolution cannot be able to undertake all the functions that can assist to achieve a durable peace. This requires that it be carried out using a number of approaches, which may include peacebuilding. Peacebuilding is generically understood as external interventions that are intended to reduce the risk that a state will erupt into or return to war, as an articulation which was made after a revision of the initial understanding from the former UN Secretary-General, Boutros Boutros-Ghali, who had defined it as an action to identify and support structures which will tend to strengthen and solidify peace in order to avoid

10 O Ramsbotham, T Woodhouse & H Miall C*ontemporary conflict resolution: The prevention, management and the transformation of deadly conflict*s (2011) 31.
11 Ramsbotham, Woodhouse & Miall (n 10 above) 10-11.

relapse into conflict as a post-conflict concept.[12] The approach to peacebuilding and conflict prevention is grounded in the concept of 'liberal peace', which derives from a long tradition of Western liberal theory and practice. Hehir notes that the desire to see the West spread libel values has obvious implications for military interventions as such action is considered part of the march of human progress and a means by which the global transition to liberal democracy can be facilitated.[13]

Liberal peace theory generally derives from the concept of liberalism in international relations and includes democracy, economic interdependence, and international organisations as its most important pillars. Individuals in a democracy are happy with the absence of war and as such would never go to war with each other, and economic interdependence creates favourable conditions for international cooperation among governments and peoples through the use of market economies which thrives on free trade and promotes peace rather than conflict. International organisations and international law are important for the regulation of international interdependence and thus ensures good relationships among states. The liberal peace thesis views political and economic liberalisation as effective antidotes to violent conflicts. Thus, promotion of human rights, democracy, elections, constitutionalism, rule of law, property rights, good governance, and neo-liberal economics have become part and parcel of the international peace building strategy.[14] In the context of interventions, the contemporary liberal perspective on intervention often described as liberal interventionalism is at times bellicose and militaristic, and thus stresses the imperative of intervention for the good of humanity.[15]

Military interventions in perspective

Internal or intra-state conflict is a form of organised violence in which factions within a country engage in violent conflict with each other and that sometimes such violence can expand to include neighbouring countries and entire regions. Internal conflict is the most frequently occurring type of organised conflict that has even eclipsed inter-state conflict by a considerable margin.[16] Such conflicts, if perpetrated to the extreme, may require military intervention from other states to pacify them. Military intervention is viewed as the deliberate act of a nation or a group of nations to introduce its military forces into the course of an

12 UN Doc 47/277 *An Agenda for Peace, Report of the Secretary-General*, 17 J47/277une 1992, para 21, available at http://www.un-documents.net/a47-277.htm (accessed 24 March 2017).
13 A Hehir *Humanitarian intervention: An introduction* (2010) 68.
14 M Barnett *et al* 'Peacebuilding: What is in a name?' *Global Governance* (2007) 1335-58.
15 R Cooper *The breaking of nations* (2004)
16 W Lahneman *Military intervention: Cases in context for the 21st Century* (2004).

existing controversy.[17] Seybolt perceives it as the threat or use of force across state borders by a state or a group of states aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens due to violence without the permission of the state within whose territory force is applied and the use of military personnel to assist the delivery of humanitarian aid to people in need.[18]

It should, however, be noted that military interventions can include interventions by a state to rescue its own citizens, while other types of interventions include non-forcible actions such as economic and diplomatic sanctions. The main argument in terms of military interventions has been the questions of consent from the target state, and authority to conduct such an operation in the context of conflict resolution. Parties to the conflict would have difficult giving consent as they would be responsible for creating and perpetuating the humanitarian crisis as part of their larger political and military strategy and similarly authority to states willing to assist would be difficult if viewed from the perspective of the international society, which is governed by legal statutes and norms.

In the absence of consent from the parties, it certainly would be difficult to conceive forcing the perpetrators to consider conflict resolution although this aspect is the most sought in order to achieve durable peace. Conflict resolution is not a one-day event - it takes time. Considering the fact that interventions target short term outcomes while conflict resolution is a concept associated with long term outcomes, there is need to look at how military interventions should be done in order to contribute to its achievement.

Military interventions are carried out in order to achieve specific goals and as such answer to a number of typologies. A typology identifies the range of circumstances across which a strategy can be applied and highlights the distinct demands each circumstance places in the intervening forces. In this context, the interventions can include; aid delivery assistance, protection of aid operations, saving victims of atrocities and defeating perpetrators, that is against a background that in order to survive, people require certain essentials including food, water, shelter, health care and protection from violence.[19] Humanitarian aid business would primarily be set up to address the first four which can be referred to as privation and to a limited extent, address violence. Interventions addressing violence would certainly require the use of appropriate strategies and techniques in order for them to have impact. It should then be realised that when policy makers face decisions about

17 USA Department of Defence (2005) (Dictionary of Military and Associated Terms. US Washington, DC: Department of Defense.
18 TB Seybolt *Humanitarian military intervention: The conditions for success and failure* (2007).
19 Seybolt (n 18 above).

whether and how to use military force to respond to a humanitarian crisis, they must realise that intervention becomes progressively more difficult from the articulated types.

Generic military intervention strategies for humanitarian purposes just like any military actions would include avoidance, deterrence, defence, compellence and offence.[20] Avoidance would be characterised by conscious effort not to engage an adversary in a hostile confrontation, deterrence would entail threat to use force as a punishment if an opponent takes a specific action, defence would entail the use of force to protect something or someone from action that an opponent is taking, and compellence entails the use or threat of force to induce an opponent to take specified action with the use or threat being withheld once the action is taken. Thus, although they may be viewed as pacification missions, apart from achieving negative peace, military interventions cannot properly address the question of positive peace but can only assist in the groundwork for the parties concerned to consider resolving a conflict and for its effects to take root. In this case, the attitudes, behaviour and conflict itself cannot be changed and that it would be difficult to employ any diplomatic track that would engender conflict resolution and in the context of the peacebuilding approach to conflict resolution, liberal peace cannot take root as there would be no basis for it to be nurtured.

Intervention and the challenges in the implementation of the UN Charter

Interventions, especially those termed humanitarian, have had a controversial past. It is argued that this *status quo* basically stems from how the practice of interventions has evolved, which in turn makes its international legal basis to be elusive. In this regard, the United Nations (UN) Charter mandated the Security Council in article 24(1) as the primary body responsible for the maintenance of international peace and security although through the 1950 General Assembly Resolution 377 (uniting for peace), the General Assembly can act when the UN Security Council is unable to sanction action unanimously or demand a cessation to ongoing military action when there is a threat to international peace and stability. Article 2(4) of the same UN Charter however prohibits all its members from the threat or use of force in any manner inconsistent to it except only in self-defence under article 51 and on authority from its Security Council using Chapter VII through article 39 which can trigger either article 41 or 42 while article 2(7) prohibits the UN itself and its' member states to interfere in the domestic affairs of its member states/ other member states.[21]

20 TC Schelling *Arms and influence* (1996).
21 Hehir (n 13 above) 86-88.

In a similar regard, the UN Charter further commits states to protect fundamental human rights through article 1(3). Customary international law, however, in a different note (states' consistent practice) also operates as another criterium for the execution of interventions whereby the just war threshold is used as its basis for interventions. This *status quo* suggests that the UN Charter contains contradictory legal provisions that at times point to the legality or illegality of interventions in certain circumstances and also that it is further complicated by the customary international law, which at some point is even not consistent. This implies that the UN Charter has struggled to reconcile its provisions in the context of sovereignty and human rights with its proscriptions against interventions both multilaterally through the Security Council and unilaterally by individual states or coalitions of states in the context of conflict resolution. Dietz and others state that the theoretical contradictions and the empirical problems of the interventions which are at most times viewed as humanitarian are inextricably linked especially in relation to the most crucial questions which include; when is it right to intervene, when is not right to intervene, legality and legitimacy, the question of who decides and the term humanitarian intervention itself.[22]

In a move to circumvent these difficult positions, a new norm 'responsibility to protect' was introduced through the work of the International Commission on Intervention and State Sovereignty (ICISS) established by the Government of Canada after Kofi Annan, who at the time was a UN Secretary-General, asked a question on how the international community should respond to 'gross and systematic violations of human rights that affect every precept of our common humanity and later endorsed by the 2005 United Nations World Summit with refinements of the original ICISS report and later by the UNSC through resolutions that it authored.[23] What is important in the responsibility to protect concept is that most of the troubling questions on interventions were dealt with most specifically in regards to moving away from the use of the term 'humanitarian intervention' and clarifying on the aspects of legitimacy and institutions for authorising interventions. It can then be argued rightly that the responsibility to protect is premised on the notion that when states are unwilling or unable to protect their citizens from grave harm, the principle of non-interference 'yields to the responsibility to protect'.

This means that the ICISS report aimed at escaping the irresolvable logic of 'sovereignty versus human rights' by focusing not on what interveners are entitled to do ('a right of intervention'), but on what is

22 T Dietz, I Bode & AF Da Costa *Key concepts in international relations* (2011) 97-98.

23 International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (2001) International Development Research Centre, Ottawa, available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 24 March 2017).

necessary to protect people in dire need and the responsibilities of various actors to afford such protection, in addition to coining the responsibilities to being categorised as responsibility to prevent, to react and to-rebuild. The elements of responsibility to prevent and to rebuild are more in line with conflict resolution that is in order to achieve durable peace while the responsibility to react, can be noted to have a lot to do with putting the military feet on the ground as part of the core business of military intervention. It is this aspect which has been problematic with the international society but also an important one in the context of dealing with large-scale loss of life or large-scale ethnic cleansing.[24]

Military interventions in the Horn of Africa

The HoA as already articulated has been subjected to numerous conflicts (inter-state and intra-state), which at most times, have had devastating effects on neighbouring countries.[25] Examples include the Eritrea-Ethiopia interstate conflict, the Kenya and Somalia Shifta conflict, the North and South Sudan intra-state conflict and the numerous Somalia intra-state conflicts that have been on-going for some time now. The Somalia conflict has been unique among all the conflicts in the region in the sense that the region's countries and other countries have been forced to militarily intervene in them. Somalia and Ethiopia in this context will be given more focus in regards to military interventions.

Somalia intervention in Ethiopia

In a bid to harness the greater Somalia dream, Mohammed Siyad Barre, a dictatorial leader who had taken over power from an elected president in a military coup, launched a popular military campaign in 1977 to take the Ogaden region of Ethiopia in which many Somalis lived.[26] The intervention was carried out unilaterally by Somalia, that is, without any authority either from the UN or the regional organisation of the time, the Organisation of African Unity (OAU).[27] Force was used against the dictates of the UN Charter. The campaign did not however manage to achieve its objective as it failed to capture the Ogaden region from Ethiopia. It is argued that the campaign created economic and political problems that at the end of it all resulted in the country's economy collapsing and, politically, clans fighting against each other due to the president's reliance on manipulating rivalries between them. This was also against a background that during the political crisis, a severe drought hit the country and robbed the country's inhabitants of their ability to feed themselves. A civil war consequently erupted, and led Barre to eventually

24 ICISS (n 23 above).
25 R Bereketeab (ed) *The Horn of Africa: Intra-state and inter-state conflict and security* (2013).
26 Seybolt (n 18 above).
27 Hehir (n 13 above) 86-88.

flee the country in 1990.[28] It can be argued that Somalia's intervention into Ethiopia really had no humanitarian basis and as such can be seen to have been only confrontational. The case of Somalis being part of Ethiopia did not merit the action taken at the time. Conflict resolution could have worked better to resolve the problem if there was any but in this case had no grounds for it to take root. Similarly, in the context of the school of thought regarding interventions and the liberal peace theory in the context of peacebuilding, nothing can be said, as the basis was simply not there.

UNOSOM, UNITAF AND UNOSOM II Somalia interventions

In 1992 and 1993, Somalia was suffering from a major famine after the country had descended into civil war. In response to the humanitarian crisis, the US and the UN launched a humanitarian effort to provide aid to the suffering population. When roving gangs and militias prevented the delivery of aid, three successive interventions, United Nations Operations in Somalia (UNOSOM), Unified Task Force (UNITAF), and UNOSOM II, with operation provide relief on the side lines, were sent to not only stop the gangs but also to set in motion a peace process in the war-torn nation.[29] All in all, this means that there was both a military and political component to the intervention. The intervention was carried out by states and institutions that had no direct stake in the conflict. It should be noted that both UNITAF and UNOSOM II were authorised by a resolution under Chapter VII of the UN Charter, meaning they could use force against actors in Somalia that did not cooperate, while UNOSOM I operated only under a Chapter VI mandate, which was meant to use force only in self-defence.

The operations in Somalia had been authorised by the UN Security Council, but had not been consented to by the conflicting parties. It would appear that the UN initially underestimated the situation, hence the Chapter VI mandate that was given to UNOSOM I. It created problems of the command structure when the US was authorised as UNITAF to operate its own command structure. In addition, it can also be argued that the strategy employed by the US after an order was given to apprehend war lord Aideed was faulty and in the process created problems for the whole mission. Considering the circumstances, it can be argued that the international community acted within the scope of the responsibility to protect concept after seeing large scale loss of life due to the conflict, and that conflict resolution in the context of Galtung's ABC theory could not work since the relationship of the parties in the conflict had been destabilised and similarly liberal peace could not take root as there was no peace to be built.

28 S Makinda 'Seeking peace from chaos: Humanitarian intervention in Somalia' *International Peace Academy*, Occassional paper (1993).
29 Seybolt (n 18 above).

Ethiopian invasion of Somalia with American backing and AMISOM takeover

In 2006, Ethiopia invaded Somalia and overthrew its Islamist government (ICU) and sought to bring Somalia's Transitional Federal Government (TFG) to power.[30] As such, it intervened in the intra-state conflict between two fighting parties in the country. This invasion signalled Ethiopia's capability to change the behaviour of the Islamist government by trying to destroy its fighting capability. It was backed in this endeavour by the US. Ethiopia's invasion was at the invitation of the TFG, and at the same time also tried to serve its national interest of defending itself from the threats of attacks after the ICU had declared a Jihad on it.[31]

In this case, although the UN did not get involved directly, it had sufficient authority to intervene in the internal conflict in Somalia through the invitation by the TFG and its self-defence agenda. It is US involvement, which technically can also be supported by its agenda to deal with terrorist activities in the area, that was problematic. It can be argued that the tasks and the strategies were appropriate for the mission, but the problem with the intervention was that Ethiopia and the US were viewed by many in Somalia as major enemies. It is interesting to note that the African Union Mission in Somalia (AMISOM), an African Union operation, took over after Ethiopia had been made to withdraw from Somalia. Despite this development, conflict resolution and peacebuilding remained problematic in Somalia.

Global anti-piracy mission off the Somali coast

The piracy problem in Somalia was caused by the country's domestic problems and the Ethiopian invasion, but can also be blamed on other external actors. These external actors are mostly European and Asian companies who used the absence of a Somali government to illegally fish on a large scale in Somalia's territorial waters and to dump their toxic waste there, as this was cheaper than processing it in Europe.[32] The fishing operations drove the Somali fishermen out of business while the waste made them sick. In the absence of a government to stop the outside companies, Somalis began to patrol the waters themselves as an unofficial coast guard. In this capacity they hijack ships and demand a ransom fee to be paid. The result has been a 'resource swap' between the law breaking companies, who make an estimated 300 million dollars a year in the

30 T Van den Berk *Realist paradise: Crises, conflicts, and interventions in the Horn of Africa* (2009).

31 ZW Yihdego 'Ethiopia's military action against the union of Islamic courts and others in Somalia: Some legal implications' (2007) 56 *International and Comparative Law Quarterly* 666-676.

32 L Phillips 'Commission ready to investigate European illegal fishing off Somalia' *EU Observer* available at http://euobserver.com/13/27983 (accessed 18 August 2014)

Somali waters, and the pirates, who collect up to a $100 hundred million in ransom.[33]

Somali piracy is also a problem due to the location of Somalia. The Somalia coast offers access to the Indian Ocean and the Gulf of Aden. This route through the Gulf of Aden is the fastest shipping route between Asia and Europe and therefore forms an essential oil transport route between Europe and the Far East.[34] Besides the transportation of oil, this route is also heavily used for other commercial shipping, which has also suffered from the piracy problem. Therefore, around Somalia, there was a threat to economic interests of all countries either directly or indirectly. The direct threat was having a ship under your country's flags hijacked. The indirect threat was the flow of oil, which could lead to rising oil prices globally.

Given the convergence of the interests by many countries, the UN Security Council managed to unanimously pass a resolution that authorised anti-piracy actions under Chapter VII of the UN Charter. This resolution from the Charter authorised all states to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea and to use all necessary means to repress acts of piracy and armed robbery.[35] An important limitation was that this authorisation only applied to states that cooperated with the TFG as the ruling authority in Somalia. This UN action was followed by action by the North Atlantic Treaty Organization (NATO), the European Union (EU), the Chinese military and private security companies. The cases of the involvement in the area fits the definition of a military intervention firstly because of the massive military component which was deployed and secondly because it intervened in a conflict, on one hand with Somali pirates, and on the other hand, with the shipping companies whose ships are threatened. It can be noted, however, that the case of the intervention was justified but created problems for the case of conflict resolution and even peacebuilding in Somalia. The piracy activities could be stopped but that could not remove the underlying sources of the conflict in Somalia. Similarly, in the context of the peacebuilding liberal peace theory, institutions did all they could but other aspects of the theory could not be satisfied. This analysis shows a total failure on the part of the concept.

Kenya military intervention in Somalia

Kenya militarily intervened in Somalia in October 2011. Its involvement in Somalia was partly motivated by a desire to inoculate North Eastern Province from the chaos across its border, ease a huge refugee burden and

33 M Salopek 'Off the lawless coast of Somalia, questions of who is pirating who' *Chicago Tribune* 2008 available at http://www.chicagotribune.com/news/chisomalia-pirates_salopek1oct10,0,6155016.story (accessed 18 August 2014).
34 Van den Berk (n 30 above).
35 Breketeab (n 25 above).

curtail the radical influence of the Al-Shabaab. The operation's purported aims surprisingly have been evolving. Initially, it was 'hot pursuit' of kidnappers identified as Al-Shabaab. At the 21 October Inter-Governmental Agreement on Dovelopment (IGAD) meeting, the stated goal shifted to the destruction or weakening of Al-Shabaab and the establishment of a buffer zone between Kenya and Somalia; later, it was the safety of Kenya; and over time, it was the capture of the port city of Kismayo.[36]

The intervention which came to be called operation *'Linda Nchi'* was hastily approved, after a string of cross-border kidnappings in Lamu and Dadaab by a small group without sufficient consideration of the consequences, at home as well as in Somalia.[37] Military leaders were apparently convinced it would be a quick campaign, but the Kenyan Defence Forces (KDF) promptly ran into difficulties on the unfamiliar terrain and have since been in the country from that time up to now. It can, however, be argued that the military intervention was carried out unilaterally without authority from the UN Security Council and even the African Union as a regional organisation. It can then be noted that Kenya, despite valid reasons for the intervention, did not satisfy the responsibility to protect norm and as such it could not be viewed as pursuing conflict-resolution and peace-building in Somalia. This meant that the conflict resolution in the context of the Galtung's ABC theory could not be realised and similarly liberal peace in the context of peacebuilding could not take root. Efforts have, however, been seen to be taken by Kenya to allow AMISOM, the AU mission in Somalia to take it on board as part of it in order to correct the norm which it violated.[38] This seems to be working but it is yet to be seen if the UN will do the same.

Conclusion

The HoA has been and is still immersed in a number of inter-state and intra-state conflicts, and forms a conflict system whereby a conflict in one country or area is usually linked to other countries or areas within the region. Causes of the conflicts are linked to the external and internal factors peculiar to the area, but most are specifically linked to the strategic position of the area. The *status quo* of the conflicts is further exacerbated by the political leadership in the various countries who, it is noted, approach the conflicts from a state centric approach rather than a human security perspective. This, in turn, translates into the local populations of the area being affected greatly and thus attracting other countries or organisations

36 The Africa Report 'Somalia: The perils of a carve-up' *Africa Confidential* (2012) 52 22.
37 International Crisis Group 'Update Kidnapped MSF workers moved to MV Albedo *Somalia Report* 12 January 2012.
38 K Menkhaus 'After the Kenyan intervention in Somalia' *Enough Project* 2012 7.

to intervene militarily with or without the UN's approval with the pretext of trying to assist the victims of the conflict.

The question of authority and the use of force by those who intervene have been problematic as they have been seen to be applied selectively by the international society. These problems on the practice and the doctrine of intervention led to the introduction of the responsibility to protect-norm. This discussion reveals the problematic nature of the UN Charter as the supreme law of the world; the behaviour of certain states that at times take the law into their own hands; and, of course, the failure of the people concerned in the conflicts to take initiatives to resolve the relevant problems. The military interventions that took place or are taking place in the HoA clearly bring out to the fore the problems that are associated with military interventions. Interventions take place without the consent of those involved in the conflict and, in this regard, it certainly becomes problematic for them to actually accept the interveners especially where force is used.

In addition to this fact, interventions are only meant to produce short term outcomes, that is, assisting the victims and probably ending the conflict. Conflict resolution and rebuilding initiatives produce long term outcomes. The view is that the military cannot assist in the conflict resolution process; it can only provide a conducive environment for it to take place. This means that military interventions should be done consecutively with conflict resolution processes in order for their assistance to be well meaning and for negative and positive peace to be achieved. Despite military interventions in the HoA, the protection of the people aspect has not been impressive, as there still were large scale loss of life and even large scale ethnic cleansing. Strategies by the militaries involved are in need of revision.

Recommendations

Following the discussion above, the following four recommendations can be drawn. First, military intervention has to be carried out hand in hand with conflict resolution and peacebuilding, with a view to achieve durable peace in addition to providing assistance to the victims of the conflicts. Second, the current law on the use of force has to be revised in order to accommodate new threats like terrorism and weapons of mass destruction, which were not considered when the Charter was being designed. The present regime of the UN Charter and the Rome Statute only contain reflections of conventional threats that had precipitated World Wars I and II. Third, the UN Charter needs to be reviewed in the context of its contradictions on the use of force in order to reflect current realities. Specifics that were left out in the R2P initial report, especially the threshold criteria for the decisions to use force for military interventions, need to be included. Fourth, unauthorised military interventions should be

completely eliminated, and states pursuing such directions must face punishment.

CHAPTER 20

PROTECTION OF CIVILIANS: EXPERIENCES FROM THE MIDDLE EAST AND NORTH AFRICA

Joe Stork

Abstract: *Governments and armed groups in the Middle East have disregarded the obligation of protection of civilians from deliberate or indiscriminate attacks. While governments have invoked national security and counter-terrorism rationales to justify unlawful attacks as reprisal for attacks by adversaries, armed groups have claimed exemption in the name of national liberation and communal defense. Although accountability for serious violations of international humanitarian and human rights law is key, no state in the region has brought the perpetrators to justice in spite of their commitment to the provisions of the Geneva Conventions. This Chapter details the experience of the author in promoting a civil society role in addressing violence against civilians by armed groups, following investigative reports that documented atrocities in Israel/Palestine and in Iraq. Based on this experience, the discussion concludes that accountability for violations by state and non-state actors alike is a long-term project requiring political and religious leaders, influential media as well as social movement activists to speak out forcefully against atrocities, especially when they are perpetrated by a government or movement whose goals they broadly support.*

Introduction

The carnage in Syria, Iraq and Libya over the past several years shows that in the Middle East and North Africa, governments and armed groups alike, have shown disregard, even contempt, for the idea that civilians should be protected from deliberate or indiscriminate attacks. Governments in these countries invoke national security and counter-terrorism rationales to justify violations by their security forces. Armed groups for their part, have claimed exemption from the laws of armed conflict in the name of national liberation and communal defense. Groups fighting to end a military occupation or in a civil war context generally justified attacks that harmed civilians in terms of reprisal for attacks by adversaries rather than as something permitted or commanded by Islamic law or doctrine.

Some armed groups responsible for breaching the principle of civilian immunity justify their use of arms in Islamic terms. For example, groups aimed at overthrowing a domestic political authority, such as Egypt's

Gama'a Islamiyya or the Saudi adherents of Al-Qaeda typically rationalised attacks that targeted or indiscriminately harmed civilians as justified by the victims' alleged support for 'impious' political regimes. Doctrinally-grounded rationales for harming civilians have become especially pervasive with the spread of Sunni against Shia sectarian strife in Iraq and Syria (and Pakistan). Broadly speaking, these rationales amount to versions of 'by any means necessary'– hardly unique to the Middle East and potent among secular nationalist as well as Islamist forces. It is precisely the core principle of International Humanitarian Law (and human rights law) that some means and methods of conflict and law enforcement are strictly prohibited, whatever the military or political objective and without regard to alleged violations by another party to the conflict.

Background

The conduct of both sides in Algeria's liberation war in the 1950s helped to shape the practices of other guerrilla movements in the Middle East, particularly among Palestinians.[1] Habits of unrestrained assault on adversaries and associated populations were ingrained in the conduct of thoroughly secular parties. When political movements claiming Islamic legitimacy emerged in the 1980s and 1990s, the armed groups they spawned – in Egypt and Algeria, for example – adopted similarly unbounded tactics. These groups' disregard for non-combatants reflected and extended the practices of secular actors.[2] There is an international dimension at play here as well. For example, parties to the war in Vietnam, including the United States (US), often flouted the prohibitions against indiscriminate and disproportionate attacks.

It would be hard to exaggerate the impact of the Israeli-Palestinian conflict on the evolution of popular views of political violence and armed conflict in the region.[3] 'Armed struggle' became a dominant feature of the Palestinian national movement in the mid-1960s, and the Palestinian cause has enjoyed near-universal support in Arab states and in Muslim communities, more broadly. That support has generally been uncritical with regard to the tactics of armed Palestinian groups and dismissed the entitlement of Israeli Jewish civilians to the protections of humanitarian law.

1 On the Palestinians, see Y Sayigh *Armed struggle and the search for state* (1997); on atrocities in the Algerian war of independence, see A Horne *A savage war of peace: Algeria 1954-1962* (1977).

2 Kalyvas has argued that massacres of civilians by Islamist rebels can be 'part of a rational strategy' intended to 'punish and deter defection by civilians'. See S Kalyvas 'Wanton and senseless? The logic of massacres in Algeria' (1999) 11 *Rationality and Society* 243.

3 Human Rights Watch 'Civilian protection and Middle East armed groups' *World Report* (2010) 30-48.

Arab human rights proponents as well as governments and groups resistant to human rights criticism have scrutinised the stance of outside actors, particularly the US and European Union (EU) member states, for evidence of partisanship and double standards in monitoring and protesting violations of international law by Israel and the Palestinian armed groups. From the other side, those who take an uncritical view of Israeli military actions point to the agendas of the United Nations (UN) Human Rights Council as rigged to produce anti-Israel outcomes while ignoring violations perpetrated by other parties.

'Responsibility to protect'

Civilian protection raises the issue of 'humanitarian intervention'. Western interventions in the Middle East from the colonial era through the 2003 invasion of Iraq featured humanitarian rationales for baser motives. A relatively 'clean' intervention undertaken on humanitarian grounds was Operation Provide Comfort in 1991, in which US and allied forces created a no-fly zone and 'safe haven' in Northern Iraq for Iraqi Kurds fleeing Saddam Hussein's military assault in the aftermath of the 1991 Gulf War, triggered by Turkey's refusal to allow the Kurds to cross the border for refuge. Unfortunately, US concern for Iraqi civilians did not appear to be uppermost in its conduct of the war itself, or the decade of economic sanctions that followed.[4] Operation Provide Comfort was one of several interventions that sparked debate, along with Somalia and Kosovo and the intervention that did not happen – Rwanda. An International Commission on Intervention and State Sovereignty issued a report in 2001 that reframed the debate from the so-called 'right to intervene' to the 'responsibility to protect'.[5]

The UN General Assembly, in its October 2005 Resolution identifying the outcomes of the UN World Summit, noted that individual states bear the responsibility to protect individuals from genocide, war crimes, ethnic cleansing, and crimes against humanity but that the 'international community, through the United Nations,' also has a responsibility to help in such protection 'through appropriate diplomatic, humanitarian and other peaceful means.'[6] 'Should peaceful means be inadequate and national authorities are manifestly failing to protect their populations,' the operative paragraph continues, 'we are prepared to take collective action,

4 On the war, see Human Rights Watch 'Needless deaths in the Gulf War' (November 1991); on the sanctions policy, see S Graham-Brown *Sanctioning Saddam* (1999) and J Gordon *Invisible war: The United States and the Iraq sanctions* (2010).

5 International Commission on Intervention and State Sovereignty *The responsibility to protect* (2001). The Commission was sponsored by the government of Canada. For a range of critical views on humanitarian interventions in the 1990s, see 'Humanitarian intervention and North-South Politics in the 90s' a special issue of *Middle East Report* no 187/188 (March-June 1994).

6 UN General Assembly, 2005 World Summit Outcome A/Res/63/308, 24 October 2005, para 139.

in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case by case basis.' This endorsement of the emerging responsibility to protect (R2P) doctrine was the result of 'persistent advocacy by sub-Saharan African countries, led by South Africa'.[7] The responsibility to protect concept is also embodied in article 4(h) of the Constitutive Act of the African Union, which establishes '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.'[8]

As Evans noted, the responsibility to protect embodies a 'continuum of obligations' that includes the responsibility to *prevent* by addressing causes of conflicts that put populations at risk, the responsibility to *react* with appropriate measures, which may be coercive (for example, sanctions) and extend to armed intervention, and the responsibility to *rebuild*.[9] The last of these has been lacking in virtually every case of military intervention that invoked humanitarian rationales, most spectacularly that of Libya, where the UN Security Council-sanctioned military intervention in 2011 morphed into a regime-change campaign followed by dereliction of the responsibility to invest in the reconstruction of state institutions capable of providing security and justice.[10]

The UN General Assembly's 'the responsibility to protect' language has had little 'buy-in' from the Security Council, which has adopted nothing similar by way of a binding resolution and confined itself to a series of consensual and non-committal Presidential Statements.[11] The council's high-profile failure to adopt a Chapter VII resolution regarding rampant violations of the laws of war in Syria testifies to the special difficulty of addressing civilian protection even in times of acute need

7 G Evans 'From humanitarian intervention to the responsibility to protect' address to a Symposium on Humanitarian Intervention, University of Wisconsin (31 March 2006) available at http://www.crisisgroup.org/en/publication-type/speeches/2006/from-humanitarian-intervention-to-the-responsibility-to-protect.aspx (accessed 25 April 2016).

8 AU Constitutive Act. See also B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *ICRC Review* 852; and the Pretoria Principles on ending mass atrocities pursuant to art 4(h) which emerged from a December 2012 conference at the University of Pretoria, available at http://www1.chr.up.ac.za/index.php/pretoria-principles.html (accessed 25 April 2016).

9 Evans (n 7 above).

10 Security Council Resolution 1973 (2011) authorised member states 'to take all necessary measures' to 'protect civilians and civilian populated areas,' and to enforce a ban on all flights in Libyan airspace except 'flights whose sole purpose is humanitarian' and flights authorised under the 'any necessary means' provision.

11 The most recent of these least-common-denominator consensus statements on protection of civilians is that of February 12, 2014 (S/PRST/2014/3), which inter alia 'reaffirms that parties to armed conflict bear primary responsibility' for protection of civilians and 'reiterates its strong condemnation of all violations' but none by name.

when the chief violator is a close ally of any of the five veto-wielding permanent members.[12] The Security Council has similarly failed to address serious violations in the context of the Israeli-Palestinian conflict owing to United States vetoes. Around the September 2014 UN General Assembly meetings, France and Mexico organised a ministerial side event to discuss 'regulating the [Security Council] veto in the event of mass atrocities.'[13]

Impunity versus accountability

Key to the 'responsibility to prevent' is the dynamic of impunity versus accountability for serious violations of international humanitarian and human rights law, including impartial and independent investigations and, where warranted, criminal prosecutions of those responsible for committing, ordering, or failing to stop the violations. One purpose of such investigations and prosecutions is to provide redress to the victims and survivors of the crimes. Another purpose is deterrence, which is crucial since military intervention might come into play only once a situation reaches or imminently threatens to reach the threshold of mass atrocities, and cannot protect civilians at risk in situations that arguably do not reach that threshold.

States' obligations to protect the right to life and prevent violations of bodily integrity

The first responsibility for ensuring accountability lies with the individual state(s) where violations of international human rights and humanitarian law occur, or persons under their jurisdiction have been victims or perpetrators. The record of Middle Eastern states in meeting their obligation to investigate serious human rights and humanitarian law violations and bring those responsible to justice has been dismal.

No state in the region has provided anything close to justice for serious and systematic human rights crimes carried out by its security forces by identifying and prosecuting perpetrators. Consider Syria under Hafez al-Asad, where security forces executed some 550 prisoners in retaliation for a June 1980 assassination attempt on the President.[14] This slaughter was superseded with the wholesale suppression of an insurrection in the city of Hama in February 1982, which led to 'a bloodbath without parallel in the

12 Security Council Resolution 2139, adopted on February 22, 2014, condemned widespread violations of international human rights and humanitarian law and called on all parties to cease attacks against civilians and lift sieges of populated areas, but without any stated consequences for failure to do so.

13 See the September 25 statement of Zeid Raad Al Hussein, UN High Commissioner for Human Rights, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15103&LangID=E (accessed 25 April 2016).

14 N van Dam *The struggle for power in Syria* (1996) 105-6.

[up-to-then] modern history of Syria.'[15] Following the Iranian revolution of 1979, the Islamic Republic executed nearly 500 political opponents in its first 18 months, and over the next four years more than 8000, culminating in mass executions of some 2,800 prisoners in four weeks in 1988.[16] The eight-year war between Iraq and Iran included missile attacks on cities and Iraq's use of chemical weapons against Iranian forces and, after the war, against Iraq's Kurdish population. The 'international community' looked the other way when it came to Iraqi war crimes generally and the resort to chemical weapons in particular.[17]

In Iraq, after the ouster of Saddam Hussein, there was a semblance of an effort to establish accountability with the establishment of an Iraqi High Tribunal that prosecuted the former dictator and key figures in his government in October 2005 on charges of crimes against humanity and war crimes.[18] The Tribunal's deeply flawed proceedings resulted in a lost opportunity to promote the rule of law in Iraq.[19] One notable effort to 'turn the page' on rampant abuses such as arbitrary detention and torture was Morocco's Equity and Reconciliation Commission (ERC). A major ERC success was to organise public, televised testimonies by victims around the country. The ERC's legacy is less certain with respect to its recommended reforms, most of which the government has yet to implement. The ERC was able to leverage state compensation to victims but without holding accountable those officials responsible for carrying out or overseeing the abuses.[20] In Algeria, in 2003, President Abdelaziz Bouteflika announced the formation of an *ad hoc* mechanism to address thousands of cases of persons who were 'disappeared' in the civil strife of the 1990s, but its narrowly-defined mandate did not include identifying the security units responsible.[21] The only country in the region that appears at present to be moving towards a serious program of transitional justice involving accountability for past abuses is Tunisia.[22]

15 H Batatu *Syria's peasantry, the descendants of its lesser rural notables, and their politics* (1999) 269.

16 E Abrahamian *A History of modern Iran* (2008) 181-2.

17 JR Hiltermann *A poisonous affair: America, Iraq, and the gassing of Halabja* (2007).

18 The focus of these efforts was the so-called Anfal campaign in which Iraq used chemical weapons against Kurdish civilians as well as armed groups in the north of the country. See JR Hiltermann 'The 1988 Anfal Campaign in Iraqi Kurdistan' *Online encyclopedia of mass violence* (February 2008).

19 M Sissons & A Bassin 'Was the Dujail trial fair?' (2007) 5 *Journal of International Criminal Justice* (2007) 272.

20 See Human Rights Watch 'Morocco: After Truth Commission, state must address persistent impunity' 28 November 2005.

21 Human Rights Watch 'Truth and justice on hold' December 2003 available at https://www.hrw.org/report/2003/12/08/truth-and-justice-hold/new-state-commission-disappearances (accessed 25 April 2016).

22 International Center for Transitional Justice 'Tunisia's specialized judicial chambers: A Q&A with Judge Walid Melki' September 2014 http://www.ictj.org/news/tunisia-specialized-judicial-chambers-walid-melki (accessed 25 April 2016). On transitional justice efforts generally, see O Thoms, J Ron, & R Paris 'State-level effects of transitional justice: What do we know?' (2010) 4 *International Journal of Transitional Justice* 329.

More typical is flagrant impunity. In Egypt, in July and August 2013, security forces used live fire to suppress mostly peaceful demonstrations, killing scores in incident after incident and, in the dispersal of the sit-ins at Rab'a and al-Nahda squares on 14 August 2013, killing upwards of 1 000 persons in a single day. Supporters of ousted President Mohamed Morsi have been rounded up in the tens of thousands, and hundreds were convicted in trials that failed to establish individual guilt for any criminal offense, but not a single security or government official has been held to account. President Abdel-Fattah al-Sisi, who, as defense minister was deeply involved in planning and overseeing the dispersal, authorised construction of a memorial at Rab'a honoring the security forces.[23]

Israel has a well-institutionalised military justice system, but its investigations into unlawful army killings of Palestinians typically amount to little more than operational debriefs in which the only persons questioned are those in the unit identified in the allegations. The result has been a distinct absence of prosecutions and appropriate punishment of security forces responsible for unlawful killings in the occupied West Bank, East Jerusalem, and Gaza.[24] The most serious of the few convictions stemming from the 2008-9 Gaza war was for credit card theft.[25]

'Respect and ensure respect': Foundations of universal jurisdiction

There is an international dimension of accountability grounded in the Geneva Conventions as well as the Convention against Torture. States share an obligation to act when a 'first responder' state fails to hold officials accountable for violations of the right to life and bodily integrity. Common article 1 of the Geneva Conventions requires that state parties to the Conventions – that is to say, almost every UN member state – to 'respect and ensure respect for' the provisions of the treaties. Article 146 of the Fourth Geneva Convention obliges state parties 'to search for persons alleged to have committed, or to have ordered to have committed, such grave breaches [war crimes], and shall bring such persons, regardless of their nationality, before its own courts.' The UN Convention against Torture, presently ratified by 159 countries, requires that states try or extradite for trial alleged torturers found in their territories.

23 Human Rights Watch 'All according to plan: The Rab'a massacre and mass killings of protesters in Egypt' (August 2014).

24 Human Rights Watch 'Promoting impunity' (June 2005) and 'Turning a blind eye: Impunity for laws of war violations during the Gaza War' (April 2010).

25 The Israeli human rights group B'Tselem announced in September 2014 that it would not respond to IDF requests for information on 'irregular' incidents during the 2014 Gaza war. 'Israeli authorities have proven they cannot investigate violations of international humanitarian law by Israel in the Gaza Strip' 5 September 2014 available at http://www.btselem.org/accountability/20140905_failure_to_investigate (accessed 25 April 2016).

While many states have incorporated Geneva Conventions' provisions into their armed forces manuals and military justice systems, politics has prevented the implementation of the 'ensure respect' dimension. To date, there has been only one convening of state parties to address allegations of IHL violations: In February 1999, 115 of the then-188 signatories to the Geneva Conventions voted, as members of the UN General Assembly, to convene a conference of High Contracting Parties in July of the same year regarding alleged Israeli violations of the Fourth Geneva Convention in the Occupied Palestinian Territories. The US opposed the initiative, saying that it would undermine peace negotiations.[26] The conference convened but quickly adjourned '[t]aking into consideration the improved atmosphere in the Middle East as a whole' and with 'the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field'.[27]

1991 saw the establishment of an International Humanitarian Fact-Finding Commission (IHFFC) in accordance with article 90 of Additional Protocol I, 'competent to enquire into any facts alleged to be a grave breach or other serious violation' of the conventions, but to date the IHFFC mechanism remains unused.[28] Since 2011, there have been several informal meetings of states convened by Switzerland and the ICRC to address the need for stronger IHL compliance measures, but no consensus has yet emerged regarding a way forward.[29]

The principle of no immunity for perpetrators of the gravest crimes underlies Common article 1 of the Geneva Conventions. The same principle has application to human rights protections as well as laws of war violations in what has come to be called universal jurisdiction – the idea that states should prosecute crimes such as torture, war crimes, genocide, or crimes against humanity without regard to where such crimes occurred.

The idea of universal jurisdiction assumed a high profile with the arrest of former Chilean dictator Augusto Pinochet in London in 1999, on the basis of a Spanish warrant for his arrest owing to his alleged role in the torture and deaths of Spanish citizens in the aftermath of Pinochet's 1973

26 Human Rights Watch 'World Report 2000' (December 1999) 370-71.

27 For the full declaration of the conference, see ICRC 'Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process (1997-2001)' Annex 1 *International Review of the Red Cross* No 847 (30 September 2002).

28 UN Security Council Resolution 1265 (1999), in emphasising state responsibility to end impunity for mass atrocities, 'affirm[ed] the possibility, to this end, of using the International Fact-Finding Commission mechanism,' but to date the mechanism has not been deployed. Second Meeting of States on Strengthening Compliance with International Humanitarian Law, 17-18 June 2013 'Background Document' 5-6.

29 See the 'Background Document' of the Third Meeting of States on Strengthening Compliance with International Humanitarian Law, 30 June-1 July 2014 (Geneva: ICRC, June 2014).

coup. The next year, the Chilean Supreme Court lifted Pinochet's immunity, opening the way for his trial in that country. In February 2000, Senegalese authorities detained Hissène Habré on charges of torture when he was the leader of Chad from 1982 to 1990. In July 2013 Habré was charged with having committed war crimes, torture, and crimes against humanity before an Extraordinary African Chambers established in Dakar with the assistance of the African Union.[30]

The exercise of universal jurisdiction has been fitful and highly politicised in cases stemming from conflicts in the Middle East. One high-profile case involved a criminal complaint filed in Belgium in 2001, against Israeli military officials including Ariel Sharon, then Prime Minister of Israel, for his role as Defense Minister in the 1982 massacre of hundreds of Palestinians in the Sabra and Shatila neighbourhoods by Lebanese Phalangist militiamen, a slaughter facilitated by Israeli Defense Forces (IDF) then occupying Beirut.[31] The complaint moved through several phases of the Belgian justice system, despite the controversy it engendered. The process was fatally undermined, though, after other plaintiffs somewhat recklessly brought complaints against former US President George W Bush and other US officials in connection with the US-led invasion and occupation of Iraq. Belgium responded to US threats to remove the North Atlantic Treaty Organization (NATO) headquarters from Brussels by revising its legislation to limit Belgian courts' jurisdiction to cases in which there is a direct link between Belgium and the crime.[32]

Palestinian human rights groups have attempted to activate the universal jurisdiction legislation of the United Kingdom (UK). In September 2005, solicitors on behalf of the Gaza-based Palestinian Center for Human Rights (PCHR) filed criminal complaints regarding killings, bombings, and house demolitions and secured an arrest warrant against retired Major General Doron Almog, former commander of the IDF Southern Command, when he flew to London for a speaking engagement. Almog, tipped off about the warrant when he landed, did not disembark; police did not board the plane to serve the warrant, and Almog returned to Israel.[33] Threats of warrants have dissuaded other Israeli officials from

30 Human Rights Watch 'Q&A: The Case of Hissene Habre before the Extraordinary African Chambers in Senegal' 20 May 2014 available at http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal. See also R Brody 'The prosecution of Hissene Habre: International accountability, national impunity' in N Roht-Arriaza & J Mariecurrena (eds) *Transitional justice in the twenty-first century* (2006) 278-300.

31 On the massacres, see B Nuwayhed al-Hout *Sabra and Shatila: September 1982* (2004).

32 Human Rights Watch 'Belgium: Universal Jurisdiction Law repealed' (2 August 2003). Similar cases had been filed under Belgian law involving the presidents or former presidents of Mauritania, Iraq, Côte d'Ivoire, Rwanda, Cuba, Iran, the Central African Republic and the Palestinian Authority. See Human Rights Watch 'Belgium: Q&A on the "Anti-Atrocity" Law' (revised June 2003) available at http://www.hrw.org/sites/default/files/reports/belgium-qna.pdf (accessed 25 April 2017).

33 D Casciani 'Police feared "airport stand-off"' *BBC News* 19 February 2008 available at http://news.bbc.co.uk/2/hi/uk/7251954.stm (accessed 30 January 2017).

visiting London even though UK law had been amended to require the consent of the Director of Public Prosecutions prior to issuing a warrant in such cases.[34]

The Netherlands, France and Germany have pioneered the use of national courts by creating specialised war crimes units comprising police, prosecutors and immigration officials to prosecute atrocity crimes. Regarding Syria, German prosecutors have launched 'structural investigations' to collect information about crimes and identify potential victims and witnesses.[35]

Regional courts: African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (African Court) was set up in 2006 under the auspices of the African Union to complement the protective function of the African Commission on Human and Peoples' Rights. Egypt, Libya, Tunisia, Algeria and Morocco are all member states of the African Union.[36] Of these states, three (Algeria, Libya and Tunisia) have accepted the Court's jurisdiction.[37] Egyptian rights organisations have brought cases to the Commission and won favourable rulings on discrimination issues. In March 2011, in response to a case brought by the Egyptian Organisation for Personal Rights, Interights, and Human Rights Watch, the Court ordered Libya to end any actions that would result in loss of life and violations of 'physical integrity'.[38] As John-Mark Iyi has discussed in detail in Chapter 14, in June 2014 the 23rd African Union Summit adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),[39] to expand the Court's jurisdiction to include genocide, war crimes, and crimes against humanity.[40]

34 A Pfeffer 'Fear of arrest still prevents Israeli officials from visiting Britain' *Haaretz* 30 May 2012.

35 Human Rights Watch 'The long arm of justice: Lessons from specialized war crimes units in France, Germany, and the Netherlands' September 2014.

36 Having left the AU's predecessor (the OAU) in 1984, Morocco was readmitted to the organization in January 2017.

37 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights available at https://www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf (accessed 11 February 2017).

38 Egyptian Initiative for Personal Rights 'Libya: African Court issues first ruling against a state' 31 March 2011 available at http://eipr.org/en/pressrelease/2011/03/31/1140 (accessed 25 April 2016).

39 Adopted on 27 June 2014, available at https://www.au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed 12 February 2017) (not yet in force).

40 Human Rights Watch 'African states: Reject immunity for leaders' 25 August 2014.

International Criminal Court

In July 1998, 120 states signed the Rome Treaty establishing an International Criminal Court (ICC). States of the Middle East dominated the short list of seven states that refused to approve the treaty – Iraq, Israel, Libya, Qatar and Yemen, along with the United States and China.[41] At present, 122 states have ratified the treaty, including Tunisia and Jordan; 34 African countries represent the most numerous regional grouping.

The ICC can exercise jurisdiction when the alleged crime(s) occurred in the territory of a state party, or when the alleged perpetrator(s) of the crime are nationals of a state party, or if referred by the UN Security Council. To date, the Security Council has referred the situations in Libya (2011) and Sudan/Darfur (2005) to the ICC, both involving state-sanctioned attacks on civilians. In the Sudan case, following investigations by the Office of the Prosecutor, the ICC issued arrest warrants for President Omar al-Bashir and two other officials on charges of war crimes, crimes against humanity, and genocide. Several African countries that are ICC member states – Kenya, Chad, and Nigeria – failed to cooperate with the Court by serving Bashir with the arrest warrant when he visited those countries.

In the case of Libya, the Court issued warrants for the arrest of Saif al-Islam Gaddafi, son of the former Libyan leader, Abdullah Sanussi, the former intelligence chief, and 35 others for crimes allegedly committed during the 2011 Libyan uprising. Sanussi is in Libyan government custody, while Gaddafi is in the hands of Zintan-based militias. The ICC Appeals Chamber in July 2014 approved a Libyan government request to prosecute Sanussi domestically, despite the near-breakdown of Libya's justice system. The same ICC Appeals Chamber in May 2014 confirmed the Court's earlier rejection of Libya's request to prosecute Gaddafi; to date Libya has failed to turn Gaddafi over to the ICC.[42] The ICC has to date not investigated or charged anyone in connection with many documented crimes by 'revolutionaries' that fall within the mandate of the Security Council referral.

The UN Security Council to date has declined to refer the situation in Syria to the ICC despite the evidence of massive crimes falling within the Court's jurisdiction.[43] A majority of Security Council member states have

41 Russia signed the treaty in Rome but has not since acceded to the statute. Thus three of the five permanent and veto-wielding members of the UN Security Council are not members of the Court.

42 Human Rights Watch 'Libya: ICC judges reject Sanussi appeal' 24 July 2014.

43 Human Rights Watch documented by name high-ranking Syrian officers and officials as well as rebel groups apparently responsible for war crimes and crimes against humanity. See Human Rights Watch 'By all means necessary' (December 2011); and '"You can still see their blood": Executions, indiscriminate shootings, and hostage taking by opposition forces in the Latakia countryside' (October 2013).

endorsed an ICC role in Syria, and a group of 58 countries in May 2014 called on the Security Council to adopt a French-proposed resolution including referral to the ICC.[44] Russia, which exercises a veto, has until now blocked this from happening.[45]

Israel has not ratified the Rome Treaty. The Palestinian Authority sought to accept ICC jurisdiction in 2009, but the Office of the Prosecutor concluded in April 2012 that the PA's status at the time as a UN 'observer entity' did not make it eligible to become a party to the treaty or to lodge a declaration bringing itself under the treaty's ambit. Subsequently, in November 2012, the UN General Assembly upgraded Palestine's status to a 'non-member observer State.' ICC prosecutor Fatou Bensouda said in late August 2014 that Palestine could now also sign the Rome Treaty.[46] On 1 January 2015, the Palestinian Authority acceded to the Rome Treaty, joining the ICC, and later in January the ICC Prosecutor Bensouda opened a preliminary inquiry into the August 1914 Israel – Hamas armed conflict in Gaza.[47]

UN Human Rights Council

In several instances, including Syria, the UN Human Rights Council established commissions of inquiry (COI) to investigate allegations of war crimes and other serious human rights and humanitarian law violations. Reports of the Syrian COI have provided useful internationally-sanctioned reporting and the Office of the High Commissioner for Human Rights has added its voice to calls for the Security Council action. The Human Rights Council can also establish monitoring and fact-finding mechanisms. The 'Goldstone Report' provided important scrutiny of the conduct of Israeli and Palestinian forces after the 2009 Gaza war.[48] Like the Security Council, however, the Human Rights Council comprises member states which, in many cases, find political advantage in remaining silent in the face of atrocities or shielding abusers from criticism.

44 Human Rights Watch 'Syria: 58 countries urge ICC referral' 20 May 2014.

45 Human Rights Watch has advocated a comprehensive approach to accountability in Syria that includes, in addition to the ICC, criminal prosecutions by Syrian courts and possibly a specialised chamber or court with international and Syrian staff to work on mass atrocity cases. 'Syria: Holistic approach needed for justice' 17 December 2013.

46 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The public deserves to know the truth about the ICC's jurisdiction over Palestine' 2 September 2014.

47 ICC press release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,' 16 January 2015, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1083&ln=en (accessed 2 April 2017).

48 Headed by Richard Goldstone, the Fact Finding Mission on the Gaza Conflict issued its report in September 2009. available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed 25 April 2016).

What role for civil society in the protection of civilians?

The author was part of a project at the Human Rights Watch (HRW) that promoted the role for civil society actors in addressing violence against civilians by armed groups.[49] This Civilian Protection Initiative, initiated in 2005, followed several HRW investigative reports on armed group atrocities in Israel/Palestine and in Iraq.[50] When HRW's documentation of war crimes and crimes against humanity by armed groups seemed to have little impact on the prevalence of such attacks, HRW decided to engage with human rights defenders, political party leaders, community activists, religious figures, and journalists and writers, with the aim of persuading them to speak out against targeting of civilians. The objective was to promote a counterforce to the prevailing tacit approval for such attacks, what seemed to be an enabling political environment where the criminal character of the attacks was overlooked because of broad support for the political aims of the perpetrators. In doing so, HRW met with a range of people throughout the region – quietly, since a public campaign could undermine its objective. The point was to have the voices of the locals heard.

After Hamas and Islamic Jihad initiated suicide bombing attacks against Israeli civilians, in 1995-96, Arab civil society activists had little to say, reflecting a general perception in the Middle East that illegal Israeli occupation practices made such violence unavoidable, even legitimate. Human rights proponents did not endorse such attacks but neither did they criticise them. Palestinian criticism of suicide bombings targeting civilians surfaced publicly at the end of 2001. In June 2002 the daily *Al-Quds* carried a full-page petition initially signed by 55 prominent figures calling on the armed groups to cease 'military operations targeting civilians in Israel' on the grounds that they deepen hatred between Palestinians and Israelis while strengthening 'the enemies of peace on the Israeli side' and 'pushing the area toward an existential war.'[51]

Several Palestinian groups helped facilitate the research embodied in our November 2002 report on Palestinian suicide bombings. Some rights activists in neighbouring countries criticised the report, although this initial hostility moderated with time. One Gaza-based independent legislator said the report 'helped define the public debate, allowing people to speak critically about these attacks.'[52] The interlocutors on the ground

49 This section relies heavily on my 'Civilian protection and Middle East armed groups' *World Report 2010* (Human Rights Watch, 2010).

50 Human Rights Watch 'Erased in a moment: Suicide bombing attacks against Israeli civilians' (October 2002); and 'A face and a name: Civilian victims of insurgent groups in Iraq' (October 2005). These reports were in addition to numerous statements condemning such attacks.

51 Cited in L Allen 'Palestinians debate "Polite" resistance to occupation' in J Beinin & R Stein (eds) *The struggle for sovereignty: Palestine and Israel 2003-2005* (2006) 301-02.

52 Interview with Ziad Abu Amr, Washington, DC, June 2006.

provided a complicated picture of the state of elite opinion regarding civilian protection. Virtually every person stressed the need to appreciate the context of military occupation. For some, this context was everything: 'We are fighting an occupation that violates [international humanitarian] law every day,' said a leader of Fatah's reformist wing.[53]

Many distinguished between attacks on civilians in Iraq, which they condemned, and attacks on Israeli civilians. For the many who agreed with the principle that civilians should be immune from attack, Palestine was the 'but' that invariably followed. On this, there was no discernible difference between Islamists and secularists or leftists. A common assertion was that Israeli society is militarised to the point that 'there are no civilians there.' Another was that the disparity of arms between Israelis and Palestinians gives the latter leeway to use whatever means they can devise.[54] 'Hamas does not want to target the civilians,' Khalid Mishal once insisted that

> Hamas defends itself, but because it has simple abilities and its rockets are inaccurate in targeting, so it reaches the civilians, but we do not intend to do that. … When the victim defends itself, even if some unintentional mistakes happen, this cannot be compared with crime[s] Israel is committing.[55]

Readiness to criticise Palestinian attacks against Israeli civilians first surfaced among Palestinians themselves. Journalists and writers in the West Bank indicated interest in being part of a public service campaign to promote awareness of humanitarian principles, although they were emphatically not proposing to initiate such an effort. Several spoke of a 'culture of fear' of running afoul of the armed groups and their partisans. This reluctance was even more pronounced in nearby countries where solidarity with Palestinians assumes a doctrinaire quality. An Egyptian political activist from an Islamist background said he condemned Palestinian attacks against civilians, but added: [56]

> I can't convince other intellectuals to join me, and the broader public is more difficult yet. In our environment I can easily be isolated as a traitor or agent. We need to emphasize abuses by the superior power.

Probably the most difficult challenge to efforts to promote public criticism of attacks on Israeli civilians was the apparent Israeli impunity in the face of its violations of international humanitarian law (IHL). 'Show me that

53 In an interview with the author.

54 Under IHL, anyone who is not a combatant is a civilian, and civilians lose their immunity only when and for such time as they directly participate in hostilities. Most wars are between forces of unequal means, and an exception to IHL on these grounds would completely undermine the principle of civilian immunity.

55 S Clemons 'Interviewing Khaled Meshal on Palestine, Goldstone, International Law and Israel Peace Process' Washington Note blog, 27 October 2009, available at http://washingtonnote.com/interviewing_kh/ (accessed 25 April 2016).

56 Human Rights Watch interview, Cairo, 9 April 2006.

international humanitarian law matters,' one said. In the words of a West Bank Hamas spokesperson, 'We will follow [IHL] if we have a guarantee' that Israel will also abide.[57] Rights activists outside of Palestine stressed that they focus on abuses committed by their own governments, which are all too ready to pounce on any opportunity to discredit these groups. If the rights groups were to condemn Palestinian armed groups for attacks on Israeli civilians, the government-controlled media would depict their action as proof of their 'Zionist' or pro-Western agenda. If the local media were free, the groups might be able to fight back, they said, but it is not. These organisations are protective of their credibility and limited political capital, and said they would find the risks too high in criticising Palestinian armed groups.

Arab rights groups had started to speak on the issue prior to our initiative. The 'Rabat Declaration' from a meeting of Arab civil society non-governmental organizations (NGOs) in December 2004 criticised 'the silence or the collaboration of the majority of Arab governments with a religious discourse and *fatwa* justifying terrorism issued by [Islamic] jurists, some of them working for religious institutions subject to the state.' The declaration spoke against 'terrorist groups in Iraq' that 'bombarded civil institutions, abducted and murdered police officers as well as Iraqi and non-Iraqi civilians.' Concerning the Palestine-Israel conflict, '[t]he conference condemns targeting and terrorizing civilians on both sides'.[58]

Our meetings involved conversations with groups perpetrating attacks against civilians. Their members grasped and claimed to have no quarrel with basic IHL standards. Sometimes they excused the harm to civilians as unavoidable, 'collateral damage'. But they quarrelled with one element of those standards – non-reciprocity, the principle that violations by one party do not justify violations by another. They were willing to spare civilians only to the extent that their adversary did so as well.

'It's not targeting civilians,' Ismail Abu Shanab of Hamas told Human Rights Watch. 'It is saying if you attack mine I'll attack yours.' Abu Shanab continued: [59]

> If you ask us to comply [with IHL], that is not difficult. Islamic teachings support the Geneva Conventions. They are accepted. When it comes to the other side, if they don't abide, we cannot be obliged to [comply with] them, except insofar as we can achieve something.

57 Human Rights Watch interview, Ramallah, August 2005.
58 'Rabat Declaration: Towards an equal partnership for democracy, human rights, fair peace and economic and social development' Statement of the Civil Society NGOs and Actors to the Forum for the Future [summit meeting of G-8 and Arab foreign ministers] 8-9 December 2004.
59 Human Rights Watch 'Erased in a moment' (2002) 52.

Usama Hamdan, who represents Hamas in Lebanon, said the policy of reprisal went hand in hand with an erasure of the distinctions between civilian and combatant in the case of Israel: 'Israel is a democratic state and popular pressure on this issue could change policies, but those civilians are supporting [IDF] attacks on our civilians.'[60]

'Targeting civilians is utterly unacceptable, said a Hezbollah leader, but in the same conversation said, 'How can you counter Israeli targeting of your civilians? You have to punish [them].'[61] He cited an agreement between Israel and Hezbollah not to target or indiscriminately attack civilians following the calamitous brief war in 1996 that established a monitoring group comprising delegates from Lebanon, Syria, France, Israel and the United States.[62] The mechanism largely functioned until war broke out again in July 2006, and Hezbollah and Israel again systematically traded indiscriminate attacks.[63] According to Hamas spokesperson Hamdan, when Khalid Mishal in Cairo in 2003 proposed a similar arrangement, Israeli officials 'pressed us on who we considered civilian and we said we are ready to accept the international definition. After three days, Sharon responded that he will not give Hamas an April agreement.'[64]

Realities of Islamist motivation

No Islamic scholars or representatives of Islamist armed groups suggested that Islamic law differed significantly from international humanitarian law when it comes to prohibiting attacks on civilians.[65] Invocations of religious doctrine are important in recruitment of fighters (or 'martyrs'), but HRW encountered little argument that indiscriminate attacks are permitted, or not prohibited, under Islamic law. In an investigation into Hezbollah's firing of rockets into civilian areas in Israel, HRW encountered no instance in which Hezbollah leaders cited religious justifications for those attacks.[66]

60 Human Rights Watch interview with Usama Hamdan, Beirut, 2 July 2006.
61 As above.
62 N Blanford *Warriors of God: Inside Hezbollah's thirty-year struggle against Israel* (2011) 147.
63 On the operation of the monitoring mechanism, see Blanford 174-76, 219, 248-49. On the indiscriminate nature of Israeli and Hizbollah attacks, see Human Rights Watch 'Why they died: Civilian casualties in Lebanon during the 2006 war' September 2007 at available at https://www.hrw.org/report/2007/09/05/why-they-died/civilian-casualties-leba non-during-2006-war (accessed 30 January 2017).
64 Human Rights Watch interview with Usama Hamdan, Beirut, 2 July 2006.
65 Some spokespersons with Indonesia's Jemaah Islamiyah have argued that Islamic ethics sometimes permit killing civilians. See S Jones 'Terrorism, human rights and advocacy strategies' presentation at the 8th annual meeting of the International Council on Human Rights Policy, Lahore, 20-22 May 2005.
66 Human Rights Watch 'Civilians under assault: Hizbollah's rocket attacks on Israel in the 2006 war' available at http://hrw.org/reports/2007/iopt0807/ (accessed 25 April 2016).

At the same time, in an environment of Islamist revivalism, the imprimatur of Islamic authority can be important. Khalid Mishal claimed that 'martyrdom operations' are

> the highest and noblest form of resistance and one that is most effective. Most of the scholars in our Islamic nations have ruled that it is permissible and, indeed, one of the best forms of jihad and resistance.[67]

It would appear from farewell messages that suicide bombers often leave that Islamic legitimation matters in their motivation.

Islamist ideology is more pronounced in armed movements committed to overthrowing a government that itself claims Islamic legitimacy. The Gama`a al-Islamiyya and Islamic Jihad movements in Egypt in the 1980s and 1990s are cases in point.[68] Muslim polities, like others, do not look kindly on would-be usurpers. In Islamic terms, a rebel movement needs to make a convincing claim that the government in question is not, or never was, genuinely or sufficiently Islamic in its practices, or has betrayed Islam in some serious manner. Such governments, no longer Muslim, must be fought as apostates, along with those who support them.[69]

Concerning the Islamist insurgency in Egypt in the 1990s, an element of its defeat (perhaps as significant as the state's repressive capacity) was the political isolation that Gama`a Islamiyya had incurred by attacks that indiscriminately killed civilians, Egyptians and foreign tourists (an important source of income for ordinary citizens). In the aftermath of this defeat, its leaders renounced the use of violence. In the view of some, the 'recantations'

> left unanswered the critical question of whether Egyptian Islamic radicalism has genuinely and comprehensively accepted the bankruptcy of its *jihadi* strategy and settled its intellectual accounts with the thinking that inspired it.[70]

67 Cited in MM Hafez 'Rationality, culture, and structure in the making of suicide bombers: A preliminary theoretical synthesis and illustrative case study' *Studies in Conflict & Terrorism* 29 165-185.

68 R Meijer 'Commanding right and forbidding wrong as a principle of social action: The case of the Egyptian al-Jama`a al-Islamiyya' in R Meijer (ed) *Global Salafism: Islam's new religious movement* (2009) 189-220.

69 According to article 19 of Al Qaeda's 2003 manifesto 'We believe that the ruler who does not rule in accordance with God's revelation, as well as his supporters, who substitute the Shari`a, are infidel apostates. Armed and violent rebellion against them is an individual duty on every Muslim' translated by Bernard Haykel, in Meijer, op. cit. 51. However, Al Qaeda confined its excommunication to rulers and not the general population. On this point in the Algerian context see International Crisis Group 'Islamism, violence, and reform in Algeria: Turning the page' (July 2004) 10-14.

70 H Roberts 'Islam in North Africa II: Egypt's opportunity' International Crisis Group Middle East and North Africa Briefing 20 April 2004.

As one former Gama'a Islamiyya member in 2014, when asked if the group's violent practices of previous decades was wrong, said: 'There's a difference between wrong and useless. The violence was simply useless.'[71]

Targeting civilians became controversial among Islamist militants themselves in the context of Sunni atrocities against Shi`a in Iraq after the US invasion, instigated primarily by Abu Musab al-Zarqawi's Al Qaeda in Iraq, the precursor to the Islamic State of 2014. Other Iraqi Sunni 'resistance' groups, notably those grouped under the banner of the Association of Muslim Scholars, strongly condemned such attacks.[72] The Palestinian-Jordanian ideologue Abu Muhammad al-Maqdisi, who had unreservedly denounced governments that do not institute rule based on Sharia and dismissed democracy as tantamount to apostasy, criticised his former comrade al-Zarqawi for brutal attacks targeting civilians in Iraq's Shia communities. 'My project is not to blow up a bar, my project is not to blow up a cinema,' al-Maqdisi told Al Jazeera in July 2005:[73]

> My project is to bring back to the Islamic Nation its glories and to establish the Islamic state that provides refuge to every Muslim, and this is a grand and large project that does not come by small vengeful acts … Since when did we speak of killing women and children? Since when did we speak of killing the laymen of the Shia?

In Algeria in the 1990s, the extreme brutality of elements of the Armed Islamic Group (GIA) determined to impose 'correct' Islamic practices quickly led to widespread defections.[74] Armed insurgents in Saudi Arabia presented a case of political violence unambiguously rooted in religious ideology. This reflects the near-total hegemony of religious discourse in Saudi Arabian discussions of political and social issues, abetted by the free hand Saudi rulers have given to Islamist ideologues along with their systematic silencing of dissenting liberal views. Many perpetrators of political violence in Saudi Arabia were ideological heirs of those the Saudi state had enabled to fight against the former Soviet-supported government in Afghanistan. The title of Nasir al-Fahd's pamphlet 'Revealing the Blasphemy of Those Who Help Americans' is a succinct statement of the rationale for insurgent violence directed against the indigenous (and religiously-sanctioned) political authority.[75]

71 P Hessler 'Election day' *New Yorker* 9 June 2014.

72 R Meijer 'Muslim politics under occupation: The Association of Muslim Scholars and the politics of resistance in Iraq' (2006) 12 *Arab Studies Journal* 92-112.

73 Cited in N Kazimi 'A virulent ideology in mutation: Zarqawi upstages Maqdisi' in H Fradkin *et al* (eds) *Current trends in Islamist ideology* (2005), http://www.futureofmuslimworld.com/research/pubID.24/pub_detail.asp (accessed 25 April 2016). On the role of Saudi Arabia's Wahhabiyya movement in fostering anti-Shi`a attitudes, see G Steinberg 'Jihadi-Salafism and the Shi`is' in Meijer (n 65 above) 107-125.

74 International Crisis Group (n 70 above).

75 See M al-Rasheed *Contesting the Saudi State: Islamic voices from a new generation* (2007) 135-36.

For Saudi dissidents in 2006, limited public support for violent opposition groups was motivated by the Saudi government's close relationship with the United States, and Washington's unacceptable policies in Iraq and the Israeli-Palestinian conflict. They agreed as well that the ruling family's accommodation of a religious establishment intolerant toward non-Muslims and Shi`a Muslims contributed to that support. They also argued that the Saudi State was just as hostile to peaceful criticisms as to the challenge of the violent groups. 'A nine-year prison term for suggesting a constitution!' said Abdullah al-Hamid, a former professor of literature and reform activist, referring to a sentence he received. 'Proponents of violence point to that and say, see what your peaceful petitions get you.'[76]

Jihad and the question of protection of civilians

The concept of *jihad*, or struggle, is integral to Islamic doctrine and tradition. In addition to incorporating different meanings of struggle, it has been quintessentially rule-bound, particularly as it applies to the use of violence.[77] Rules, of course, are part of the field of contestation. The concept of protected persons is a central one in Islamic ethics of war. Groups like Egypt's Ansar Bayt al-Maqdis have to date largely confined armed attacks to military and security targets.[78] Another recent example is the Yemen-based Al-Qaeda in the Arabian Peninsula (AQAP), which publicly apologised for a December 2013 attack on a military hospital in San'a in which AQAP fighters murdered doctors, nurses and patients, although the group has not disavowed other attacks on protected persons.[79] Some Islamist as well as Kurdish armed groups in Syria have publicly adhered to international standards regarding recruitment of child soldiers, gender-based violence, and use of anti-personnel landmines. One element in the May 2014 'revolutionary covenant' of the Islamic Front (which does not include key forces like ISIS or Jabha al-Nusra) condemns targeting of civilians by government forces and states that 'revolutionary

76 Author's interview with Abdullah al-Hamid, Riyadh, November 2006 (notes on file with author).

77 For an illuminating analysis of the evolution of the concept of jihad in Islam's first centuries, see RP Mottahedeh & R al-Sayyid 'The idea of the *Jihad* in Islam before the Crusades' in AE Laiou & R Parviz Mottahedeh *The Crusades from the perspective of Byzantium and the Muslim world* (2001) available electronically at www.doaks.org/etexts.html.

78 D Barnett 'The strategy of Egypt's AB al-Maqdis' Atlantic Council, 10 February 2014, available at http://www.atlanticcouncil.org/blogs/egyptsource/the-strategy-of-egypt-s-ansar-bayt-al-maqdis (accessed 31 January 2017).

79 One such atrocity was the killing of more than a dozen captured and disarmed Yemeni soldiers in the Hadhramaut region. A video of the apology for the hospital attack available at http://www.youtube.com/watch?v=ppQfTDbtWWw (accessed 31 January 2017).

forces strive to keep civilians out of the circle of violence and are firmly committed to that end.'[80] By contrast, an ISIS message promoting insurgent attacks in Egypt advocates targeting 'citizens of the counties that entered into a coalition against Islamic State' and more generally 'the disbeliever whether he is civilian or military.'[81]

There is a continuing need for opinion-shapers in majority Muslim countries of the Middle East to promote shared parameters of Islamic ethics and IHL principles. An important piece of this civil society effort must be to confront and counter hate speech and incitement to violence by groups like Islamic State and their adherents, along with blasphemy laws and state-sanctioned speech vilifying minority religious communities.[82] At the intergovernmental level, the Organisation of Islamic Cooperation (OIC) has put forth strong resolutions on Syria and recent statements by OIC Secretary General Iyad Ameen Madani has vigorously contested the claims of the Islamic State group to speak in the name of Islam.[83] The underlying element is the understanding that, in warfare and policing, there are limits as to the means and methods that parties may employ.[84] The limits spelled out in the Islamic tradition include prohibitions against treachery and mutilation, and specify categories of enemy persons who are immune from attack, including children, slaves, women, and the lame and blind.[85]

Conclusion: Ending a culture of impunity

IHL addresses how armies and fighters use arms, not whether they should take up arms or not. In Islamic terms, the issue is not whether jihad is permissible, compulsory, or prohibited (although these are important questions about which Islamic law, and more generally international law, have much to say), but how that struggle is conducted when it assumes an armed dimension. Since groups responsible for attacks that harm civilians

80 See the translation by the Syrian Legal Development Program, available at http://www.syrianldp.com/#!17-may-2014-joint-statement/czc6 (accessed 31 January 2017).

81 As above.

82 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, conclusions and recommendations from regional expert workshops organised by the Office of the High Commissioner for Human Rights, adopted on 5 October 2012.

83 'Countering ISIS needs multifaceted approach: Interview with Iyad Madani' International Peace Institute, 26 September 2014. See also the open letter of more than 100 Sunni scholars to AB al-Baghdadi, available at http://lettertobaghdadi.com/ (accessed 25 April 2016).

84 S Hashemi cites the Quranic injunction to 'not transgress limits' in the course of fighting 'God's cause' and enumerates restraints based in the *sunna* (practices) of the Prophet Muhammad and his earliest ('rightly guided') successors as leaders of the Muslim community. See 'Interpreting the Islamic ethics of war and peace' in SH Hashmi (ed) *Islamic political ethics: Civil society, pluralism, and conflict* (2002).

85 J Kelsay *Arguing the just war in Islam* (2007), especially in Chapter 3. Kelsay writes: 'The point is not simply that the Prophet identified, women, children and others as protected groups. Rather, these persons are listed because, as a general matter, they "do not fight"' 114).

frequently invoke the reprisal argument, proponents of IHL need to address the apparent absence of political will internationally to confront impunity for unlawful killings – to ensure respect for core humanitarian principles – by all parties, including powerful and well-connected states. As the armed groups and their partisans see it, IHL is a legal regime that favours states, can afford precision weapons and appear respectful of IHL even when their attacks kill many civilians, while insurgent groups are limited to weapons that are crude and inaccurate. (States, for their part, argue that IHL favours insurgent groups by making it easy for their fighters to blend in with the civilian population, increasing civilian casualties that are blamed on state armed forces.)

This prevalence of impunity, rather than any fundamental incompatibility of IHL principles with Islamic ethics and law, constitutes a main obstacle to constructing a viable and effective body of public opinion against such attacks by groups with whose goals they sympathise. When it comes to targeting civilians, the prohibitions are not contingent on reciprocal behaviour by one's adversary. However, if the more powerful adversary encounters no consequences for serious violations, it is difficult to persuade others that it is in the interest of all parties to uphold and respect IHL.

Clearly, there is a role in the process of promoting respect for core IHL principles in Arab societies, for persons who are able to articulate those principles in language that will persuade other Muslims, including Islamists and nationalists who deploy Islamic idioms and doctrinal references. These arguments will have zero impact on the behaviour of groups like the so-called Islamic State, but they will resonate with people they are attempting to influence. It is no longer unusual to find columns and editorials in Arab media criticising attacks against civilians by armed groups. Eliciting broader commitment to the core principle of civilian immunity from opinion-shapers, and society more broadly, will require further initiatives from regional as well as international activists.

To address impunity, and advance civilian protection, there is a need to use existing mechanisms of accountability, including campaigns to pressure veto-wielding members of the United Nations (UN) Security Council, the five Permanent Members (P5), from standing in the way of the International Criminal Court (ICC) to investigate the violations and prosecute perpetrators. Here, institutions like the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights can play a role. The African Union membership of Arab States like Algeria, Egypt and Libya offers opportunities for promoting justice and accountability. The African Union's suspension of Egypt following the *coup d'état* against President Mohamed Morsi was grounded in an unconstitutional seizure of power. However, the suspension was lifted after an election was conducted in an environment of severe repression. Can the African States, which endorsed the African Union's

right to intervene in a member state in 2000 and adopted the notion of the responsibility to protect in the UN General Assembly in 2005, play a role in holding Syrian authorities accountable for the bloodletting there? Can African states-- that comprise a quarter of the states parties to the ICC, and that are highly regarded among Palestinians, and Arabs generally for their successful liberation struggles – promote broader membership in the ICC by Arab states?

Promotion of, and accountability for, IHL violations by state and non-state actors alike is both an urgent and a long-term project, and the absence of full accountability should not excuse any indulgence of any party that violates civilian immunity. This is why it is critical for political and religious leaders and influential media, as well as human rights and other social movement activists, to speak out forcefully against such atrocities, even when – especially when – they are perpetrated by a government in their name or a movement whose goals they broadly support.

CHAPTER 21

THE AFRICAN UNION'S AGENDA ON THE PROTECTION OF CIVILIANS: A REVIEW OF ITS AMBITION AND PRACTICE

Solomon Dersso

Abstract: *The crisis of protection of civilians was one of the major features of the civil wars and armed conflicts that Africa witnessed in the aftermath of the end of the Cold War. The atrocities that these wars and conflicts occasioned triggered paradigmatic policy and normative shifts from the state-centric principle of non-intervention to non-indifference. This resulted in the establishment of a continental normative and institutional framework geared towards the protection of civilians and the creation of conditions for sustainable peace within the framework of the African Peace and Security Architecture (APSA). This Chapter offers an analysis of the normative and institutional frameworks that underpin and form part of the protection of civilians (PoC) agenda of the AU and the efforts towards implementing protection of civilians. While there have been moves towards the operationalisation of the protection agenda including the process of developing guidelines on protection of civilians in armed conflict, it is submitted here that there remain flaws not only in its follow up in practice but also in the institutionalisation of the protection mandate and its full integration into all the AU's peace and security engagements.*

Introduction

With intra-state conflicts becoming the most predominant form of conflict on the continent, there is nothing more central to peace and security in Africa than the protection of civilians from mass atrocities. This is mainly attributable to the fact that intra-state conflicts have come to pose a greater threat to the security of people than traditional inter-state conflicts. Indeed, one of the characteristics of intra-state conflicts has been that they result in much greater suffering of civilians than those carrying weapons.

As the on-going conflicts in Eastern Democratic Republic of the Congo (DRC), Northern Nigeria, Somalia, South Sudan and the Central African Republic (CAR) show, the 'terrorising of civilian populations by domestic factions'[1] including deliberate targeting of civilians is commonplace in intra-state conflicts. Since it broke out in mid-December

1 The Commission on Global Governance *Our global neighbourhood* (1995) 79.

2013, the civil war in South Sudan resulted in the death of more than 10 000 people, the internal displacement of 1.4 million people and the flow of about half a million refugees into neighbouring countries.[2] Deliberate targeting of civilians accounts for a significant percentage of these deaths and displacement.[3]

In many of the conflicts that erupted since the 1990s, millions of people have perished not only from such direct attacks, but also as an indirect result of conflict. Today, in the CAR and the Sahel, millions of people displaced by conflicts face disease, hunger and malnutrition and in Somalia and South Sudan, millions are in imminent danger of perishing from famine.

A related feature of intra-state conflicts is that most of them also involve grave violations of international human rights and international humanitarian law (IHL) including war crimes and crimes against humanity. According to the report of the United Nations Mission to South Sudan (UNMISS) issued in May 2014, both parties to the conflict committed grave violations of human rights and humanitarian law including extrajudicial killings, enforced disappearances, rape and other acts of sexual violence, arbitrary arrests and detention, targeted attacks against civilians not taking part in hostilities, violence aimed at spreading terror among the civilian population, as well as attacks on hospitals, personnel and objects involved in a peacekeeping mission.[4]

Additionally, these conflicts are often undertaken by groups that are lacking discipline and command and control. While some of the armed groups such as the Lord's Resistance Army (LRA), Al-Shabaab and Boko Haram use terrorism as their *modus operandi,* others, including those operating in eastern DRC, Darfur, CAR and South Sudan, engage in armed insurgency and guerrilla warfare. In these asymmetric conflict situations, the heavy handed and military-heavy response of government forces and even peace missions have at times been undertaken without due regard to international human rights and humanitarian law and hence inflicted suffering on civilian population caught in the fighting.

It is important to recognise that the factors underlying these issues of protection are numerous and deep-seated. These include the curse of the continuing fragility of the post-colonial African state, socio-economic

2 See International Crisis Group 'South Sudan: A civil war by any other name' available at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/south%20sudan/217-south-sudan-a-civil-war-by-any-other-name.pdf. (accessed 8 March 2017).

3 UN Mission in the Republic of South Sudan 'Conflict in South Sudan: A human rights report' (May 2014) available at http://www.unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf / (accessed 8 March 2017).

4 See generally United Nations Mission in the Republic of South Sudan *Conflict in South Sudan: A human rights report* (8 May 2014).

deprivation and pervasive inequality in access to political power and resources, contested legitimacy of the system of governance and governments in a number of countries, ethnic and religious tension and rivalry, the lack of a culture of rule of law and respect for rights, and the proliferation of arms and weapons.

It follows from the foregoing, that the demand for civilian protection is pressing in Africa. Similarly, while attention is mostly drawn to address the immediate risks of atrocities, for a system of protection in Africa to be effective, it needs to address the underlying conditions that precipitate threats of violence against civilians.

Departing from the foregoing circumstances that set the context for the protection of civilians in Africa, this Chapter seeks to examine how the issue of protection of civilians is addressed in Africa. This investigation first traces the origins of the protection of civilians-agenda in Africa. This is followed by the efforts at the level of the continent to create and institutionalise a normative and institutional framework for the protection of civilians in Africa. Third, the practice in the protection of civilians is analysed. Finally, an attempt is made to flesh out the major issues and gaps in the African civilian protection agenda.

Origin of the protection of civilians-agenda in Africa

The protection of civilian agenda in Africa owes its immediate origin to the horrors that the numerous conflicts of the 1990s unleashed on the civilian population in many parts of the continent. For Africa, the end of the Cold War, which marked the dawn of a new world order famously characterised by Francis Fukuyama as the end of history and the triumph of liberalism,[5] did not mark the onset of a peaceful and stable era. It was rather accompanied by the eruption of violent conflicts and the collapse or explosion of a number of states.

The immediate post-Cold War period became one of the darkest, bloodiest and bleakest times for Africa. Outside of the colonial era, at no other time has violence been more horrific and tragic than during this period. It was as though Africa has gone 'from the frying pan into the fire.'[6]

The fall of Siad Barre in 1990 resulted in the collapse of the Somalia state. This was accompanied by internecine violence between rival armed factions that destroyed the infrastructure and livelihood of most parts of the country leaving hundreds of thousands to death and starvation.[7] After years of authoritarian rule under Mobutu Seseseko, the DRC, formerly

5 F Fukuyama *The end of history and the last man* (1992).
6 MW Mutua 'Putting humpty dumpty back together: The dilemmas of the post-colonial African state' (1995) 21 *Brooklyn Journal of International Law* 505, 506.
7 I Lewis *Understanding Somalia and Somaliland* (2008) 71 & 78.

Zaïre, descended into one of Africa's most brutal civil wars in which millions of people perished.[8] The civil war that ensued following the rebellion that Charles Taylor waged against Samuel Doe's government led to the implosion of Liberia and the descent of its people into the abyss of horror.[9] Gross acts of brutality were committed in the civil wars fought in the country from 1989 to 2003.[10] Sierra Leone's civil war unleashed as much horror on the people of the country as the conflict in Liberia.

However, it was the 1994 Rwandan genocide that shocked Africa to its core. In a period of one hundred days, close to 800 000 Rwandese, almost one tenth of the population of the country, were mercilessly massacred.[11] The plan to annihilate members of the Tutsi ethnic group and moderate Hutus specifically targeted women and children 'with ghoulish zeal and unimaginable cruelty'.[12]

In many of these instances, Africa was left 'to fend for itself'. With the international community failing to act, it was the member states of the Economic Community for West African States (ECOWAS) that assumed the responsibility of stopping the violence in Liberia and Sierra Leone.[13] In Somalia, although the UN deployed peacekeeping forces, it left Somalia in conditions that were no better than when it intervened.[14] Even more tragically, no one, not even the United Nations (UN) did enough to avert Africa's worst mass atrocities during the 1994 Rwandan genocide. The failure of the UN, the body tasked with the responsibility of maintaining international peace and security, underscored the level of Africa's marginality to the international system. In its report, the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda concluded that 'the international community did not prevent the genocide, nor did it stop the killing once it had begun.'[15] This was

8 For an acclaimed, comprehensive and rich, *albeit* journalistic, account of the crisis of DRC, see JK Stearns *Dancing in the glory of monsters: The collapse of the Congo and the Great War of Africa* (2011).

9 At one point the situation led former Gambian President, Sir Alhaji Dauda Jawara to describe Liberia as a 'butcher house.' See Truth and Reconciliation Commission of Liberia 'Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume II Consolidated Final Report' (2009) 155 available at http://trcofliberia.org/reports/final-report (accessed 1 March 2017).

10 Approximately 200 000 people lost their lives, one million were displaced, and 60-70 per cent of the population suffered some form of sexual violence. See BBC News Africa 'Country profile: Liberia' available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1043500.stm (accessed 8 March 2017).

11 See Independent Inquiry Report (n 15 below) para 1.

12 OAU's International Panel of Eminent Personalities to investigate the 1994 genocide in Rwanda and the surrounding Events *Rwanda: The preventable genocide* (2000) 160.

13 See A Adebajo *The curse of Berlin: Africa after the Cold War* (2010) 37-40.

14 Lewis (n 7 above) 77-81.

15 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda UN Doc S/1999/1257 available at http://www.un.org/News/dh/latest/rwanda.htm (Independent Inquiry Report) para 2 (accessed 8 March 2017).

made more disappointing by the fact that the slaughter took place in the presence of a UN Mission in Rwanda.[16]

At the Organisation of African Unity (OAU) summit in July 1994 in Tunis, articulating the most profound case for Africa to put in place collective mechanism for addressing similar tragedies on the continent, President Nelson Mandela of South Africa stated that

> [r]wanda stands out as a stern and severe rebuke to all of us for having failed to address Africa's security problems. As a result of that, a terrible slaughter of the innocent has taken place and is taking place in front of our very eyes. We know it is a matter of fact that we must have it in ourselves as Africans to change all this. We must, in action assert our will to do so.[17]

Consensus was reached on the fundamental view that member states of the OAU should bring together their efforts and assume responsibility to be able to act against similar kinds of violence on the continent. Ambassador Said Djinnit, the first Commissioner for Peace and Security of the African Union (AU), put this as follows:[18]

> No more, never again. Africans cannot watch the tragedies developing in the continent and say it is the UN's responsibility or somebody else's responsibility. We have moved from the concept of non-interference to non-indifference. We cannot as Africans remain indifferent to the tragedy of our people.

From non-interference to non-indifference: An agenda for the protection of civilians in Africa

In the preamble to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol),[19] the centrality of the protection of the civilian agenda was affirmed in AU member states' lamentation that 'no single internal factor has contributed more to … the suffering of the civilian population [in Africa] than the scourge of conflicts within and between our states.'[20]

A major response of Africa to this challenge was to put in place a continental normative and institutional framework geared towards the

16 See R Dallaire *Shake hands with the devil: The failure of humanity in Rwanda* (2003).
17 N Mandela as quoted in African rights *Rwanda: Death, despair and defiance* (1995) 1138.
18 Ambassador S Djinnit AU Commissioner for Peace and Security 28 June 2004 Addis Ababa, as quoted in K Powell *The African Union's emerging peace and security regime - opportunities and challenges for delivering on the Responsibility to Protect* ISS Monograph 119 (2005).
19 Protocol of the Constitutive Act Relating to the Establishment of the Peace and Security Council of the African Union was adopted in Durban, South Africa on 10 July 2002 in terms of article 5(2) of the Constitutive Act and entered into force on 26 December 2003.
20 As above.

protection of civilians from atrocities and the creation of conditions for sustainable peace. The motion for putting in place such a framework was set in the decision in 1999 of transforming the now defunct OAU to the current AU. At the fourth extraordinary session of the Assembly of Heads of State and Government of the OAU held in Sirte, Libya, the Assembly adopted a declaration calling for the establishment of the African Union to replace the OAU. The declaration expressly acknowledged that 'the Continental Organization needs to be revitalised in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances.'[21]

This transformation was meant to usher Africa into a new era in which the protection of civilians and human security broadly take central place. The establishment of the African Peace and Security Architecture (APSA) under the PSC Protocol marked the inauguration of the agenda towards human security and the protection of civilians on the continent. The APSA has two components: a normative and policy component and an institutional dimension.

Normative dimension of the APSA for civilian protection

At the normative level, the protection agenda is anchored on two related fundamental frameworks. The first involves the redefinition of the principle of state sovereignty. The second and related framework is the commitment to an interventionist peace and security regime.

Sovereignty redefined

The principle of the sovereignty of states is the cornerstone of the Westphalian international order. Sovereignty is a legal status by virtue of which the possession by a society of an independent political authority as a state is recognised internationally. Seen in this light, sovereignty has two aspects: first, sovereignty defines the legal identity of states within the international system as equal entities and possessing of the same legal capacities; second, sovereignty signifies independent political authority over the people and territory within the jurisdiction of a state. This is associated with 'the capacity to make authoritative decisions with regard to the people and resources within the territory of a state'.[22] In international law, this is given institutional guarantee through the principle of non-intervention, which prohibits members of the international community from intervening in the internal affairs of a state.

21 OAU Sirte Declaration of 1999 available at http://www.uneca.org/adfiii/riefforts/ref/other5.htm (accessed 20 March 2017).

22 International Commission on Intervention and State Sovereignty (ICISS) The Responsibility To Protect (2001) *Report of the ICISS* 12.

Sovereignty and its corollary, the principle of non-intervention, are the most important principles on which the OAU was founded. Of the seven basic principles outlined under article 3 of the OAU Charter, four concerned the sovereignty and territorial integrity of African states.[23] In the practice of the OAU, these principles were regarded as precluding the OAU or any member state from scrutinising the African state's domestic activities and, therefore, were scrupulously observed. The OAU has been operating within the framework of, and in strict adherence to, its state-centric principles of sovereignty of states and non-intervention.[24]

Under the Constitutive Act of the AU, the AU made a complete break from the OAU by redefining sovereignty. Unlike the OAU Charter in which sovereignty was sacrosanct and almost absolute, within the framework of the AU, sovereignty is limited. This is provided for in the ground-breaking principle of the right of the AU to intervene in a member state.[25] The Constitutive Act stipulates in article 4(h) that the AU has the right to intervene in a member state 'pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. It not only creates the legal basis for intervention, but also imposes an obligation on the AU to intervene to prevent or stop the perpetration of such heinous international crimes anywhere on the continent.

This provision, together with the emphasis on ending conflicts and promoting peace and security, reverses the primacy that the OAU accorded to the state and its state-centric principles over people and the rights and interests of citizens. Most notably, it revises the understanding and scope of application of the principles of state sovereignty and non-interference. By narrowing down the scope of application of state sovereignty and non-interference, this provision removed some of the issues these principles had hitherto covered from the exclusive domestic jurisdiction of the state and made them matters of continental concern. It

23 See the Charter of the Organisation of African Unity art 3(1), (2), (3) & (5).

24 As one author put it 'the OAU was still firmly rooted in its ideal to protect state sovereignty and its unwillingness to intervene in the internal conflicts of member states.' In elucidating the impact of this, the author further said 'Its stance on sovereignty was perhaps the main weakness of the OAU when it came to conflict management, and one that threatened to render the organisation irrelevant in the new international environment.' F Olonisakin 'Conflict management in Africa: The role of the OAU and sub-regional organisations' in J Cilliers & A Hilding-Norberg (eds) *Building stability in Africa: Challenges for the new millennium* (2000) 50-57.

25 For literature on this, see GA Aneme *A study of the African Union's right of intervention against genocide, crimes against humanity and war crimes* (2008); J Cilliers & K Sturman 'The right intervention; Enforcement challenge for the African Union' (2002) 11 *African Security Review*; K Kindiki *Intervention to protect civilians in Darfur: Legal dilemmas and policy imperatives* ISS Monograph 131: Institute for Security Studies (2007); AA Yusuf 'The right of intervention by the African Union: A new paradigm in regional enforcement action? (2005) *African Yearbook of International Law* 3-21; D Kuwali & F Viljoen (eds) *The responsibility to protect: Article 4(h) of the Constitutive Act of the AU* (2014); SA Dersso 'The African Union' in G Zyberi (ed) *An institutional approach to the responsibility to protect* (2013).

settled the controversy around the limits of these principles in cases of grave danger to the lives of citizens of a state. This represents a paradigmatic shift from the OAU's exclusive focus on state security to the security and wellbeing of individuals and peoples encapsulated by the concept of human security. Unlike the OAU Charter, the Constitutive Act has strong human rights content. Indeed, one of its objectives is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.[26]

As such, sovereignty and non-interference would no longer shield states from external scrutiny and even military intervention, not only where they endanger the lives of people on a massive scale, but also where they are unable to protect their citizens from such grave threats.[27] Nor can these principles justify inaction on the part of the AU in the face of such threats. In this, the AU Constitutive Act became a pioneer in leading what has come to be characterised as a 'systemic shift in international law, namely, a growing tendency to recognise that the principle of state sovereignty finds its limits in the protection of 'human security'.[28]

Sovereignty is additionally redefined in another way as well. This is the shared responsibility that African states assumed for the peace and security of each African state. This is expressed through the affirmation by AU member states of 'the fact that the defence and security of one African country is directly linked to that of other African countries'.[29]

Interventionist peace and security regime

The peace and security regime to which the AU member states subscribed is not based on traditional security paradigm that exclusively focuses on violent conflicts. It is rather a regime that is premised on the new security paradigm, which focuses on broader human security issues. The new normative concept of human security, which underpins the AU's peace and security regime, is more explicitly stated in the AU's Solemn Declaration on a Common African Defence and Security Policy (CADSP). The CADSP makes as its point of departure a definition of security 'which encompasses both traditional and state-centric notion of the survival of the state and its protection by military means from external aggression, as well as the non-military notion which is informed by the

26 See art 3(h) of the AU Constitutive Act.

27 As Cilliers and Sturman put it, '[t]he absence or disappearance of a functioning government can lead to the same kind of human catastrophe as the presence of a repressive state. In Africa, intervention will be needed in as many cases where a weak state is unable to protect its citizens, as when a repressive state is unwilling to do so or is itself the cause of the abuse.'

28 C Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm?' (2007) 101 *American Journal of International Law* 99 100-101.

29 See Solemn Declaration on Common African Defence and Security Policy.

new international environment and the high incidence of intra-state conflicts.'[30] More than anything else, it is the rise in intra-state conflicts witnessed on the continent during the post-Cold War period that prompted African states to embrace the new normative concept of human security as the basis for AU's peace and security regime.[31]

The AU's peace and security regime is thus one in which not only protection from physical violence arising in conflict situations but also issues of democracy, human rights and governance feature prominently. Article 3(g) states as one of the objectives of the AU, the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.[32] Additionally, the promotion of democratic principles and institutions, popular participation and good governance form part of the objectives of the AU.[33]

Out of the 16 fundamental principles by which the AU is to be guided, at least six of them could be said to embody human rights provisions and one of them is concerned with human rights issues in the context of violent conflicts. Most notably, article 4(m) stipulates that respect for democratic principles, human rights, the rule of law and good governance is one of the fundamental principles of the AU. Article 4(j) reiterates the right of the AU to intervene in member states provided for in article 4(h) of the Constitutive Act.

Accordingly, conditions that the CADSP defined as threats to peace and security in Africa include: the existence of grave circumstances, namely war crimes, genocide and crimes against humanity; lack of respect for the sanctity of human life, impunity, political assassination, acts of terrorism and subversion; *coup d'état* and unconstitutional change of government, as well as situations which prevent and undermine the promotion of democratic institutions and structures, including the absence of rule of law, equitable social order, population participation and electoral processes; and absence of the promotion and protection of human and peoples' rights, individual and collective freedoms, equitable opportunity for all, including women, children and ethnic minorities. While these furnish the normative foundation of the protection agenda in Africa, the AU peace and security regime additionally provided for institutions and mechanisms for addressing and responding to the threat or actual

30 African Union, Solemn Declaration on a Common African Defence and Security Policy, Addis Ababa (African Union, 28 February 2004) para 6.

31 As the Policy states: 'The causes of intra-state conflict necessitate a new emphasis on human security, based not only on political values but on social and economic imperatives as well.'

32 In the OAU Charter, except the indirect reference made by the express allegiance made to the Universal Declaration of Human Rights in the preamble, human rights were not incorporated into any of the substantive parts of the Charter.

33 Art 3(h).

occurrence of atrocities. These constitute the institutional dimension of African Peace and Security Architecture (APSA).

Institutional dimension of the African peace and security architecture

Central to the institutional dimension of the APSA is the Peace and Security Council (PSC).[34] According to article 2 of the PSC Protocol, the PSC is 'a standing decision-making organ for the prevention, management and resolution of conflicts', which operates as 'a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'. The mandate of the PSC as stipulated under article 7 of the Protocol includes competences to

> anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity; undertake peace-making and peace-building functions in order to resolve conflicts where they have occurred; authorise the mounting and deployment of peace support missions; *recommend to the assembly intervention in a member state in respect of grave circumstances as provided for in article 4(h) of the Constitutive Act* (emphasis added); and support and facilitate humanitarian action in situations of armed conflicts or major natural disasters.

The PSC is the strategic decision-making body of the APSA that conceptualises or designs and oversees the implementation of initiatives relating to the protection of human rights issues envisaged under article 4(h). On the basis of article 6 of the PSC Protocol, the modalities for the PSC to exercise its powers include early warning and preventive diplomacy, peace-making, including the use of good offices, mediation, conciliation and enquiry and peace-support operations (PSOs) and intervention, pursuant to article 4(h) of the AU Constitutive Act.

For discharging its mandate including with respect to article 4(h) of the AU Constitutive Act, the PSC is supported by other structures that form part of the APSA. According to article 2 of the PSC Protocol, the other parts of the APSA that support the PSC include the AU Commission, the Panel of the Wise, the Continental Early Warning System (CEWS), the African Standby Force and a Special Fund.

The AU Commission implements the AU policies, prepares its strategic plans and coordinates the body's activities and meetings. In the area of peace and security, the AU Commission, the PSC Protocol states that 'the Chairperson of the Commission shall, under the authority of the Peace and Security Council, and in consultation with all parties involved in a conflict, deploy efforts and take all initiatives deemed appropriate to

34 For more information visit African Union: Peace and Security Council (PSC) available at http://au.int/en/organs/psc (accessed 8 March 2017).

prevent, manage and resolve conflicts'.[35] As most members of the PSC lack the requisite technical capacity and in-house expertise, they rely for taking decisions with respect to situations envisaged under article 4(h) of the AU Constitutive Act or threats of violence against civilians broadly on the information and analysis that they receive from the AU Commission, either through the Chairperson himself or through the Commissioner for Peace and Security.

Apart from providing the information and analysis required for enabling the PSC to execute its mandate with respect to article 4(h) of the Constitutive Act, the Commission is also assigned the responsibility of ensuring 'the implementation and follow-up of the decisions taken by the AU Assembly in conformity with article 4(h) of the Constitutive Act'.[36] This may range from launching an investigation, deploying a preventive force, facilitating talks for negotiating a ceasefire and a final political settlement, to suspending the target state from participating in the activities of the AU to deploying an intervention force into the affected country. It clearly emerges from the above that, the AU Commission plays a key role in initiating actions for applying article 4(h) of the Constitutive Act, and in mobilising the political will of member states for ensuring that prompt decisions are taken and that such decisions are implemented.

For purposes of providing the PSC with relevant data and analysis, the AU Commission, in principle, depends on the Continental Early Warning System (CEWS), another component of the APSA. The CEWS is tasked with the responsibility of collecting, analysing, and assessing emerging threats to peace and security in Africa. Accordingly, the purpose of the CEWS is the provision of timely advice, otherwise known as early warning, by availing information and analysis to the Chairperson of the AU Commission on potential conflicts and threats to peace and security. That information would enable the Chairperson or the Commissioner for Peace and Security to draw the attention of the PSC and ultimately develop appropriate and timely response to prevent or resolve conflicts or crisis situations in Africa, including those envisaged under article 4(h).

The major initiatives that the AU deploys in cases of the eruption of violent crisis, including those involving article 4(h) cases include the launching of an investigation mission and series of diplomatic efforts such as mediation processes. Once seized of an early warning on the emergence of a violent crisis involving an article 4(h) situation, the AU Commission, through the Chairperson, issues a press statement expressing concern and urging for ending violence, sometimes even condemning those perpetrating violence. This is followed by a debate at the PSC on the situation and the course of action that the AU should pursue. Often the

35 PSC Protocol, art 10(2)(c).
36 PSC Protocol, art 10(3)(b).

PSC outlines a framework for a political resolution of the crisis. On the basis of such a framework, the AU Commission launches a mediation mission through a special representative of the Chairperson of the Commission or through a high level *ad hoc* committee.

Failing such investigative and mediation efforts and when the PSC decides to deploy an intervention force, the PSC Protocol envisages a resort to the African Standby Force (ASF), another component of the APSA. As provided for under article 13 of the PSC Protocol, '[i]n order to enable the Peace and Security Council to perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4(h) and (j) of the Constitutive Act, an African Standby Force shall be established'. Clearly, the ASF is one of the most critical elements of the APSA that will enable the AU to deliver on its promise of intervention to protect people against grave violations and of prompt and robust response to manage and resolve any serious humanitarian crisis in Africa.

The protection of civilians in Africa: From normative commitment to policy and practice

Institutionalising civilian protection agenda in AU policy processes

As part of the effort for translating the normative framework on the protection of civilians into political action and operational engagements, the AU Commission with the support of the Australian Government developed the draft Guidelines on the Protection of Civilians in Peace Support Operations in 2010. Although it remains in a draft form, it has acquired a *de facto* authority that guides and informs AU interventions for resolving conflicts. The draft Guidelines defines civilian protection as

> [a]ctivities undertaken to improve the security of the population and people at risk, and to ensure the full respect of the rights of groups and individuals recognized under regional instruments, including the African Charter of Human and Peoples' Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons, and the Convention Governing the Specific Aspects of Refugee Problems in Africa, and international law, including humanitarian, human rights and refugee law.[37]

The 2010 PoC guidelines were developed to provide guidance to the AU PSC with respect to the formulation of a protection of civilians mandate when deploying peace support operations. Significantly, as pointed out by

37 AU (2010) *Draft guidelines on the protection of civilians in African Union peace support operations.* AU document available at http://www.apsta-africa.org/template/default/pdf/Draft%20AU%20PoC%20Guidelines%20-%20English.pdf (accessed 8 March 2017).

the Report of the Chairperson of the Commission, the guidelines 'would provide clear guidance in the planning and conduct of AU mandated peace support operations'.[38] The draft Guidelines has three key parts. The first part outlines the underlying principles and provides for a definition of what constitutes the PoC. The second part offers guidelines on incorporating protection of civilians in all relevant stages in the African Peace and Security Architecture leading to deployment of peace support operations. The third part deals with mechanisms for the operationalisation of protection of civilians in the mission.

The Guidelines articulate a four-tiered framework approach to the protection of civilians. The first is what could be best described as the primacy of the political. This entails and demands that first and foremost, protection is a matter best pursued as part of the political process for the settlement of conflicts. This is a manifestation of not only the centrality of the political process but also the recognition within the AU framework that protection is fully realised only through the full settlement of conflicts on the basis of peace processes. This framework also insists that protection of civilians forms part of peace processes including mediation and peacemaking initiatives. Accordingly, mediators and negotiating parties are expected to develop and commit to measures that contain conflicting parties from engaging in activities that endanger civilians.

The second framework is protection from physical violence. This covers the various measures that need to be adopted for preventing emerging violence, containing and averting ongoing violence and deter the perpetration of violence against civilians.

The third is rights-based protection which involves activities that include human rights monitoring and reporting, investigation of violations of human rights and international humanitarian law, the institutionalisation of approaches that deter and punish perpetration of violations and the building of or support for local and national rule of law and criminal justice processes. This can be implemented in various forms including the establishment of units of peace support operations with human rights monitoring and reporting tasks (AMISOM and AFISMA), deployment of human rights monitors (Burundi since 2015) and the establishment of investigation missions (South Sudan in 2014/2015 and Burundi in 2015/2016).

The fourth and final framework is the establishment of a protective environment. At the heart of this is post-conflict reconstruction and development necessary for consolidating security, preventing relapse to

38 AU (2011), Progress report of the Chairperson of the AU Commission on the development of guidelines for the protection of civilians in African Union Peace Support Operations, AU Doc. PSC/PR/2(CCLXXIX) para 6 (Report of the AU Commission Chairperson).

conflict and sustaining peace. Going beyond and above peacemaking initiatives that aim at political settlement, this entails socio-economic and institutional reconstruction measures and interventions supporting the delivery of basic social services and reform processes in socio-economic governance, justice and security.

Recognising the importance of appreciation of the nature and sources of threats to the security of civilians, the AU Commission deemed it necessary that the Continental Early Warning System (CEWS) is updated. As the CEWS is intended to monitor emerging conflict situations across the African continent, and to provide timely and relevant information and analysis, equipping it with the capacity to provide information and input on threats is key for enabling in the mandating, planning and implementation of peace support operations. The development of indicators specific to protection threats, risks and vulnerabilities was made part of the early warning indicators of the CEWS.

At the level of the PSC, apart from the various themes that in various ways cover protection issues, in the context of AU peace support operations, a decision was taken for mainstreaming protection of civilians. Accordingly, in its statement of June 2012, the PSC stressed the importance of 'mainstreaming' protection of civilians 'in standard operating procedures of AU peace support operations' and that 'PoC *must* form part of the mandate of future AU missions'.[39]

In line with the draft Guidelines, AU missions have come to have structures that cover the wider protection needs of civilians in conflict situations including civilian components such as human rights monitors and gender experts. The deployment of such components as part of peace support operations is now becoming an established practice.

Acknowledging the specificity of various conflict situations, the AU initiated a process for developing mission-specific protection strategies. The AU Commission observed that 'the development of a framework which can be used by all missions to develop their specific protection strategies is important, as this provides parameters and key considerations to assist missions in drafting comprehensive protection strategies'. It is further stated that such a framework would 'enable the development of mission strategies which clearly articulate the different roles and responsibilities of the different components of a mission, and the modalities of interface with other external protection actors.'[40]

Based on the draft Guidelines, the AU in 2013 elaborated and adopted *Aide-memoire for the consideration of issues pertaining to the protection of civilians in Africa.* In consonance with the appreciation that protection of civilians is

39 AU (2012) *Press statement*. AU document PSC/PR/BR/1.(CCCXXVI), 26 June 2012.
40 Report of the AU Commission Chairperson (2011) para 20.

an issue to be pursued across the full spectrum of AU's peace and security processes, the aide-memoire articulates AU's approach from prevention to post-conflict phases. This has illustrated that the draft guidelines should be revised and cover all AU peace processes going beyond peace support operations to which it is apparently confined as exhibited by its title.

Protection in AU peace support operations: AMIS, AMISOM, AMISFA, MISCA and MAPROBU

Following its establishment, the building and institutionalisaiton of its new ambitious peace and security agenda was not the only task that the AU has been engaged in. Alongside institution building, the AU has also been called upon to deploy responses to the various peace and security challenges facing the continent.[41] This is reflected in the fact that before AU's peacekeeping and intervention outfit, the African Standby Force, has become operational, the AU mandated and deployed some ten peace support operations.

List	Mission	Deployment date	Mandate	Role in PoC from the decision authorising deployment
1.	African Union Mission in Burundi (AMIB)	2003	Supervise, observe, monitor and verify the implementation of ceasefire agreement	Not provided
2.	African Union Mission in Sudan (AMIS) I	2004	Monitoring of the implementation of the ceasefire agreement and peace agreement, contributing to general security and delivery of humanitarian assistance	Protection, within the capacity of the force, of the civilian population

41 SA Dersso 'Stabilization missions and mandates in Africa's peace operations: Implications for the ASF?' in C de Coning, L Gelot & J Karlsrud (eds) *The future of African peace operations* (2016) 38.

3.	AMIS II	2004	Same as above	Protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability
4.	African Union Mission for Support to the Elections in Comoros (AMISEC)	2006	Provide secure environment for the conduct of the 2006 elections in Comoros	Take all measures necessary to protect its personnel, as well as civilians within the proximity of the polling stations
5.	African Union Mission in Somalia (AMISOM)	2007	Protection of federal institutions and key infrastructure, support national dialogue and reconciliation	Not provided in the decision establishing the mission until 2013
6.	Regional Task Force of the African Union-led Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army (RCI-LRA)	2011	Creating an environment conducive to the stabilisation of the affected areas, free of LRA and facilitating the delivery of humanitarian aid to the affected areas	'Ensure the main-streaming of the civilian protection in all military and security initiatives aimed at resolving the LRA problem'
7.	African-led International Support Mission to Mali (AFISMA)	2013	Restoration of state authority	To protect civilians under imminent threat of force

8.	African-led International Support Mission to the Central African Republic (MISCA)	2013	Restoration of state authority	The protection of civilians … through the implementation of appropriate measures
9.	Multinational Joint Task Force (MNJTF) against Boko Haram	2015	Conduct operations aimed at containing the threat of Boko Haram	Create a safe and secure environment in the areas affected by the activities of Boko Haram and other terrorist groups, in order to significantly reduce violence against civilians and other abuses, including sexual- and gender-based violence
10.	African Prevention and Protection Mission in Burundi (MAPROBU)	2015	Stabilisation of the security situation in Burundi, supporting peace efforts, protecting the civilian population	Contribute, within its capacity and in its areas of deployment, to the protection of civilian populations under imminent threat

Source: Author's compilation

The Darfur crisis was the first occasion to test the application of the AU norms, most particularly its protection of civilians' agenda. Following the signing of the Humanitarian Ceasefire Agreement of April 2004, the PSC decided to send a mission to Darfur. The first step was the deployment of military observers for monitoring, verifying, investigating and reporting

transgressions of the ceasefire agreement, known as the African Union Mission in Sudan (AMIS) I.[42] Subsequently, the AU deployed a full-fledged mission to Darfur, known as AMIS II.[43]

When AMIS I was first introduced, its operation was confined to monitoring the observance of the ceasefire agreement. No civilian protection role was envisaged in its concept of operations or rules of engagement. In the light of the magnitude of the crisis in Darfur, particularly in terms of the humanitarian dimension, clearly this ommission meant that AMIS I was not organised or operationally disposed for extending protection to civilians.

When AMIS II was deployed, the PSC expanded both the mandate and the size of the mission.[44] The revised mandate of AMIS included the following functions: (i) monitor and observe compliance with the Humanitarian Ceasefire Agreement of 8 April 2004 and all such agreements in the future; (ii) assist in the process of confidence building; and (iii) contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes, in order to assist in increasing the level of compliance of all parties with the Humanitarian Ceasefire Agreement of 8 April 2004 and to contribute to the improvement of the security situation throughout Darfur.[45]

The tasks assigned by the PSC to AMIS II included protecting civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the government of Sudan; and protecting both static and mobile humanitarian operations under imminent threat and in the immediate vicinity, within capabilities.[46]

AMIS signified 'the most concrete manifestation of the AU response to Darfur'.[47] Despite its various limitations, AMIS was the only international military presence in Darfur for a considerable period of time. As the only line of defence between the notorious Janjaweed militia and Darfur civilians, in those areas under its military presence AMIS, at the very least prevented the armed groups from causing more destruction.

42 For more on AMIS see S Appiah-Mensah 'AU's critical assignment in Darfur: Challenges and constraints' 14 *African Security Review* (2005) 7-21.
43 Communique of the 17th Session of the PSC, (20 October 2004), AU Doc. PSC/PR/Comm. (XVII).
44 As above.
45 n 43 above, para 4.
46 n 43 above, para 6.
47 C Badescu & L Bergholm 'The African Union' in DR Black & PD Williams (eds) *The international politics of mass atrocities: The case of Darfur* (2010) 101.

Apart from its presence, AMIS was also credited with using innovative approaches to provide the best levels of protection within their capacity. [48] In his report to the Security Council in 2005, former Secretary-General Kofi Annan observed that 'in the areas where AMIS had deployed, it was doing an outstanding job under very difficult circumstances, greatly contributing to an improved security situation.'[49]

Perhaps AU's long running and largest peace operation to date is AMISOM. When the Peace and Security Council (PSC) authorised the deployment of AMISOM, it mandated the mission (i) to provide support to the Transitional Federal Institutions (TFIs) in their efforts to stabilise the situation in the country and further dialogue and reconciliation, (ii) to facilitate the provision of humanitarian assistance, and (iii) to create conducive conditions for long-term stabilisation, reconstruction and development in Somalia.

The nature of the conflict in AMISOM's areas of operation and AMISOM's mandate has necessitated and involved the use of combat operations. As a result, there has been high demand not only for protecting civilians but also for conducting such operations without endangering civilians. Despite the fact that no civilian protection mandate is given to AMISOM in the decision authorising its deployment, its Rule of Engagement stipulated that AMISOM could use force beyond self-defense particularly to afford protection to civilians under imminent threat of physical violence. In addition, AMISOM has also been engaged in supplying humanitarian assistance to local populations in its area of operation particularly through the provision of medical care, water supplies and electricity.

Despite these overtures towards the protection of civilians, AMISOM not only lacked the explicit mandate but also the necessary organisation and capacity for ensuring civilian protection. The force, size and design of AMISOM was such that until 2011, it operated mainly as a military operation focusing almost exclusively on defending itself, the TFG institutions and key infrastructure in Mogadishu.[50] AMISOM's experience exhibited the delicacies and challenges that arise with respect to

48 According to Appiah-Mensah, AMIS 'has acted as an interposition force to protect the vulnerable, especially, internally displaced persons (IDPs), during imminent attacks. The rapid and timely deployment of AMIS to Zalingei, following a tense situation after the kidnapping of civilians by SLM/A, helped to prevent retaliation against IDPs; also the deployment of AMIS to Muhajeriya stopped the advance of Government of Sudan forces into this town and thus averted a probable displacement of some 40,000 IDPs'. See Appiah-Mensah (n 42 above) 8. Also see ICJ Africa Briefing No 28, 4-6.

49 Report of the Secretary-General on United Nations Assistance to the African Union Mission in the Sudan, UN Doc S/2005/285, 3 May 2005, para 5. Available at http://www.un.org/Docs/sc/sgrep05.htm (accessed 20 March 2017).

50 SA Dersso 'Somalia dilemmas: Changing security dynamics, limited policy options' ISS Paper No 218, Addis Ababa: Institute for Security Studies http://www.issafrica.org/uploads/Paper218.pdf (accessed 8 March 2017).

protection of civilians in situations of asymmetric warfare. It illustrated not only the necessity of explicit civilian protection mandate outlining the principles that govern the conduct of peace support operations in situations of asymmetric warfare including observance of international humanitarian law and human rights. After three years of difficult experience, the AU started to implement incremental reforms for ensuring the protection of civilians in AMISOM operations. In 2011, it developed an indirect-fire policy, which requires avoidance of the use of indirect fire, investigating and reporting attacks by Al-Shabaab against civilians and providing assistance to those whom AMISOM unintentionally harmed. AMISOM also increased the diversity of its capabilities with the deployment of civilian components that facilitate civilian protection works. In 2013, AMISOM adopted a mission wide protection of civilians-strategy and protection of civilians was incorporated as an explicit mandate of AMISOM under the new Concept of Operations adopted by the PSC. In 2016, the mission also established a Civilian Casualties Tracking, Analysis and Response Cell (CCTARC).

Although its principal task was to defeat the LRA, one of the RCI-LRA's tasks was to 'ensure the mainstreaming of the civilian protection in all military and security initiatives aimed at resolving the LRA problem'. While this is a significant improvement from AMISOM, RCI-LRA suffers from similar issues of military heaviness, and logistical and institutional problems. These problems became compounded by the fact that RCI-LRA operates more as a multinational coalition with even weaker supervisory and coordination arrangements than AMISOM, which operates as an AU mission for whose planning and supervision of its conduct the AU takes responsibility.

In all the subsequent missions the AU mandated and the multinational coalition against Boko Haram, protection of civilians has become a common feature of the mandate of African peace operations. Such has been the case with respect to both AFISMA and MISCA. AFISMA was mandated to support Malian authorities in recovering the areas to the North of its territory under the control of terrorist, extremist and armed groups, and in reducing the threat posed by terrorist organisations including al-Qaeda in the Islamic Maghreb (AQIM), Movement for Oneness and Jihad in West Africa (MUJAO) and associated extremist groups. Reflecting the lessons from previous missions including AMISOM, the mandate required AFISMA to take appropriate measures to reduce the impact of military operations upon the civilian population. This mandate was supplemented by the first-ever mission-wide strategy for PoC and for the first time 50 human rights monitors led by a member of the African Commission on Human and Peoples' Rights, the AU's principal human rights organ, were deployed.

When authorising the deployment of MISCA, the PSC mandated the mission 'to: (i) [undertake] the protection of civilians and the restoration of

security and public order, through the implementation of appropriate measures; (ii) the stabilisation of the country and the restoration of the authority of the central Government; (iii) the reform and restructuring of the defense and security sector; and (iv) the creation of conditions conducive for the provision of humanitarian assistance to population in need'. In a development that registered significant improvement on AMISOM, MISCA's force composition reflected the diversity of roles required for protection when it was mandated with the initial total strength of 3 652 personnel including 3 500 uniformed personnel (2 475 for the military component and 1 025 for the police component) and 152 civilians. MISCA also continued with the deployment of human rights monitors, but unlike in the case of AFISMA where the relationship between human rights monitors and the mission was not clear, human rights monitors were deployed as part of MISCA.

In an attempt to counter Boko Haram, the AU authorised another regional coalition of national forces under the Lake Chad Basin Commission. The MNJTF was mandated to

> create a safe and secure environment in the areas affected by the activities of Boko Haram and other terrorist groups, in order to significantly reduce violence against civilians and other abuses, including sexual- and gender-based violence.

The MNJTF faces the same issues affecting the RCI-LRA. As with AMISOM, one of the major issues facing the MNJTF operations is also ensuring that its military actions against Boko Haram have the least diverse impact on civilians. As with AMISOM, there have been reports of MNJTF operations resulting in major civilian casualties.

Although it did not take off the ground, the most recent mission to be mandated by the PSC was MAPROBU. The PSC in its decision of 17 December 2015 mandated MAPROBU to 'contribute, within its capacity and in its areas of deployment, to the protection of civilian populations under imminent threat'.[51] For the first time, the PSC invoked article 4(h) of the Constitutive Act and put the option of deploying MAPROBU by force if the government of Burundi failed to cooperate for the deployment of MAPROBU. While in the end the proposal of the PSC for a forcible deployment of MAPROBU was not endorsed by the AU Assembly and MAPROBU was aborted,[52] the AU was able to deploy

51 African Union Peace and Security: Communique of the 565th Meeting of the PSC on the Situation in Burundi.

52 See PD Williams 'The African Union's coercive diplomacy in Burundi (2015) *IPI Global Observatory* Available at https://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/; SA Dersso *To intervene or not to intervene: An inside view of the AU's decision making on Article 4(h) and Burundi* (2016) Occasional paper, World Peace Foundation available at http://fletcher.tufts.edu/~/media/Fletcher/Microsites/World%20Peace%20Foundation/Publications/AU%20Decision-Making%20on%20Burundi_Dersso.pdf (accessed 20 March 2017).

human rights monitors and military observers, *albeit* far lower than the 200 the PSC mandated and without proper legal arrangement with the host government.[53]

Protection outside of AU peace support operations: The case of Côte d'Ivoire

The AU is called upon and is expected to respond to threats of atrocities not only in conflict situations where it deployed peace operations, but also in other crisis situations as well. Indeed, peace operations and its use for protection purposes is only one means for ensuring the protection of civilians. As noted earlier, the AU can additionally use mediation, peace-making, high-level panel, sanctions and commission of inquiry.

The AU was involved in efforts for resolving the crisis that gripped Côte d'Ivoire following the contention over the outcome of the presidential run-off election on 28 November 2010. Initially, ECOWAS led the effort to resolve the crisis in the country. With these efforts failing to yield the expected outcome, the AU assumed the challenge of pursuing diplomatic efforts. Following the failure of the mediation efforts of the AU Mediator, Kenyan Prime Minister Raila Odinga, in unlocking the stalemate, the PSC decided at its meeting of 28 January 2011 to set up a high level panel for the resolution of the crisis. The PSC charged the High Level Panel with the task of evaluating the situation and formulating, 'on the basis of the relevant decisions of the AU and Economic Community of West African States, an overall political solution'.

The proposal of the Panel for the political solution of the crisis, which the PSC adopted, included guarantees for a safe exit for Gbagbo, affirming Ouattara as the elected president and the formation of a national unity government by Ouattara. Speaking at a news conference the following day, Ambassador Ramtane Lamamra, then AU Commissioner for Peace and Security and leader of the team of experts, stated that 'Gbagbo is requested to withdraw and the constitutional council is asked to swear in Ouattara as president'. The proposed government of national unity, to be led by Ouattara, is envisaged to involve some former presidents of Côte d'Ivoire, members of other parties and, most importantly, people drawn from among Gbagbo's supporters.

Following the rejection of the Panel's proposal by Gbagbo's camp, the PSC tasked the AU Commission to appoint a High Representative (HR) for the implementation of the overall political solution by launching engagement with the parties.

53 See ICG, Africa Briefing No 122, The African Union and the Burundi crisis: Ambition versus reality (September 2016).

While much attention and effort was put into convincing Gbagbo to surrender power with dignity, the risks of on-going and potential violations of human rights, including the perpetration of mass atrocity crimes did not receive as much attention. It was not the mere occurrence of violence that made the situation in Côte d'Ivoire susceptible to the commission of mass atrocities such as crimes against humanity. The situation additionally manifested the existence of ethnic tensions, propagation of hate speech; xenophobic militia groups including the so-called 'Young Patriots'; and the occurrence of mob-violence along ethnic lines. Indeed, on 19 January 2011, the Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect warned about 'the possibility of a genocide, crimes against humanity, war crimes and ethnic cleansing in Côte d'Ivoire'.[54]

Although the use of force as a last resort was put on the table by ECOWAS, no adequate effort was made to mainstream the issue of protection of civilians in the mediation efforts of the AU and ECOWAS.[55] While the PSC started to express protection concerns as manifested in its call for 'an end to all acts of violence and abuse towards the civilian population'[56] and in its condemnation of the attacks against the civilian population and the commission of atrocities,[57] the mediation efforts did not pay enough attention to the rising cases of violations of human rights, the use of the media to incite hate and violence, and the resort of supporters to propagation of hate and perpetration of violence. As a result, the protection agenda was not raised as a major concern and did not form part of the peace process when the mediators were engaging both sides.

Conclusion: Major issues and gaps in the protection of civilian agenda in Africa

The foregoing clearly shows that the protection agenda occupies a major place in the norms and institutions of the AU. First, the protection agenda draws from and is anchored on the normative foundations of the AU. As the emphasis on human security and the ground-breaking principle of non-indifference under article 4(h) of the Constitutive Act illustrate, the protection agenda is a defining feature of the AU peace and security norms. Second, the protection agenda has been made to shape and

54 Statement attributed to the Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect (19 January 2011, New York) available at http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Cote%20d%27Ivoire,%2019%20Jan%202011.pdf (accessed 20 March 2017).

55 See SA Dersso 'The need for prioritizing the protection of civilians from mass atrocities in Côte d'Ivoire' *ISS Today* (11 January 2011).

56 See Communiqué of the 259th meeting of the PSC on the situation in Côte d'Ivoire, 28 January 2011, AU Doc. PSC/AHG/COMM(CCLIX).

57 See Press statement of the 270th meeting of the PSC on the situation in Côte d'Ivoire, 5 April 2011, AU Doc. PSC/PR/BR.1 (CCLXX).

permeate AU's political and policy discourse and practice. Third, apart from informing the operationalisation of the various components of the African Peace and Security Architecture (APSA), the protection agenda has led to the elaboration of protection specific frameworks. The draft AU Guidelines on the Protection of Civilians is a case in point. Fifth, not only that protection of civilians has become a feature of the decisions of the PSC authorising the deployment of peace support operations but also it has led to the formulation of multidimensional tasks necessary for the protection of civilians and the designing and implementation of mission specific strategies and processes for protection.

It has also emerged from the practice thus far that there remain a number of issues affecting AU's protection agenda. As events in South Sudan, CAR and Northern Nigeria aptly illustrate, the protection of civilians remains a major concern. At the political and policy level, from Darfur to Burundi, the AU policy bodies have showed not only a lack of consistency but also failed to uphold the normative position on protection in their policy pronouncements and actions. There is also a need for a clear and standard formulation of protection mandate of peace support operations in PSC decisions authorising their deployment. While the protection agenda received impetus with efforts for its mainstreaming, much of the focus has been on the institutionalisation of the protection agenda in peace support operations. Most notably, the protection of civilians was not mainstreamed into all aspects of the operationalisation of the African peace and security regime as AU's peace-making efforts in Côte d'Ivoire illustrated. Thus, the elaboration of the draft AU Guidelines on the Protection of Civilians should be expanded beyond its current focus on peace support operations.

With respect to the implementation of protection in peace processes, although the protection of civilians is becoming a regular feature of AU missions as exemplified by the recent AU missions in Mali and CAR, the AU faces huge challenge of translating it into structures, processes and day-to-day operation of its missions.

First, there is an issue of the military-heavy character of AU missions. As the mission in Somalia illustrates, AMISOM was designed and implemented as a military-heavy undertaking. As subsequent missions also show, AU missions like AMISOM, with their military-heavy character, seem to be more suited to undertaking military operations than the full spectrum of civilian and policing tasks necessary for protection. This issue is also attributable to the nature of the security environment in which the missions operate and the lack of impartiality of some of the contingents or their failure or their lack of adequate awareness and preparations to uphold their protection mandate.

Second, AMISOM and other AU operations have not been adequately linked to effective political efforts to resolve the conflicts. Indeed, for many

years, AMISOM has been operating in the absence of any meaningful political process. In 2010, it was accordingly observed that, like any similar peace operations that are not by their design fit to resolve a conflict, 'the use of AMISOM (alone and in the absence of a political framework or process) has proven to be utterly inadequate for the task of stabilising the security situation in Somalia'.[58] In this regard, more needs to be done to implement the primacy of the political dimension, which is central to the protection agenda. As pointed out elsewhere, 'the use of military operations should be anchored in a clearly articulated political strategy and process for resolving the conflict or the crisis that led to the deployment of peace operations'.[59]

Third, almost all AU missions suffer from resource and logistics supply shortages. Related to the perennial funding shortages, the lack of required equipment including SUVs, transport capabilities and force enablers remain to be common features of AU missions. The realisation of adequate, predictable and flexible funding is thus key for implementing protection in missions. Related to this is also the importance and necessity of expanding the capacity of countries contributing military, police and civilian capabilities including in particular in equipping them with the necessary capabilities.

Fourth, for purposes of effective mission level protection of civilians, it is a prerequisite that the personnel making up the mission are provided with the necessary training that equips them with the necessary understanding and skills to enable them to effectively discharge their protection responsibilities once deployed. The work for this has thus to start at pre-deployment stage.

Fifth, there are challenges of priorities and clarity of responsibilities of various actors and the provision of necessary resources or logistics support according to protection needs and priorities. Protection mandates and operations require the integrated application and use of a wide range of tools drawing on and harnessing the contribution of a variety of actors, including, apart from the diverse mission components, other multilateral actors, humanitarian actors and relevant national actors in the host society, particularly affected communities. Planning for and institutionalising processes and mechanisms for strategic and operational coordination are key to a successful and comprehensive execution of protection activities.

In sum, the protection of civilians is a shared responsibility. The primary responsibility is that of the individual sovereign state. Here, attention should be drawn to addressing issues of fragility and legitimacy of the post-colonial African state with a view to enhance the capacity and

58 Dersso (n 50 above) 14.
59 Dersso (n 41 above) 47.

responsibility of the state for delivering on its protection mandate. But when the state is unable or manifestly fails to protect its citizens from mass atrocities, the responsibility shifts from the state to the international level. And here, the responsibility of the AU under article 4(h) of the Constitutive Act and other provisions in the PSC Protocol should not and cannot be seen as optional but as obligatory. Understandably, the role is not something that Africa can and should by itself alone bear. As such, it is critical that international actors work closely with and bear their part of the protection burden by extending support to the AU.

CHAPTER 22

ASIAN PERSPECTIVES ON ATROCITY PREVENTION AND PROTECTION OF CIVILIANS

Noel M Morada

Abstract: *This Chapter examines various perspectives of Asian states with regard to protection from atrocities and the protection of civilians, focusing mainly on the following issues: (1) the relationship between the concept of the responsibility to protect (R2P) and the notion of protection of civilians (PoC) in United Nations (UN) peace missions; (2) sovereignty and protection of civilians; (3) accountability of state and non-state actors in civilian conflicts; and (4) addressing gaps in protection mandates and implementation. Most Asian states remain wary of conflating the responsibility to protect-norm with protection of civilians in armed conflicts. They also continue to emphasise the importance of respect for sovereignty and territorial integrity of states while underscoring the need for parties in armed conflict to abide by international norms such as the international humanitarian law (IHL) and international human rights law (IHRL). Particularly Asian states with sizeable troop contributions to the UN peace missions underscored the importance of narrowing the gaps between mandates and their implementation on the ground, specifically with regard to providing more resources, equipment, training, as well as ensuring the safety of peacekeeping troops in volatile situations.*

Introduction

Asian states have participated in various debates in the UN on the subject of mass atrocities prevention and the protection of civilians in armed conflicts. Specifically, since the adoption of the Responsibility to Protect by the World Summit in 2005 and its inclusion in the protection of civilians debates in the UN Security Council based on resolutions 1674 (2006) and 1894 (2009), a number of Asian countries have expressed their opinions and views on a range of issues concerning these two concepts. It is significant to note that a number of Asian countries have participated in several UN peace missions abroad, some of which with a mandate to protect civilians. As a region, Asia provided the second most uniformed

personnel to UN peacekeeping, with about 42 per cent of the total (or 41 132 of 98 200) as of December 2013.[1] The biggest troop- and police-contributing countries from Asia are India, Pakistan, and Bangladesh. China and other Southeast Asian countries have also contributed peacekeeping forces to various UN peace missions in Africa, the Middle East and the Caribbean.

This Chapter examines the various perspectives of Asian states with regard to the prevention of atrocities and protection of civilians. Specifically, it covers the following themes, which have been the foci of issues covered by statements made by several Asian states in the UN in the protection of civilians-debates since 2006: (1) the relationship between the R2P and the PoC in UN peace missions; (2) sovereignty and protection of civilians; (3) accountability of state and non-state actors in civilian conflicts; and (4) addressing gaps in protection mandates and implementation. As can be gleaned from the following discussion, most Asian states remain wary of conflating the norm of R2P with protection of civilians in armed conflicts. They also continue to emphasise the importance of respect for sovereignty and territorial integrity of states while underscoring the need for parties in armed conflict to abide by international norms such as IHL and IHRL. Particularly Asian states with sizeable troop contributions to UN peace missions underscored the importance of narrowing the gaps between mandates and their implementation on the ground, specifically with regard to providing more resources, equipment, training, as well ensuring safety of peacekeeping troops in volatile situations.

Conflating the responsibility to protect and the protection of civilians

In September 2005, prior to the adoption of the concept in the World Summit Outcome Document, the United Kingdom (UK) and Benin made reference to the responsibility to protect in the UN Security Council debate on Resolution 1674. Specifically, the UK argued for the need to reach an agreement on the concept even as it underscored the point that 'the international community has a collective responsibility to protect' civilians in armed conflict.[2] For its part, Benin stressed that '[t]he protection of civilians is a key area in fulfilling the 'responsibility to protect.'[3]

The Philippines was the only Asian country that commented extensively on the concept of the PoC, with reference to the point made by

1 See Asia section of 'Country Profiles' in Providing for Peacekeeping online, available at http://www.providingforpeacekeeping.org/profiles/asia/ (accessed 15 October 2014).
2 S/PV.5209 provisional verbatim record of the 5209th meeting of the Security Council, 21 June 2005, 13.
3 S/PV.5209 (n 2 above) 11.

the UK and Benin. In particular, it pointed out that there is a 'need to have a common view and a collective understanding of how [the] concept would appropriately and effectively address the needs of civilians in a conflict situation.'[4] It further argued that interventions in the context of implementing the responsibility to protect take into account the nuances of conflict situations, such as the capacity of governments, the region's environment, and the political will to resolve conflicts. Thus, for the Philippines, the responsibility to protect 'could be complemented, or even pre-empted, if the responsibility to prevent conflict were also adequately addressed'.[5] Evidently, the Philippines did not have any problem linking the concept with protection of civilians in armed conflicts.

Following the adoption of Resolutions 1674 and 1894, which incorporate and reaffirm the principle of the R2P based on paragraphs 138 and 139 of the 2005 World Summit Outcome Document, a number of Asian countries have expressed some reservations about conflating these two concepts. Specifically, China first expressed its reservations in the protection of civilians-debate in June 2006 about reaffirming the responsibility to protect-concept as part of Resolution 1674, which it does not believe to be 'the same as the simple concept of responsibility to protect, about which many countries continue to have concerns'.[6] It also argued that although the Outcome Document elaborated extensively on the concept of the R2P, it still needed further 'in-depth discussions' in the General Assembly and not within the Security Council. In a subsequent protection of civilians-debate in late 2006, China pointed out that in discussing the protection of civilians, 'the Security Council should continue to approach with caution the concept of the responsibility to protect' even as it argued that Outcome Document 'gave an extensive and very cautious representation of the responsibility to protect'.[7] For China, it was not appropriate to 'expand, wilfully interpret, or even abuse' the concept even as it stressed that Resolution 1674 'only reaffirmed in principle the relevant statement as contained in the [Outcome Document], without any further elaboration'.[8] It reiterated its earlier point that the R2P-concept should be further discussed in the UN General Assembly and not in the Security Council.

In the protection of civilians-debate in November 2007, China appears to have changed its tone with regard to the use of 'responsibility to protect' in Resolution 1674 as it pointed out that the concept 'should be interpreted

4 n 2 above, 15.
5 As above.
6 S/PV.5476, provisional verbatim record of the 5476th meeting of the Security Council, 28 June 2006,10.
7 S/PV.5577, provisional verbatim record of the 5577th meeting of the Security Council, 4 December 2006, 8.
8 As above.

and applied in a prudent and accurate manner'.[9] However, it argued once more for further discussion of the responsibility to protect in the General Assembly even as it asserted that the concept 'is not yet mature' and that many member states in the UN have their concerns about it.[10] In May 2008, China again cautioned the Security Council to 'approach the concept of the responsibility to protect – and especially its application – with great prudence' in the context of discussing the protection of civilians in armed conflict and also stressed that the proper forum for further discussion of the concept 'responsibility to protect' is the General Assembly.[11] Although the concept of responsibility to protect was reaffirmed once more in Resolution 1894 in 2009, which coincided with the 10th anniversary of the protection of civilians-debates in the Security Council, China did not make any explicit comments on the concept and its relationship to protection of civilians and has since avoided any reference to the principle in subsequent protection of civilians-debates in the Security Council. It is significant to note that it was also in 2009 that the first General Assembly interactive dialogue on the responsibility to protect was held, which became an annual event in the United Nations headquarters in New York.

Apart from China, other Asian states also expressed their views in the Security Council on the issue of conflating the responsibility to protect with protection of civilians in armed conflicts. Japan, for example, did not question the reaffirmation of the responsibility to protect-concept in Resolution 1674, citing in particular the importance of the Security Council taking collective action in responding to mass atrocities in accordance with the 2005 Outcome Document. In this context, it pointed out that the Security Council 'needs to further discuss the role it should play in protecting civilians in armed conflict more energetically and in more depth.'[12] However, in a subsequent statement in May 2008, Japan made a clear distinction between the concept of human security and responsibility to protect, articulating that the former is an important framework in promoting the protection of civilians. In particular, it stated that

> human security is a concept that complements [s]tate security and seeks protection and empowerment of individuals, putting the livelihood and dignity of individuals at the centre of our focus. It is consistent with the letter and spirit of the Charter of the United Nations and promoted in full respect of national sovereignty. It does not, in any way, suggest military intervention,

9 S/PV.5781, provisional verbatim record of the 5781st meeting of the Security Council, 27 November 2007,10.
10 S/PV.5781 (n 9 above) 10.
11 S/PV.5898, provisional verbatim record of the 5898th meeting of the Security Council, 27 May 2009, 9.
12 S/PV.5577 16.

> even as a last resort, and thus differs from the notion of the responsibility to protect.[13]

Japan also advocates for mainstreaming the human security framework in the UN's activities, especially in the work of the Peace building Commission, which is tied to the protection of civilians in armed conflicts. In September 2015, Japan announced at the UN General Assembly dialogue that it has appointed a R2P focal point after its concerns about conflating human security and responsibility to protect have been addressed satisfactorily and that the potential for misunderstanding of these two concepts is quite low.[14]

In the aftermath of the Libyan crisis in 2011, a number of Asian states expressed their concerns either explicitly or implicitly on linking the responsibility to protect with the protection of civilians in armed conflicts, especially after the Security Council invoked the principle in Resolution 1973. China, for example, pointed out during the protection of civilians-debate in May 2011 that Resolutions 1970 and 1973 were aimed at putting an end to violence and to protect civilians in Libya. It categorically opposed 'any attempt to wilfully interpret the resolution or to take actions that exceed those mandated by the resolutions' and also called on those implementing these resolutions to make every effort 'to avoid yet greater civilian casualties.'[15] In a subsequent protection of civilians-debate in November 2011, China reiterated these points concerning the implementation of the Security Council resolutions in Libya and stressed that in implementing the protection of civilians, there should be 'no political motives or purposes involved, including regime change.' As earlier mentioned by Foley in Chapter 3, it also welcomed the Brazilian initiative on responsibility while protecting (RwP) and called for careful study and discussions of the concept.[16] In February 2013, China once again stressed the need to avoid 'politicising the protection of civilians' and carrying out 'regime change under the same pretext.' It also called on the Security Council to adopt 'a consistent position' in dealing with protection of civilians and avoid 'double standards or select practices' that can only damage its authority and role.[17]

13 S/PV.5898, provisional verbatim record of the 5898th meeting of the Security Council, 27 May 2008 (resumption) 5.

14 See remarks by H.E. Motohide Yoshikawa, Permanent Representative of Japan to the United Nations on the Occasion of an Informal Interactive Dialogue on the Responsibility to Protect, 8 September 2015, available at http://www.responsibilitytoprotect.org/japan.pdf (accessed 27 February 2017).

15 S/PV.6531, provisional verbatim record of the 6531th meeting of the Security Council, 10 May 2011, 21.

16 S/PV.6650, provisional verbatim record of the 6650th meeting of the Security Council, 9 November 2011, 25.

17 S/PV.6917, provisional verbatim record of the 6917th meeting of the Security Council, 25 February 2013, 25.

It is interesting to note that in June 2012, Ruan Zongze, a Chinese scholar published a piece titled 'Responsible protection: Building a safer world' in the *China International Studies*, journal of the China Institute of International Studies (CIIS), a think tank affiliated with the foreign ministry, where he provided a critical perspective on how the responsibility to protect was implemented in Libya and why China was opposed to intervention in Syria. He also explored the concept of 'Responsible Protection,' which, according to him, contains six essential elements, to wit: (1) the object of protection must be made clear; (2) the legitimacy of those who implement protection must be established; (3) the means of protection must be strictly limited, with the prerequisite that all peaceful and non-military means must be first exhausted; 4) the purpose of protection must be defined even as its primary aim must be to 'mitigate humanitarian catastrophe'; (5) those given a mandate for protection should be responsible for 'post-intervention' and 'post-protection' reconstruction of the state concerned; and (6) the United Nations should create 'mechanisms of supervision, outcome evaluation and post factum accountability to ensure the means, process, scope, and results of 'protection'.[18]

In October 2013, CIIS hosted an international conference in Beijing to discuss the concept of Responsible Protection, with participants coming mainly from the BRICS (Brazil, Russia, India, China, and South Africa). While the concept does not appear to have been formally sanctioned by the foreign ministry, it is clear that it complements the Brazilian initiative of responsibility while protecting. On a positive note, Gareth Evans pointed out that the concept of Responsible Protection, like the RwP that preceded it, 'reflects a genuinely and widely felt concern' which, if not addressed, 'will make Security Council resolutions in support of military action in responsibility to protect cases almost impossible to obtain in the future.'[19] While he noted that it is not certain that China and the rest of the BRICS countries will champion the responsible protection idea in a formal way, he nonetheless argued that it 'should not be viewed as a rearguard action designed to undermine the responsibility to protect-norm, but rather an effort to assume co-ownership of it.'[20]

India essentially echoed the same concerns raised by China with regard to protecting civilians in Libya albeit implicitly during the protection of civilians-debates in 2011. In particular, it called for: (1) uniform application of the principle of protecting civilians; (2) the

18 R Zongze 'Responsible protection: Building a safer world' *China International Studies* No 34 (May/June 2012) available at http://www.ciis.org.cn/english/2012-06/15/content_5090912.htm (accessed 15 October 2014).

19 G Evans 'Protecting civilians responsibly' *Project Syndicate* online 25 October 2013, available at https://www.project-syndicate.org/commentary/gareth-evanson-moves-by-china-and-other-brics-countries-to-embrace-humanitarian-intervention (accessed 15 October 2014).

20 As above.

decision to intervene must be based on 'credible and verifiable information' and must avoid associating protection of civilians with political motives; and (3) the response of the international community must be proportionate to the threat involved.[21] It also criticised some member states for being 'too willing to expend considerable resources for regime change in the name of protection of civilians' but were not willing to provide minimal resources to UN peacekeeping missions.[22] As well, India also expressed support for the concept of RwP as it stressed the importance of ensuring responsibility while protecting in implementing the Security Council's resolutions on protection of civilians.[23]

For its part, Sri Lanka welcomed the clarification made by the UN Secretary-General in his report on protection of civilians in June 2012 with regard to the distinction between the responsibility to protect and protection of civilians. In particular, the report stated: [24]

> The protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while responsibility to protect is a political concept, set out in the 2005 World Summit Outcome [Document] … there are important differences in their scope. The protection of civilians relates to violations of international humanitarian and human rights law in situations of armed conflict. The responsibility to protect is limited to violations that constitute war crimes or crimes against humanity or that would be considered acts of genocide or ethnic cleansing.

Sri Lanka expressed hope that the above clarification will help in the application of both principles in a considered and non-political manner.[25]

Meanwhile, Pakistan stressed the importance of maintaining the 'clear distinction between the established norms on the protection of civilians and the evolving concept of the responsibility to protect' during the protection of civilians-debate in August 2013.[26] It reiterated this point in February 2014 inasmuch as 'the conflation of these two concepts creates legal confusion.' It argued that based on international consensus and legal opinion, international humanitarian law covers only situations of armed conflict and that the mandate and discussion on this issue in the Security Council are 'also limited to situations of armed conflict'. Hence, maintaining the distinction between these two principles is useful in order

21 S/PV.6531 (n 15 above) 20-21.
22 S/PV.6650 (n 16 above) 18.
23 S/PV.6790 provisional verbatim record of the 6790th meeting of the Security Council, 25 June 2012, 24.
24 S/2012/376 para 21.
25 S/PV.6790 (n 23 above) 16-17.
26 S/PV.7019, provisional verbatim record of the 7019th meeting of the Security Council, 19 August 2013, 18.

'to avoid the frequent drift into reporting about situations that do not come under the purview of armed conflicts as recognised by international law.'[27]

From the foregoing, it is clear that a number of Asian states have strong reservations and concerns about conflating the concepts of R2P and PoC. Much of this stems from the unease about the use of force or intervention in implementing the responsibility to protect, which contravenes the norm of respecting the sovereignty and territorial integrity of States. As a concept, protection of civilians, which is anchored on international humanitarian law (IHL), does not promote the use of force or intervention as it undermines state sovereignty. Instead, it adheres to the principles of neutrality, impartiality and independence in providing humanitarian assistance to civilians in armed conflicts.

In most protection of civilians-debates in the Security Council since 2006, most Asian States invoke these principles under IHL as part of implementing civilian protection mandates carried out by UN peacekeeping missions in various parts of the world. As well, many Asian States have expressed preference for peaceful and political resolutions of armed conflicts, underscoring the importance of mediation, negotiation, and addressing the root causes of armed conflicts. The use of force under Chapter VI of the UN Charter is viewed only as justifiable if there is a clear threat of armed conflicts to international peace and security. Indeed, many Asian states have expressed unease about the use of force and external intervention in implementing the responsibility to protect, especially in the aftermath of the Libyan crisis in 2011 even though they do not necessarily oppose the concept in the context of preventing mass atrocity crimes covered by the principle.

Sovereignty and protection of civilians

Most states in Asia have underscored the importance of respecting national sovereignty and territorial integrity of states in protecting civilians in armed conflicts. China, Myanmar, India, Pakistan, Bangladesh, and Sri Lanka have consistently referred to this principle in their respective statements during the protection of civilians-debates in the UN Security Council. Shared views among China, India, Pakistan, Bangladesh, and Sri Lanka have been articulated on the following points: (1) the primary responsibility for protecting civilians lies with national governments concerned; (2) humanitarian aid organisations should adhere to the principles of neutrality, impartiality, and independence even as they are expected to respect the sovereignty of states; (3) international assistance including the deployment of peacekeeping missions should be driven by national requirements; (4) the consent of States is necessary if international

27 S/PV.7109, provisional verbatim record of the 7109th meeting of the Security Council, 12 February 2014, 47.

organisations are to engage armed non-state actors in a dialogue (for example, for purposes of ceasefire agreements); and (5) the role of the United Nations is to support national authorities in protecting civilians through capacity building, preventive diplomacy, conflict prevention, and peaceful resolution of conflicts.

While Japan, South Korea, Indonesia, Malaysia, the Philippines, Thailand, and Vietnam also share the view that the primary responsibility to protect civilians lies with national governments, they were also cognizant of the reality that many states have not strictly adhered to international humanitarian and international human rights law for a number of reasons. Some states however, have not yet ratified relevant international treaties and conventions (for instance, 1949 Geneva Convention, Rome treaty, arms trade treaty), while others also lack national capacity and resources to address the root causes of internal conflicts (for example, poverty, access to justice, education). In this regard, a number of Asian states such as Japan, Korea, Indonesia, Vietnam, the Philippines, and Thailand, have called for a more comprehensive approach to the protection of civilians through a number of strategies, such as: (1) strengthening the rule of law; (2) promoting security sector reform; (3) creating national mechanisms for the protection of civilians; (4) adopting national policies that focus on protection of women and children; (5) ensuring accountability against impunity; and (6) promoting a culture of peace. For its part, Indonesia underscored the importance of anchoring protection of civilians on three pillars, namely, human rights, security, and development, which are interlinked.[28]

Accountability of state and non-state actors in armed conflicts

For some states in the region that have internal armed rebellion, for example, Pakistan and Sri Lanka, they were quite sensitive to references made in protection of civilians-debates in the Security Council that characterised their situations as armed conflicts that fall under the framework of IHL. In June 2012, Pakistan expressed strong disappointment and rejected the contents of the UN Secretary General's Report over 'unwarranted references' to its counter-terrorism operations as armed conflict.[29] In February 2013, Pakistan also stressed that 'international humanitarian law covers only situations of armed conflict and should not be extended to other situations,' even as it also pointed out the need to avoid 'occasional drift into reporting about situations that do not fall within the category of armed conflict.[30] For its part, Sri Lanka defended its policies in protecting civilians while it conducted operations

28 S/PV.6066, provisional verbatim record of the 6066th meeting of the Security Council, 14 January 2009, 31.
29 n 23 above, 16.
30 S/PV.6917, provisional verbatim record of the 6917th meeting of the Security Council, 25 February 2013, 16.

against the Liberation Tigers of Tamil Eelam (LTTE), which it considers a 'ruthless terrorist group'[31] in several protection of civilians-debates in the Security Council.

In June 2009, for example, it criticised the Secretary-General's report as suffering from 'selectivity of language and situations in dealing with different countries' and contained 'considerable factual inaccuracies in some places' with reference to the situation in Sri Lanka.[32] In explaining the government's efforts in protecting civilians, it underscored the following points: (1) non-state actors such as the LTTE have used civilians and facilities such as schools and hospitals as shields to pursue their terrorist operations; (2) they do not adhere to international norms and standards and do not feel bound by any legal framework;[33] (3) they forcibly conscript civilians including children under the age of 12 and used them as combatants and forced labour; (4) that Sri Lankan troops were trained to distinguish between combatants and civilians;[34] and (5) that in the final phase of the conflict (2006-2009), Sri Lanka engaged with the UN, its agencies, and the International Committee of the Red Cross (ICRC) and representatives of the international community even as the government maintained its 'zero casualty' policy.[35]

Meanwhile, Indonesia pointed to the 'still-vague meaning and distinction among armed groups, combatants, and civilians' as a source of difficulty in promoting the protection of civilians, which accordingly has 'cost civilian lives in various conflicts by both mistake and design.'[36] The proliferation and fragmentation of non-state armed groups have also complicated this problem even as many of these groups reject the idea of civilian protection. As well, because of the asymmetric nature of armed conflicts in various parts of the world, the principles of distinction and proportionality are being violated. For these reasons, Indonesia argued that there is a 'need for reinvigorated commitment and determined comprehensive action in dealing with the protection of civilians in armed conflict.'[37]

For Malaysia, all parties to an armed conflict 'should do their best to distinguish between civilians and combatants' and non-state actors must also be 'obligated to ensure the safety of civilians' under international humanitarian and human rights laws.[38] Accordingly, accountability is an integral part of ensuring compliance of parties in a conflict and impunity

31 S/PV.6216, provisional verbatim record of the meeting of the Security Council, 11 November 2009 (resumption), 36.
32 S/PV.6151, provisional verbatim record of the 6151st meeting of the Security Council, 26 June 2009 (resumption), 23
33 As above.
34 S/PV.6216 (n 31above) 37.
35 n 16 above, 18.
36 n 23 above, 21.
37 As above.
38 S/PV.7019 (n 26 above) 43.

must not be tolerated. In February 2014, Japan pointed out that state or non-state military groups 'frequently obstruct, delay, or prevent United Nations humanitarian operations in an arbitrary manner within territories they control.'[39] The impact of this on the safety and security of civilians requires 'continued and urgent attention of the Security Council to act in a visible and concrete way' in order to mitigate the suffering of civilians in armed conflict.[40]

Asian states have divergent views on how accountability and issues of impunity should be handled. China argues that national courts should handle cases of impunity; on the other hand, countries like Japan and South Korea[41] give importance to the role of the International Criminal Court (ICC) to deal with cases of impunity. Specifically, China pointed out that '[i]n prosecuting and punishing actions that violate human rights and contravene international humanitarian law … it is essential that the major focus is on making full use of domestic judicial systems as the primary channel for such efforts.'[42] In the protection of civilians-debate of June 2007, Japan cited its role in supporting the establishment of a hybrid court in Cambodia to put on trial the most responsible Khmer Rouge leaders for atrocity crimes in that country by providing a voluntary contribution of US$26.1 million, which is 40 per cent of the total cost.[43] It also argued that there should be careful consideration of achieving a proper balance between national reconciliation and punishing those who committed impunity.[44] Japan also called for accountability of those who committed violence in Libya and Côte d'Ivoire and appealed to the Assad government in Syria to allow fact-finding investigations by a Commission of Inquiry in the country. Accordingly, it pointed out that in order for referrals to the ICC to be viable, genuine cooperation of all member states, including those parties to the Rome Statute, is indispensable.' For its part, South Korea underscored the need to respect the role of the ICC, especially if there is 'a clear and evident failure of states to prosecute criminals'[45] even as it also supported calls for referrals of mass atrocities in Syria to the ICC.[46] Accordingly, South Korea believes that the Security Council and other relevant bodies should 'devise measures to ensure compliance regardless of the status of parties' in an armed conflict,[47] a point that was also echoed by Japan and who also urged the Security Council to take measures 'to verify facts and establish accountability' in such situations.[48]

39 S/PV.7109 (n 27 above) 78.
40 As above.
41 n 15 above, 21.
42 n 26 above, 27.
43 n 10 above, 6.
44 As above.
45 n 31 above, 45.
46 n 26 above, 11.
47 n 15 above, 29.
48 n 31 above, 45 11.

It is significant to note that China is not a party to the Rome Treaty, while Japan and South Korea have acceded to the ICC together with other Asian states such as Bangladesh, Cambodia, and the Philippines. In 2009, the Philippines passed a domestic law against genocide and crimes against humanity, while Cambodia enacted a law against denial of Khmer Rouge atrocities in 2013. Meanwhile, Nepal and Sri Lanka, which are not parties to the Rome Treaty, have emphasised the importance of national reconciliation processes in dealing with their internal conflicts and to ensure protection of civilians in the future. Sri Lanka in particular had set up a 'Lessons Learnt and Reconciliation Commission' in order to address both reconciliation and accountability issues.[49]

Addressing gaps in protection mandates and implementation

In various debates in the Security Council since 2006, Asian states have underscored a number of points in connection with protection of civilians-mandates and their implementation. The common themes include: (1) the need for clear, coherent, and achievable civilian protection mandate; (2) the challenge of adequate resources and capabilities of peacekeeping missions; (3) the importance of a comprehensive and holistic approach in protection of civilians in armed conflict, including the incorporation of post-conflict rebuilding; and (4) the need for better consultation and coordination in undertaking protection and humanitarian activities among stakeholders. China, for example, pointed to the necessity of ensuring that protection of civilians-mandates are 'clear, realistic, and feasible' and that resources and equipment 'are adequate and fully guaranteed'.[50] In September 2015, President Xi Jinping announced before the UN General Assembly that China planned to set up a permanent peacekeeping force of 8 000 troops, provide US$100 million to the African Union, and promised US$1 billion 'peace and development fund' to the UN. This is apparently in response to calls from the US and other Western countries for China to shoulder more responsibilities in the world body.[51]

Japan pointed out that peacekeeping for protection of civilians 'must be clear and achievable', with 'all the necessary resources' for implementing its mandate.[52] It also called for all actors engaged in activities related to the protection of civilians to have 'a clear understanding of their responsibilities and of the division of labour' amongst government, civil society, peacekeeping troops, and

49 See statements of Nepal's (n 9above) 18 and Sri Lanka's statements (n 15 above) 31.
50 n 27 above, 17.
51 J Perlez 'China surprises U.N. with $100 million and thousands of troops for peacekeeping' *The New York Times* 28 September 2015 available https://www.nytimes.com/interactive/projects/cp/reporters-notebook/xi-jinping-visit/china-surprisesu-n-with-100-million-and-thousands-of-troops-for-peacekeeping (accessed 27 February 2017).
52 n 15 above, 32.

humanitarian organisations. Specifically, it argued that it is important that 'a clear distinction is maintained between the activities of humanitarian non-governmental organisation (NGOs) and efforts of peacekeepers to facilitate humanitarian activities' so that the neutrality and independence of these efforts are not undermined.[53] Japan also believes that a successful implementation of protection of civilians-mandates would have to be 'realistic and feasible'; should take into full consideration 'the local security and other situations' including available resources and field support; and needs to have not only a military but also a civilian component 'in order to deal with issues such as human rights violations and civil-military coordination.'[54] While it considers sanctions as part of a comprehensive approach to protection of civilians in armed conflicts, Japan also acknowledged that the political climate, including sanctions, 'often complicates negotiations on humanitarian access.'[55]

Accordingly, humanitarian assistance 'should not be politicised' and that host countries 'should cooperate in light of their responsibility to protect civilians.'[56] As well, it underscored the importance of studying and analysing the factors that hamper the smooth functioning of mechanisms and tools for protection of civilians in order to improve their effectiveness.[57] South Korea also echoed the need for 'clear, credible, and achievable mandates'[58] for protection of civilians, which should be conditioned on operational definition of those mandates. It underscored the importance of peace building as an important component of peacekeeping process in order to stabilise countries that are emerging from conflicts, which should include 'setting up of transitional justice mechanisms and the rule of law.'[59] Sri Lanka also stressed the need for post-conflict rebuilding as part of protection of civilians-mandate and cited its own development programs in conflict areas that focused on infrastructure and livelihood projects, together with protection of women in war-affected areas of the country.[60]

South Asian states are major troop- and police-contributing countries in UN peacekeeping missions and have articulated mainly the need for better equipment and resources to support protection of civilians-mandates. India, for example, pointed to the problem of resources as a 'primary gap between Security Council mandates and implementation.'[61] Specifically, it called for 'increased number of peacekeeping troops, proper equipment, and required assets' to support peace missions. It also stressed

53 S/PV.5476 (n 6 above) 11.
54 See n 30 above, 17-18.
55 See S/PV.6790, (resumption) n 23 above, 4
56 As above.
57 S/PV.7109, n 27 above, 78.
58 S/PV.6216 (resumption), n 31 above, 45.
59 As above.
60 n 16 above, 18.
61 n 31 above, 38.

that: (1) protection of civilian mandates 'requires a more integrated view' where multiple stakeholders are involved and not just the military; (2) the development of PoC normative frameworks 'should be accompanied by mechanisms to enforce those norms'; (3) there is a need for the Security Council to clarify the meaning of protecting civilians, 'what constitutes a threat, and what kind of response is expected and who is to respond to those threats'; and (4) the importance of consulting with troop contributing countries before the Security Council changes a protection of civilians-mandate.[62]

Pakistan and Bangladesh also echoed India's point about resource gaps in supporting UN peace missions. In particular, Pakistan underscored the importance of providing peacekeeping missions with 'adequate resources and operational tools' that will help them implement their protection of civilians-mandates, especially in 'reporting and intelligence capabilities and protection of women and children.'[63] It called for 'incorporating lessons learned into the planning and assessment stages' of protection of civilians-mandates and their implementation and for consultations with troop-contributing countries in the process of changing the mandates of peace missions.[64] For its part, Bangladesh also underscored the need for dialogue between the Security Council and troop contributing countries to address issues related to resource gaps. It also called for strengthened protection mandates for peacekeepers, as well as 'adequate provisions for security and safety' of peacekeeping troops.[65]

Southeast Asian states have also articulated the importance of clear and achievable protection of civilians-mandates and better coordination amongst stakeholders in implanting those mandates. However, they also highlighted the need for adequate training and preparedness of peacekeeping missions, particularly in having a better understanding the dynamics of local contexts where they are deployed. Indonesia, while also acknowledging the need to ensure 'full clarity on the concept and operationalisation of protection of civilians' as well as the 'provision of requisite equipment and resources', underscored that it is also 'crucial to understand the local dynamics of how civilians try to protect themselves.[66] It also stressed the need for: pre-assessment of protection of civilians; regular evaluation and reporting of protection of civilians-mandates; and developing relevant planning processes, guidance materials, and training modules prior to and during deployment, which should be based on information derived from contemporary missions.[67] For its part, Malaysia pointed out that successful protection of civilians by UN peace missions is

62 S/PV.7109, n 27 above, 34-35.
63 n 26 above 18.
64 n 27 above, 47 12.
65 n 23 above, 24.
66 n 27 above, 57-58.
67 n 27 above, 58.

anchored on 'a more comprehensive and holistic approach that incorporates the provision of resources, support and training' and supported by 'strong coordinating mechanisms and effective flow of information.'[68] Specifically, peacekeeping missions should be well trained, with knowledge of international law and understanding of local cultures.[69]

Meanwhile, Thailand underscored the importance of relevant training and orientation for peacekeeping troops, particularly 'in the areas of international law, gender-based issues, and cultural sensitivity.'[70] It believes that training modules for troops should be 'appropriate to different situations' and developed based on consultations between the UN and troop-contributing countries. It also decried the peacekeeping missions with protection of civilians-mandates that 'are often conducted without sufficient resources or lacking in capacity or both' and called for incorporating assessment of threats to civilians 'into any mission strategy, structure and resources before mandating missions.'[71] For Vietnam, the protection of civilians in armed conflict should be 'approached from a holistic perspective' and 'can only be viable if the practical needs of civilians'[72] such as subsistence, education and health care are adequately addressed. It also stressed 'the need for accurate, timely and reliable information from the field' in order to ensure that protection of civilians-mandates are effectively and efficiently implemented.[73]

The Philippines also advocates the need for taking a holistic and comprehensive perspective in the protection of civilians in armed conflict and underscores the importance of: (1) developing a culture of protection and domestic ownership of PoC;[74] (2) building mechanisms for early warning system and preventive deployments; and (3) strengthening diplomatic initiatives as part of peace missions.[75] As well, the issue of safety and security of peacekeeping troops has preoccupied the Philippines in recent years after Filipino troops were held hostage in the Golan Heights in 2013, and in late August 2014, when they engaged in a fire fight to protect themselves from Al-Nustra Front rebels after Fijian peacekeepers were held hostage. The Filipino contingent was later withdrawn from the Golan Heights peacekeeping mission ahead of its tour of duty.[76]

68 n 16 above, 21.
69 n 26 above, 34.
70 n 27 above, 51.
71 As above.
72 n 31 above, 21-22
73 n 31 above, 21-22
74 See S/PV.6427, provisional verbatim record of the 6427th meeting of the Security Council, 22 November 2010 (resumption 1), p 25.
75 See n 2 above, 15-16.
76 JM Aurelio 'PH pulls peacekeepers out of Golan Heights ahead of time' *Philippine Daily Inquirer* 20 September 2014 available at http://globalnation.inquirer.net/111403/philippine-peacekeepers-pull-out-early-from-golan/ (accessed 17 October 2014).

Conclusion

From the foregoing discussion, there is no question that Asian states recognise the importance of preventing mass atrocities covered by the principle of responsibility to protect and the need for parties in armed conflicts to abide by protection of civilians within the framework of IHL and IHRL. However, most states in the region remain wary of conflating the concepts of R2P and PoC especially if these would contravene the respect for sovereignty and territorial integrity of states. Specifically, with regard to the responsibility to protect, much of the reservations stem from the use of force under Pillar 3 and the potential for abuse of mandates under Chapter VII of the UN Charter particularly if it is used as a pretext for regime change as is widely perceived to be the case in Libya in 2011. In this regard, Asian states led by China and India, which are members of the BRICS bloc, continue to espouse the use of non-military and peaceful means in resolving internal armed conflicts, and the importance of accountability and transparency in carrying out coercive intervention under the responsibility to protect.

The concern for protecting national sovereignty is also reflected in their views about prosecuting those who have committed mass atrocities and violated IHL and IHRL, as well as how humanitarian assistance by NGOs should be provided. With the exception of Japan, South Korea, Cambodia, and the Philippines, many Asian states have remained non-party to the Rome Treaty and continue to prefer domestic courts to handle cases of impunity and mass atrocity crimes committed by state and non-state elements. As well, most states in the region have articulated their preference for humanitarian NGOs to respect the principle of independence, neutrality, and non-partisanship as they carry out their missions. The consent of states is also considered important if the UN and other humanitarian missions explore peace negotiations in armed conflict. For UN peace missions to be successful, most troop- and police-contributing states in the region have underscored the need to address the current gaps between mandates and implementation, in particular with regard to providing more funds for equipment, resources, as well as ensuring the safety of peacekeepers in the field.

Unlike the African Union that has article 4(h) in its Constitutive Act to address mass atrocities covered by the responsibility to protect and protection of civilians, the Asian region does not have a counterpart normative framework that allows for a regional response in dealing with systematic violations of human rights in member states. The Association of Southeast Asian Nations (ASEAN) remains an inter-governmental regional organisation with limited mandate in responding to internal armed conflicts and violations of human rights in member states. At best, it is still in the process of norm building, which focuses on the promotion of human rights protection and respect for IHL and IHRL. The ASEAN

Inter-Governmental Commission on Human Rights (AICHR) does not have a mandate for sanctioning and monitoring member states that fail to abide by regional and international norms, even as only five out of ten members have national human rights institutions. In South Asia, the South Asian Association for Regional Cooperation (SAARC) has not made significant progress in addressing human rights and mass atrocities in the region even as it remains focused on economic and social cooperation. At best, it has discussed these issues informally and on the margins of the summit meetings of SAARC.

PART IV: THE FUTURE OF PROTECTING CIVILIANS AND PREVENTING MASS ATROCITIES IN AFRICA

CHAPTER 23 OVERCOMING CHALLENGES IN PROTECTING CIVILIANS

Gilbert Mittawa

Abstract: *The armed conflict in the Democratic Republic of the Congo (DRC) is a textbook example of how civilians have been the main casualties in contemporary warfare. Although the United Nations (UN) endeavours to end conflicts and foster reconciliation by way of peacekeeping, UN peacekeepers have been challenged and found wanting in some of these operations. This discussion sets out to identify the challenges faced by peacekeepers in protecting civilians in order to effectively accomplish their mission. The Chapter reveals the challenges peacekeepers face, including a lack of political will, as well as inadequate funding, training and equipment. The Chapter suggests that in order to effectively 'save strangers', any protection mission must adopt a political framework that addresses fears of domination and creates incentives for local populations to withdraw their support for armed or terrorist groups. It is necessary to mobilise adequate financial resources, and to generate a robust peacekeeping force that includes well-trained and adequately equipped troops. There is also a need to cultivate a culture of respecting human rights and humanitarian norms by warring factions during armed conflict, through both punitive and preventive measures.*

'There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence, with the ability and determination to defeat them.'[1]

Introduction

The reality of millions of civilians caught up in armed conflicts is a grim one, and civilians are now the main casualties of war worldwide. Indeed, resident or displaced civilians are often specifically targeted for violent

1 UN General Assembly and Security Council *Report of the Panel on United Nations Peace Operations* A/55/305-S/2000/809 and 21 August 2000. In this paper, 'The Brahimi Report' available at http://www.stimson.org (accessed 5 August 2014) (UN Under-Secretary-General Lahdar Brahimi chaired the panel, hence the name 'Brahimi Report').

attack, rather than being incidentally harmed, and this has led to an unacceptably high toll on human life and livelihoods.[2] In contemporary armed conflicts, innocent civilians often constitute an overwhelming majority of victims and have at times been deliberately targeted. The most vulnerable populations at risk include women and children, who are often killed, raped and sexually abused, kidnapped and enslaved, and children, who are taken and forced to become soldiers. Survivors are often displaced or die due to the indirect effects of armed conflict: disease, malnutrition, and famine.[3]

In the Democratic Republic of the Congo (DRC), for example, the humanitarian consequences of war in the East, driven by the scramble for the illegal exploitation of natural and mineral resources, have been horrific. In the five eastern provinces of the DRC, the number of excess deaths directly attributable to the Rwandan and Ugandan occupation between 1998 and September 2002 had been between 3 million and 3.5 million people.[4] The war in DRC is admittedly towards the worst end of the scale and continues to challenge the international community. Civilian populations continue living in danger and misery.

Since 1948, the United Nations (UN) has helped end conflicts and foster reconciliation through peacekeeping operations in dozens of countries the world over.[5] By 2014, the UN has carried out a total of 69 peacekeeping operations with 16 still ongoing, globally.[6] By providing basic security guarantees and responding to crises, a real difference has also been noticed in other places with recently completed or on-going operations such as Sierra Leone, Burundi, Côte d'Ivoire, Timor-Leste (East Timor), Liberia, Haiti and Kosovo.[7] While success has been registered in these countries, in others, UN peacekeepers have been challenged and found wanting, for instance, in Somalia, Rwanda and the former Yugoslavia in the early 1990s. It is on this premise that this Chapter sets out to identify the challenges faced by peacekeepers in implementing the protection of civilians-mandate, in order to effectively accomplish such noble missions.

2 Office of Coordination of Humanitarian Assistance (OCHA) Special Report: Civilian Protection in Armed Conflict, April 2003 available at http://www.global protection cluster.org/_assets/files/tools_and_guidance/protection_of_civilians/OCHA_Special Report_PoC_Armed_Conflickt_2003_EN.pdf (accessed 24 March 2017).

3 Citizens for Global Solutions 'Protecting civilians in armed conflict' available at http://globalsolutions.org/files/public/documents/CP-Factsheet-Protecting-Civilians-in-Armed-Conflict.pdf (accessed 12 July 2014).

4 See OCHA (n 2 above).

5 For example, Cambodia, El Salvador, Guatemala, Mozambique, Namibia and Tajikistan.

6 See UN Peacekeeping Fact Sheet available at http://www.un.org/en/peacekeeping/resources/statistics/factsheet (accessed 3 December 2014).

7 See 'Success in peace keeping' available at http://www.un.org/en/peacekeeping/operations (accessed 6 August 2014).

Saving strangers: The concept of protection of civilians

Protecting civilians has emerged as a central purpose of many contemporary peace operations. Civilian humanitarian agencies and military peacekeepers increasingly recognise the moral duty and operational importance of protecting threatened civilians – saving strangers, as Wheeler calls it.[8] As peacekeeping missions have grown in number, frequency, size and mandate, the UN has increasingly made concerted efforts to put civilian protection at the heart of these operations. How well and effective peacekeeping missions protect civilians is a significant question that requires adequate evaluation. It has been argued that protecting civilians is a complex process involving many different actors (international, regional, and local stakeholders) over time (from planning into execution).[9] The challenges to this process are vast; ranging from legal, political and operational needs on the ground. The problems also extend to challenging security environment, lack of infrastructure, lack of operational clarity and inadequate personnel as well as materials.

On the ground, several missions – primarily United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) in the DRC and the United Nations-African Union Mission in Darfur (UNAMID) in Sudan – have spearheaded practical innovations to enhance civilian protection, despite limited resources and difficult environments. These operations have increasingly used and developed mobile operational bases, quick response units, and early-warning systems to anticipate, prevent, deter or rapidly intervene to stop violence against civilians. Joint protection teams and protection clusters have enhanced the effectiveness of these efforts by providing a more comprehensive approach to civilian protection to include humanitarian relief as well as social and economic support to threatened civilian populations. It also targets the perpetrators of violence through deterrence, supports disarmament and reintegration of former combatants and fosters reconciliation on the ground to ensure sustainable security for civilian populations.

Why civilian protection matters

Consensus is building around the importance of protecting civilians. Protection of civilians, just as that of wounded and captured combatants, has been recognised as imperative by all states, when they ratified the four Geneva Conventions of 1949.[10] As the high cost of wars (armed conflict)

8 NJ Wheeler *Saving strangers: Humanitarian intervention in international society* (2002).
9 Citizens for Global Solutions (n 3 above) 1.
10 Geneva Conventions Relative to the Treatment of Prisoners of War 12 August 1949, 6 UST 3316, 75 UNTS 135 available at http://www.icrc.org (accessed 12 August 2014).

in terms of human losses, material damages and lasting harm to societies is visible to everyone, states have found compelling reasons to limit the unnecessary evils of war, and to protect those who do not or no longer take part in hostilities.[11]

Overall, civilian protection is essential because it is critical to the perceived success of peacekeeping operations and the UN's ability to work credibly in the field of peace and security. The security of the population is a prerequisite for an enduring political arrangement among warring groups. Thus, civilian protection is important to the broader political goals of creating and upholding peace agreements. Preventing attacks on civilians also preempts spoilers from creating instability and weakening fragile peace processes in post-war environments. Moreover, humanitarian assistance cannot be provided by relief agencies, international and regional organisations, and non-governmental organisations (NGOs) when civilians and third party providers are at risk of being attacked. It follows, therefore, that the security of civilians is a key aspect of providing development assistance in post-conflict situations.

The UN Security Council has set important precedents for civilian protection through its statements and resolutions, especially in the mandates of UN peacekeeping operations. The first of these landmark resolutions was passed in 1999, when the Security Council unanimously voted in favor of Resolution 1265, which addressed the Council's inclination to take 'appropriate measures' in response to situations where civilians are being targeted or humanitarian assistance is deliberately circumvented.[12] The Resolution also called on states to hold leaders accountable for acts of genocide, crimes against humanity and other serious violations of international humanitarian law (IHL). The most important precedent resulting from the resolution was a willingness to consider expanding the peacekeeping mandate to better protect civilian populations. Shortly afterwards, it became unofficial UN policy that when peacekeepers saw violence perpetrated against civilians, they should be 'presumed to be authorised to stop it, within their means'.[13]

In 2006, the Security Council passed Resolution 1674, committing it to take action to protect civilians in armed conflicts. The UN has also set civilian protection precedents in the mandates of specific missions, including, among others the United Nations Organisation Mission in the Congo (MONUC), which later changed to MONUSCO, United Nations Mission in the Republic of South Sudan (UNMIS), and United Nations Assistance Mission in Afghanistan (UNAMA). Over time, the emphasis

11 Enhancing protection of civilians in armed conflict and other situations of violence, ICRC Reference Material, September 2008), available at http://www.icrc.org (accessed 18 August 2014).
12 UN S/RES/1265 (1999).
13 See RA Pape 'When duty calls: A pragmatic standard of humanitarian intervention' (2012) 37 *International Security* 41.

on civilian protection has increased and become a frequent staple for UN peace operations. Other UN organs and agencies, in particular the UN General Assembly Special Committee on Peacekeeping (known as the C34), the Department of Peacekeeping Operations (DPKO), and the Office for the Coordination of Humanitarian Affairs (OCHA), have included the topic of civilian protection in their agendas and enhanced their efforts to protect endangered civilian populations.[14]

Challenges in protection of civilians

Numerous challenges impede the capacity of peacekeepers to effectively protect civilians on the ground. As then UN Secretary-General Ban Ki-Moon acknowledged, the relevant actors continue to struggle over what it means for peacekeeping operations to protect civilians, in both definition and practice. The perennial problems of many operations is best summarised by the Brahimi Report from 2000: peacekeepers may not be able to justifiably use of force against attackers in order to protect civilians when they feel 'morally compelled' to do so. Despite developments in peacekeeping mission mandates, it is not always clear how these mandates translate into operations on a case-by-case basis, creating situations wherein troops and police are not clear on what is expected of them.

Lack of adequate funding

While the UN Security Council takes decisions about establishing, maintaining or expanding a peacekeeping operation, the financing of UN peacekeeping operations is the collective responsibility of all UN member states. In accordance with the provisions of article 17 of the UN Charter, every UN member state is legally obligated to pay its share towards peacekeeping. The United Nations General Assembly apportions peacekeeping expenses based on a special scale of assessments under a complex formula that member states themselves have established. This formula takes into account, among other things, the relative economic wealth of member states, with the five Permanent Members of the Security Council (P5) required to pay a larger share because of their special responsibility for the maintenance of international peace and security.

These, together with other general guiding principles were reaffirmed by the General Assembly under Resolution A/RES/55/235 adopted on 23 December 2000. In the mid-1990s, the UN found itself financially strapped and borrowed money from peacekeeping accounts to cover shortages in the UN regular budget, which in turn delayed reimbursements to Troop Contributing Countries (TCCs) as well as Police Contributing Countries (PCC). Many member states paid their dues for UN

14 As above.

peacekeeping late or not in full.[15] This challenge is better epitomised by the events in South Kivu in the DRC, where MONUSCO terminated a marine contract with a ship being used for patrolling on Lake Tanganyika. The result of this is that between June and August 2014, Armed Groups (AGs) operated with much freedom. The armed group Mai Mai Yakatumba, for example, attacked commercial ships sailing from Uvira-Kalemie and further attacked villagers along the shore. Thus, the task of protecting civilians along the lake shore became a difficult one due to inadequate resources.

Lack of political will

Most countries lack political will for participation in protection missions and to fulfill pledges to provide contingents of peacekeepers. For instance, in Somalia, the lack of a successful peace process and the hostility of factions to African Union Mission in Somalia (AMISOM) and its mission signaled the probability of casualties; the lack of guaranteed full funding meant a state willing to assist the AU would end up footing the bill when government funds are already short. International organisations, including the UN, AU, and the Inter-Governmental Agreement on Development (IGAD), do not demand compulsory military participation of members in peacekeeping or peace enforcement operations. While proportional funding of a mandated operation is often theoretically mandatory within international organisations, deploying soldiers is voluntary. It takes political will, whether from a realist or idealist political perspective, for a state to send its military personnel into a potentially hostile situation based on international organisations' requests.

To reiterate, for AMISOM, several African states pledged, in public, peacekeepers for AMISOM yet only Uganda and Burundi deployed their soldiers in support of the AU. Upon mandating AMISOM, the AU requested peacekeepers from its members and received pledges from Ghana, Malawi, and Nigeria in addition to Uganda and Burundi.[16] Almost immediately, the pledging states began to back out of their commitments when asked for specific details of deployment dates. As one Kenyan reporter noted, '[m]any African nations [are] said to be nervous about committing troops to one of the world's most dangerous countries … where warlords and their gunmen have ruled unchecked for 16 years.'[17]

Experience has shown that many countries are not ready and willing to contribute troops towards protection missions. This eventually affects the intended strength levels and consequently affects the effectiveness of

15 The Brahimi Report and Future of UN Peacekeeping Operations, available at http://www.stimson.org (accessed 6 August 2014) 12.
16 *The East African Herald* 2007.
17 As above.

any mission. It is imperative, therefore, for heads of state and government to appreciate that saving strangers requires greater political will in support of the mission mandates. It must be recognised that in protecting civilians, action and not words is what matters. In the absence of political will, international organisations such as the UN and the AU ought to devise mechanisms to ensure that member states contribute troops including police personnel and the required resources in support of protection or peacekeeping missions. All parties to a conflict, therefore, ought to demonstrate a genuine commitment to a political process towards peace. The host country ought to be fully committed towards provision of unhindered support to operations and freedom of movement. This must be coupled, among others, by supportive engagement with neighbouring countries and regional actors.

Lack of local ownership

There is no doubt that effective humanitarian action is paramount in saving protections at risk but could never take the place of political action that must prevent conflicts and ultimately stop them. Experience has shown that political players are in most cases responsible for massive suffering in conflict areas, either directly or indirectly. In the DRC for example, a report of the UN Group of Experts on the Democratic Republic of the Congo highlighted astonishing roles played by both local political and security forces in fuelling the conflict.[18] In particular, the Group focused on episodes of diversions of military equipment, as well as interference with the disarmament, demobilisation, reintegration and resettlement (DDRR) processes and of operational collaboration between government forces and rebels. For example, there is information that in Katanga province in Eastern DRC, some government politicians based in Kinshasa provide support to the armed group Kata-Katanga (cut Katanga) in order to advance their agenda of wanting the secession of the province.[19] The armed group Kata-Katanga has been responsible for various human rights violations within the province. Further, it is reported that the majority of the local armed groups get support from local chiefs and inhabitants in terms of supplies and information, among others.

It is, therefore, clear that as long as locals play an active role in promoting atrocities, intervention missions will be a futile process, no matter how well trained and equipped troops are. To address this, inculcating a culture of local ownership within the host nation is required. Peacekeeping agents must actively engage locals, understand their ethnic

18 United Nations 'Final Report of the United Nations Group of Experts on the Democratic Republic of the Congo' UN Doc, S/2008/773, (12 December 2008) available at: https://www.scribd.com/doc/8921493 (accessed 20 December 2014).

19 Information obtained through field research by the author in South Kivu and Katanga provinces of DRC (July 2014).

inclinations and interests in order to ably advocate for the benefits of owning the peace process.

Lack of clear, credible and achievable mandates

Often times, the task of protection of civilians becomes cumbersome due to problems with the mission mandate. These range from lack of clear, credible and concise mandate as it was the case with AMISOM or a case of same mission, different mandates as seen under MONUSCO. Without doubt, the AMISOM mandate was more carefully developed and written than that of the IGAD Mission in Somalia (IGASOM). The broad guidelines of IGASOM gave way to the more precise instructions of AMISOM. However, it is difficult to imagine how AMISOM with 7,650 soldiers could be capable of carrying out the mandate in a country the size of Somalia. Certainly, AMISOM, as deployed, was not capable of this task.

Although the mandate looked to be a well-crafted piece, it must be indicated that it was a peacekeeping mandate (as opposed to peace building or enforcement). However, there was no peace to keep in Somalia at that time. It was difficult for a traditional peacekeeping mandate to work in a situation like Somalia. The only possible option that would have brought the intended results was an enforcement mandate. This weak mandate prevented AMISOM from confronting the armed groups with greater force hence unable to flush them out and bring the long awaited peace. In light of the evolving trend of division of labour between the AU and the UN, the AU should be the first to respond to a crisis situation by deploying its stabilisation force. This means that African peace missions need to be given a robust mandate and adequate resources commensurate with the situation on the ground.

In DRC, the initial mandate for the peacekeeping force was under Chapter VI of the UN Charter. As stated above, MONUSCO took over from an earlier UN peacekeeping operation, MONUC on 1 July 2010. MONUSCO's original mandate was established by UNSC Resolution 1925 adopted in 2010. It authorised the use of all necessary means to carry out its mandate relating, among other things, to the protection of civilians, humanitarian personnel and human rights defenders under imminent threat of physical violence and to support the government of the DRC in its stabilisation and peace consolidation efforts. This proves problematic as the force(s) are unable to confront rebels responsible for various atrocities in the country. As was with AMISOM, in most parts of the DRC (particularly Eastern DRC), there is no peace to keep, rendering Chapter VI mandate a potentially 'toothless tiger.'

On 28 March 2013, faced with recurrent waves of conflict in Eastern DRC threatening the overall stability and development of the country and

the Great Lakes Region in general, the Security Council decided, by its Resolution 2098, to create a specialised Force Intervention Brigade (FIB) for an initial period of one year and within the authorised MONUSCO troop ceiling of 19 815. With three infantry battalions, one artillery and one special forces and reconnaissance company, FIB was to operate under direct command of the MONUSCO Force Commander, with the responsibility of neutralising armed groups and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in Eastern DRC and to make space for stabilisation activities. The results were visible and effective as the FIB, in support of FARDC managed to flush out M23 rebels out of Eastern DRC. The mandate of the FIB was renewed through UNSC Resolution 2147 adopted on 28 March 2014.[20]

Notwithstanding the change in dynamics, the situation in Eastern DRC remains problematic as the entire Framework Brigades (the traditional peacekeeping brigades that do not include the FIB) operate under Chapter VII mandate but without the wider latitude to confront armed groups as is the case with FIB. This entails that the Framework Brigades cannot engage armed groups unless fired upon, thus making protection of civilians a challenging task. Further, the FIB cannot deploy in all the regions of DRC, which means that armed groups have the liberty to abuse the innocent population while MONUSCO stands aside and look. A typical challenge associated with this 'one mission, different mandates approach' was noticed at Mutarule in South Kivu in the DRC where about 33 members of an ethnic group were massacred in an area 9 kilometres from a MONUSCO base.[21] Human Rights Watch found that a senior Congolese army officer stationed nearby, who had been repeatedly warned and informed of the attack by armed assailants, did not act to stop the killings. MONUSCO troops within the vicinity were also aware of the attack but did not intervene, and only visited Mutarule two days after the massacre. The Pakistani commander of the MONUSCO peacekeepers' base in Sange at that time, told Human Rights Watch that 'the peacekeepers had been alerted to the killings on the evening of June 6 [2014], after the attack was under way. He said that when he called his superiors, they told him to clarify the situation and gather more information.'[22] He further informed Human Rights Watch that he had contacted his battalion commander, who said he would 'sort it out.'[23]

20 For the adjusted mandate of the Mission, please see resolution 2147, operative paragraphs 1-7, available at http://www.un.org/en/peacekeeping/missions/monusco/mandate (accessed 20 August 2014).

21 For a detailed account of the events and the history to the existing tensions within the Plain, see generally K Berwouts 'The Mutarule massacre: Conflict from below in eastern Congo' available at http://africanarguments.org/2014/06/18/the-mutarule-massacre-conflict (accessed 18 June 2014).

22 See generally, Human Rights Watch 'DR Congo: Army, UN failed to stop massacre' 3 July 2014, available at http://www.hrw.org/news (accessed 6 July 2014).

23 As above.

It is such inactivity that raises the serious question as to what really is the role of peace keepers in DRC and further undermines the capability of the mission in saving populations at risk. Should technicalities as to mandate prevent troops to act even if there is a real threat to life? Or do they ought to act in such situations, regardless of the prevailing mandate? To remedy this challenge in such hostile environments, there is need for a clear and robust mandate. Peacekeeping mandates cannot work in cases that require peace enforcement as in grave circumstances to stop mass atrocities outlined, for example, in article 4(h) of the AU Constitutive Act. As such, the UN, AU and other bodies ought to ensure that protection missions are supported by a proper mandate, which should be a clear and concise statement that the intervening forces shall use all the necessary means to prevent or halt mass atrocities and apprehend the perpetrators. This calls for greater coordination among all players to clearly determine the mandate of any mission. Further, policy directions ought to be implemented such that when peacekeepers see violence perpetrated against civilians, they should be presumed to be authorised to stop it, within their means. After years of peacekeeping missions, states can no longer afford to grant a peacekeeping mandate in situations that demand peace enforcement as this can render the whole mission a futile process.

Overcoming the problems to protect populations at risk

Protection of civilians is often faced with innumerable challenges ranging from limited or insufficient resources, lack of political will to non-cooperation among various actors. Peacekeeping operations often deploy amidst the unrealistic expectation, that they will be able to protect all civilians at all times. The dynamic nature of the places in which peacekeepers operate means that the security situation can change very quickly. It is imperative to understand that protection of strangers is not solely the responsibility of UN peacekeeping operations. It is a systemic effort that includes: the Security Council, which provides the mandate for the protection of civilians; the UN Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS) who plan, deploy and manage peacekeeping operations; troop contributing countries (TCCs) that provide the personnel for the operations; peacekeepers on the ground who implement the mandate; and most importantly, the host government which has the primary responsibility for protecting its citizens. Improving protection of civilians, therefore, must be addressed holistically, with a view to improving the performance of all actors who share a stake in saving strangers from physical violence. In addition to what is outlined by Dan Kuwali in Chapter 24, below, are some of the initiatives that may be employed in achieving the aforementioned.

Proper training and practice

It is generally accepted that military personnel are usually trained and organised primarily to conduct combat operations where they are required to close with, and destroy, an enemy. In peacekeeping operations, however, the situation is different. Their mission is essentially to keep, enforce and promote peace and to safeguard the geostrategic changes. Peace and relief operations, therefore, represent a tremendous paradigm shift in military thinking and culture. This means that very specific rules and forms of training are required for the military to be in keeping with re-orientation of the paradigmatic change in mission and strategy. Yet, in spite of robust mandates for peacekeeping missions, civilians continue to be targeted.[24]

The preceding elucidation, therefore, calls for a change in military tactics and training to suit the paradigm shift. Apart from traditional (conventional) military techniques, armed forces ought to understand the concept of protection of civilians and should be trained in the implementation of protection of civilian's mandates. Regular military training, including pre-deployment ought to include up-to-date concepts of civilian protection as part of the curriculum. This approach will enable armed forces to adopt the culture of civilian protection which shall eventually be manifested in various peace support operations (PSOs). Initiatives ought to be undertaken in developing protection of civilians training courses targeted at personnel about to deploy, as well as those already working in peacekeeping operations. These training courses should be tailor made for all military, police and civilian personnel.

More importantly, troops should clearly understand the environment and terrain they are to operate in. For instance, much of the DRC is mountainous with thick forests, and poor road communication. It has been noted that most contingents that deploy under MONUSCO find it difficult to negotiate the terrain. It is, therefore, imperative that proper training ought to be conducted before deployment. This must be coordinated among all TCCs deploying in a particular mission to ensure that issues of operational doctrine are harmonised prior to deployment in order to avoid a fragmented approach.

The issue of proper and adequate training extends to understanding the social, political and economic factors prevailing in the host nation. In Africa, issues of ethnicity play a vital role in the dynamics of a conflict. Troops ought to understand that the decisions they make at tactical level have immediate strategic and political implications. Failure to understand

24 See AMS Bah 'The dynamics of civilian protection in the post-Cold War era' in F Aboagye & AMS Bah (eds) *A tortuous road to peace The dynamics of regional, UN and international humanitarian interventions in Liberia* Pretoria: Institute for Security Studies (2005) 21-49 21.

fully the mission and the operational environment can quickly lead to incidents and misunderstanding that will reduce legitimacy and consent and result in actions that are inconsistent with the overall political objective.[25]

Thus, there is greater need to acquire additional capacities that include the ability to operate within the framework of coalitions and in an atmosphere fraught with national sensitivities. Troops on the ground must develop the ability to employ their equipment with an optimum effect for a great variety of tasks. This development requires the revision of military doctrine and strategies, and corresponding restructuring of the national armed forces, to enhance their defensive capabilities, particularly the human protection role, and simultaneously limits their offensive strength. Training must be a priority prior to deployment of troops in peace support operations, no matter how short the timeline is.

Integrating international human rights and humanitarian law in military doctrine

To ratify a treaty is one thing yet to implement it is another thing altogether. To be effective, international treaties must be integrated in domestic legislation. Clear responsibilities were recognised, for instance, in article 1 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land, where states undertook to 'issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land.' Similarly, Common article 1 to the four Geneva Conventions of 1949 requires states to 'respect and to ensure respect for the [Conventions] in all circumstances.' Other provisions of the Conventions provide for a duty to 'disseminate the text as widely as possible' and to include the study thereof in their military instructions.

Article 83(2) of Additional Protocol II (AP II) even requires that 'any military authorities shall be fully acquainted with the text thereof' and article 87(2) goes further to say that 'commensurate with their level of responsibility, commanders should ensure that members of the armed forces under their command are aware of their obligations.' Thus, it may be rightly argued that the obligation to disseminate IHL and provide instructions to members of the armed forces is widely recognised that it has become customary international law.

While it is true that inadequate knowledge or understanding of the law is a contributing factor, experience has shown that the people who know or even adhere to the basic principles of the law commit violations. Violations do occur due to various factors such as insufficient skills,

25 See US Army FM 100-23, Chapter 1, Fundamentals of Peace 1.

wrongful behaviour or attitude, lack of adequate equipment, lack of will or lack of effective sanctions for violations.[26] The heart of the problem is not that the belligerents do not know the law, but rather, the problem lies in translating knowledge into appropriate behaviour. This points to the importance of disseminating the contents of the Geneva Conventions as widely as possible in order to create an environment conducive to lawful behaviour. The key strategy here is integrating the law in military doctrine. What is needed is that relevant laws must be translated into concrete measures, means and mechanisms at doctrine, education, training and equipment backed by an effective system of sanctions.

Effective dissemination and implementation of IHL in the field will enable armed forces understand their responsibility to the people they save. This shall synthesise a culture of adherence to the tenets of the law in discharging the protection mandate. Peacekeepers should abide by the provisions of international humanitarian and human rights law and other applicable laws including those of the host state. This culture will reduce crimes committed by peacekeepers thereby attaining local acceptance and legitimacy for the whole mission.[27] Protection forces shall be guided, at all material times, by the principles of consent, impartiality and the non-use of force except in self-defence and defence of the mandate. Through that, they shall be perceived as legitimate and credible, particularly in the eyes of the local population. These efforts ought to be complemented by the utmost sensitivity towards the local population and upholding the highest standards of professionalism and good conduct with great caution to avoid becoming part of the problem.

Enhancing cooperation among all agencies

It may not be disputed that UN peacekeeping is a unique global partnership. It brings together the General Assembly, the Security Council, the Secretariat, troop and police contributing countries and the host governments in a combined effort to maintain international peace and security. Due to this unique architecture, there ought to be concerted efforts by all arms and agencies, including civilian and NGOs in the implementation of the protection mandate. This would include, among others, sharing information (intelligence), constant liaison and joint operational planning, among others.[28] The UN Security Council ought to

26 P Saland 'International criminal principles' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute: Issues, negotiations, results* (1999) 189 206.

27 For example, in DRC, some peace keepers have been accused of sexually abusing local women and of involvement in illegal trade. This practice angers the local population and affects the legitimacy and consent of the host nation (population).

28 The United Nations under MONUSCO has a Joint Mission Analysis Cell (JMAC) constituting both military and civilian analysts. However, this initiative does not extend to NGOs operating within the DRC conflict region(s).

demonstrate a unity of purpose within its powers with active support to operations in the field.

Promoting security sector reform

It has been noted that security is a precondition for sustainable peace, development and human rights. The withdrawal of international peace operations and the success of what is often a substantial international investment are contingent upon the extent to which national institutions in post-conflict countries can establish sustainable peace and development on the basis of human rights. The consequences of failures in building these institutional capacities have been demonstrated in repeated peace operations in Haiti, Liberia and Timor-Leste (East Timor). This is one of the reasons why UN peace support operations have increasingly emphasised the need to establish effective and accountable security sector.[29]

In order to achieve sustainable peace and development, it is essential for a country to undergo a vibrant security sector reform (SSR) once a conflict is over. That way, the people feel safe and secure, and develop confidence in their state. The importance of security sector reform cannot be overemphasised. It ensures that security goes beyond traditional military elements and that a wider range of national and international institutions and actors are involved. It also underscores that effectiveness, accountability and democratic governance are mutually reinforcing elements of security. Thus, security sector reform offers a framework to assist national actors, the UN and other international partners in implementing a shared vision of security.

To achieve the above, national authorities ought to take a leading role in the process that ought to be undertaken without discrimination and with full respect for human rights and the rule of law. To be effective, these processes have to be linked to other factors of stabilisation and reconstruction such as transitional justice and disarmament, demobilisation, reintegration and resettlement, with particular focus on rehabilitation of ex-combatants, including women and children. It has been noted that the security forces commit the majority of human rights violations. One of the reasons for this trend, as observed in Eastern DRC is faulty DDRR processes. For example, after surrendering, rebels are straight away integrated into national armed forces. Thus, the mentality and allegiance of being a rebel still remains in them while serving in government. To put it short, the demobilisation and disarming turns out to

29 See 'Securing peace and development: the role of the United Nations in supporting security sector reform Report of the UN Secretary-General, Comprehensive review of the whole question of peacekeeping operations in all their aspects, General Assembly Sixty-second session, 23 January 2008, available at http://www.un.org (accessed 30 July 2014).

be a legitimised 'arming' process. To avoid this scenario, there should be proper conduct of the DDRR process in order to achieve a meaningful rehabilitation and integration of ex-combatants.

Transformation of the security sector must be inherently linked to national goals. Thus, effective support by outside actors requires knowledge and sensitivity that the process may generate. Equally, successful reform of the security sector needs political commitment, basic consensus and coordination among national actors. Broad national consultation lies at the heart of national ownership. Ultimately, however, security sector reform can succeed only if it is a nationally led and inclusive process in which national and local authorities, Parliaments and the civil society, including traditional leaders, women's groups and others are actively engaged.

Issues of infrastructure, training and equipment should be addressed as part of the reform process. Demand for increased operational capacity is particularly pressing in fragile and post-conflict environments. Bilateral and regional partners, therefore, ought to devote resources to capacity development and, to that end, look at how resources for substantial security sector reform efforts can be provided. In the long run, a well-executed SSR would help prevent conflicts or crises from resurging and a tool that can be employed in response to emerging threats or potential internal or external pressures.

Arresting and prosecuting perpetrators of international crimes

It is generally agreed that the commission of international crimes, particularly those atrocities outlined in article 5 of the Rome Statute of the ICC, constitutes human rights violations. In any legal order, there is always a need to address infringements whenever they occur. There are several possibilities for responding to human rights violations. Some of them are: finding those responsible for the violation of the law; implementing measures to prevent future violations; and taking issue with the victims. As rightly noted under the Pretoria Principles,[30] states and international organisations (including the AU) have the obligation to prevent mass atrocities, at the minimum, to fill the protection gap and enhance the protection of civilians in armed conflicts by strengthening the mechanism to oversee the compliance with IHL on the continent, detect violations and put pressure on the recalcitrant parties in armed conflicts to comply with IHL in order to prevent war crimes.[31]

30 See Pretoria Principles on ending mass atrocities pursuant to article 4(h) of the Constitutive Act of the African Union Centre for Human Rights, University of Pretoria available at http://www1.chr.up.ac.za/images/files/research/mass_atrocities/Pretoria%20Principles.pdf (accessed 21 August 2014).

31 As above.

When the law has been broken, finding the perpetrator is the corollary. The great German 19th century criminal law scholar Franz von Liszt[32] pointed out that finding a person who is responsible for a violation of the law has several consequences. First, the belief in the reliability of the legal system is enhanced. The social system is strengthened by the experience that the legal system is able to defend itself. Second, the sense of justice is upheld or rectified. The general sense of justice is profoundly disturbed if a core rule is broken. This irritation is equalised if responsibility is attributed and a punishment inflicted. Third, the attribution of moral guilt for failure to conform to a common standard is a human urge. Fourth, naming someone who is responsible for atrocities makes it easier for society and the individual victim to bear the suffering.[33] Last, it goes hand in hand with the finding of the responsible that the true history of events can be unraveled. Knowing the persons involved and getting insights into the structure of the crime will help to document the breach of the law. The victim then stands a chance to get noticed by society for what has happened. Taking these reasons together there does not seem to be a real alternative to finding the person responsible for the crimes.

The prevention of future atrocities on the other hand is paramount for a serious reaction to a human rights violation and prosecution is one of the strategies employed since it has a deterrent effect. In its preamble, the Genocide Convention aims at liberating mankind from genocide as such an odious scourge. The same is true for the codification of the laws of war, whereas the Hague Convention IV of 1907 clearly expresses an understanding that law should help to control military activities and reduce the suffering of both combatants and civilians. From the preceding, it follows that prosecuting the perpetrators of mass atrocities is considered necessary to 'discourage future offences, deter vigilante justice, promote reconciliation and reinforce respect for the law.[34]

Finding the person responsible and making efforts to prevent future harm may not be enough. Initiatives ought to be employed to place the victim at the centre of interest for two main reasons. The first reason is that appropriate compensation for suffering is in general a desire for justice. Even if the *status quo ante* cannot be re-established,[35] neither factually nor emotionally, at least a monetary compensation may serve to repair for the deed. The second reason is that a democratic society cares for the battered

32 Von Liszt stated that state punishment is an abstraction and objectification of revenge as a primitive form of sentence; the original intention, however, remains the same (*Der Zweckgedanke im Strafrecht* (*The idea of purpose in criminal law*) (1882)). See also A Von Hirsch 'Censure and sanctions' (1996) 15 *Law and Philosophy* 407.

33 A Von Hirsch 'Censure and sanctions' (1996) 15 *Law and Philosophy* 407.

34 MO Scharf 'The letter of the law: The scope of the international legal obligations to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 44 42.

35 This was made clear eg in the talks between the then Federal Chancellor of Germany K Adenauer and the then President of the Conference on Jewish Material Claims against Germany, N Goldmann, see P Heuss in *NS-Forced Labour: Remembrance and Responsibility* 293 (Peer Zumbansen ed 2002).

and wounded.[36] Therefore, it is not only direct and individual compensation that is an issue here; redress means that support is given to the victims also in pedagogical and psychological matters. To enhance the protection of civilians, there should be mechanisms within the framework of PSO to ensure that victims of conflict are adequately compensated, either in monetary terms or physiologically.

Conclusion

The discussion in this Chapter has revealed that protecting populations in conflict areas is not an easy task. As noted, forces on the ground face several challenges to implement a given mandate which include a lack of political will, inadequate funding, and the need for training and equipment to prevent or halt mass atrocities of the scale of Rwanda, Darfur Region of Sudan and Somalia. Implementation of protection of civilian mandates without the consent of all factions to a conflict can face serious resistance. Therefore, where there is no peace agreement, and the consent of all the belligerents cannot be secured, the intervening forces should be robust so as to overcome resistance on the ground. Any mission deployed without the benefit of acceptance by all factions may be a futile process if the intervening forces do not have the capability to overpower and apprehend the perpetrators of mass atrocities against innocent civilians.

To effectively implement any mandate and secure cooperation of the warring factions, there should be adopted a political framework that addresses fears of domination and creates incentives for local population to withdraw their support for armed/terrorist groups. It has to clearly articulate measurable goals and an exit strategy and ensure that any major offensives, either individually or as part of the whole mission, are accompanied by a political strategy to win the support of local clans and social groups and stabilise those areas in which they are present.

Further, implementation of protection mandates needs financial resources and robust military capability including well-trained and adequately equipped troops. To do this, there is need for strategic cooperation and partnership with the states and organisations that are able and willing to provide financial support. Over and above this, there is need for member states to have the political will to contribute troops to protect civilians. Peacekeeping operations succeed when they are led or complemented by well-equipped, well-trained forces of sufficient size and with a mandate that allows for robust defence as well as counterattack. A British force deployed to Sierra Leone in 2000 to assist the UN peacekeeping mission is a perfect example, as is a French-led force *Operation Artemis* deployed in Eastern DRC in 2003.

36 As above.

As Angelo Gnaedinger has pointed out, the effectiveness of humanitarian action could be improved but could never take the place of political action that must prevent conflicts and ultimately stop them.[37] Not only parties to conflicts, but also the entire international community, must enforce IHL, through both punitive and preventive measures. It is for this reason that states have an obligation under the 1949 Geneva Conventions to ensure respect for humanitarian norms to both the military and civilians alike during peacetime, through teaching in schools and training in military institutions.

37 See generally 'Secretary-General tells security council that protection of civilians in situations of armed conflict is key to sustainable peace' Press release on Security Council's 4660th Meeting 10 December 2002, available at http://www.un.org/News/Press/docs/2002 (accessed 16 August 2014).

CHAPTER 24

THE FUTURE OF PROTECTION OF CIVILIANS IN AFRICA

Dan Kuwali

Abstract: *Traditional peacekeeping has evolved into various forms, including peace enforcement operations, protection of civilians, the responsibility to protect and stabilisation missions including special political missions. The deployment of peace support operations (PSOs) in complex conflict situations has brought about major policy implications calling for the need to review various aspects of PSOs. Also, the operationalisation of the African Standby Force, which was designed on the model of the traditional United Nations (UN) PSOs, has been overtaken by new threats to peace and security on the continent. This Chapter advances several recommendations for future PSOs to better protect civilians on the continent such as: reformulating the strategic guidance of PSOs to encompass the complexity of missions and the changes and dynamism of the operating environment, including balancing military, diplomatic and political assets; establishing a rapid deployment capability; focusing on conflict prevention, managing and resolution, including increasing the participation of women in such processes; local ownership of peace building initiatives, which should include measures that eliminate such forms of inequality in the society; and increasing training and capacity building. African actors should go beyond discussing African solutions to African problems and find effective solutions, mobilising resources and garnering political will to act decisively.*

Introduction

The United Nations (UN) Secretary-General (UNSG) has established a High-Level Panel on UN Peace Operations (the High-Level Panel) to explore strategic options for UN peace support operations (PSOs). On its part, the African Union Commission (AUC) is also considering to establish its own assessment panel focusing on African peace operations, following the recommendations contained in the Report of the Independent Panel on the Assessment on the African Standby Force (ASF) chaired by Ambassador Professor Ibrahim Gambari.[1] This is against the

1 African Union 'Report of the Independent Panel of Experts' assessment of the African Standby Force and Plan of Action for achieving full operational capacity by 2015' 2013. See also C de Coning, L Gelot & J Karlsrud 'Strategic options for the future of

background of a previous study by Ambassador Lakhdar Brahimi 16 years ago.[2] In short, some of the key questions to be considered by the High-Level Panel include: whether the peacekeeping mandates are right for the current context; whether the current guiding principles of PSOs are relevant; or whether they are relevant for some operations, but not others; whether 'peacekeeping' is the right umbrella term to describe the full range of UN operations considering that there is a continuum of political and peacekeeping operations that is difficult to categorise; whether a new typology is needed – one that includes stabilisation missions; whether the UN has the right tools to respond to new challenges such as criminal networks and trans-national actors, among other threats. The issue of partnership is also part of the UN review of PSOs. The aim of the review is to generate a new consensus at the UN and in the international community. This essay, therefore, seeks to provide some suggestions that should be considered by the High-Level Panel, with a focus on PSOs in Africa and the experiences drawn from the implementation of the African Peace and Security Architecture (APSA).

Lessons learnt from the changing terrain of peacekeeping in Africa

Member states and the UN have a fundamental responsibility to prevent armed conflicts and to protect people from atrocities and egregious crimes pursuant to their obligations under the UN Charter. The context for peacekeeping operations (PKOs) in Africa has changed, especially in the past decade. Traditional peacekeeping has evolved into various forms, including peace enforcement operations, protection of civilians, the responsibility to protect (R2P), stabilisation missions, and special political missions (SPMs). Today, protection is at the heart of modern UN PSOs, with ten peacekeeping operations, containing 95 per cent of all UN deployed personnel, and having a mandate to protect civilians. Traditionally, PSOs were based on sovereignty in the sense of autonomy and consent of the host state, neutrality, impartiality and non-use of force except in self-defence and defence of the mandate. However, it is now accepted that threats to peace are not limited to states, but also involve non-state actors within states. Yet, with a few exceptions, especially, peace enforcement operations, UN PSOs are still based on, impartiality, and non-use of force. It has been argued that impartiality, which is crucial to maintaining the consent and cooperation of the main parties, should not be confused with neutrality or inactivity. In this sense, UN peacekeepers

African Peace Operations 2015-2025 Seminar Report, Norwegian Institute of International Affairs, available at http://nai.diva-portal.org/smash/get/diva2:785692/FULLTEXT02.pdf (accessed 18 March 2015).

2 United Nations 'Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations (Brahimi Report)' UN Doc A/55/305-S/2000/809, 21 August 2000.

should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate.[3]

Africa has not only been a crucial ground for PSOs, African countries also have extensive experience in such operations. Of the 16 on-going peacekeeping operations world-wide, eight are deployed in Africa, and of the 11 political and peace building missions, six are located in Africa. Out of a total annual peacekeeping budget of around US$7 billion, US$5 billion goes towards African operations. Over this period, African participation in peacekeeping missions has grown uninterruptedly to almost 70 000 men and women in 2016, close to 50 per cent of the total contributions. Of the 37 African countries that contribute troops, six are amongst the top ten overall world troop contributors, and their participation extends beyond the African continent (notably Haiti and Lebanon).

The design of the African Standby Force (ASF) was derived from UN operations in the 1990s, yet new threats to peace and security have emerged since 2004 when this pan-African force was established. Thus, the ASF has been overtaken by new and emerging peace and security challenges and developments in PSOs. For example, AU member states have not accepted the idea of having either a central command in the ASF or regional standby forces. Although the AU Peace Support Operations Division (PSOD) has been established at the strategic level, it is a parallel structure to the ASF and *ad hoc* in nature. Also, RECs have their own mechanisms. In its present establishment, the ASF seems to be a formulation of 'lead nations' or coalitions of the willing and able.

The effort for translating the ASF concept into an institutional reality and achieve the operational readiness of the ASF has been underway since 2003 and is still on-going. Indeed, parallel to the efforts of preparing the ASF for operational readiness, the role of the AU in deploying PSOs in response to a number of conflict situations has increased tremendously. In the process, there has been a significant shift in the PSOs deployed by the AU, including in respect of their scope, mandate and tasks. Unlike much of AU's early PSOs, recent missions have been assigned responsibilities for undertaking stabilisation activities and roles in the host countries such as the African Union Mission in Somalia (AMISOM). These developments have major policy implications. This is particularly the case with respect to

3 Just as a good referee is impartial, but will penalise infractions, so a peacekeeping operation should not condone actions by the parties that violate the undertakings of the peace process or the international norms and principles that a UN PSOs upholds. Notwithstanding the need to establish and maintain good relations with the parties, a peacekeeping operation must scrupulously avoid activities that might compromise its image of impartiality. A mission should not shy away from a rigorous application of the principle of impartiality for fear of misinterpretation or retaliation. Failure to do so may undermine the peacekeeping operation's credibility and legitimacy, and may lead to a withdrawal of consent for its presence by one or more of the parties. United Nations Peacekeeping 'Principles of UN peacekeeping' available at http://www.un.org/en/peacekeeping/operations/principles.shtml (accessed 17 March 2015).

AU's PSOs doctrine and in the form that the ASF takes for operational readiness. Unlike traditional peacekeeping operations, these AU operations have had the following five key features:

The mandate of AU peace support operations have included offensive force

The mandate of AU PSOs has included offensive force capabilities, going beyond the UN Charter. For example, defeating the enemy has been included in the operations' rules of engagement (ROEs) as exemplified in AMISOM. Except for the UN operation in the Democratic Republic of the Congo (DRC), that is, the UN Mission in the DRC (MONUC), which later transformed to United Nations Stabilisation Mission in the Democratic Republic of Congo (MONUSCO), the AU has been prepared to do more than the UN. The greater risk of regional insecurity has increased the likelihood of generating peacekeeping capacity from neighbouring countries in Africa. Somalia and Mali indicate this shift from PSOs meant to saving strangers to PSOs meant to saving neighbours.[4] In the case of Mali, for example, Chad and Burkina Faso are neighbouring country troop contributors to the PSOs. The same is the case with Kenya and Uganda in Somalia as well as Tanzania in the DRC.

The AU peace support operations have generally been military heavy

There has been an attempt by the AU to build multi-dimensional operations, but as the Report of the Independent Panel on the Assessment of the ASF concluded, it has had limited success. AU operations are still military-heavy as compared to their civilian component. As such, enhancing the civilian component is important to avoid situations in which PSOs are construed as a strategy of militarisation.

The African Standby Force has not implemented a rapid intervention capability

The APSA is yet to implement the rapid intervention capability. It is useless to have an ASF, if it cannot deploy rapidly. Such deployment at present is limited to situations of war crimes, genocide and crimes against humanity pursuant to article 4(h) of the Constitutive Act of the AU.[5] However, rapid intervention is also needed in cases that are not so extreme, but in which the absence of intervention could lead to larger-scale

4 D Kuwali & G Alfredsson 'The responsibility to protect minorities: The question of protection by kin-states' (2014) 71 *Europa Ethnica* 62-68.

5 See generally, D Kuwali *Responsibility to protect: Implementation of article 4(h)* (2011). See also D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014).

violence. That is why the ASF Assessment Report called for an immediate operationalisation of the rapid deployment capacity of the ASF. At the same time, rapid deployment must be seen as a phase, *albeit* a critical one, of an overall response to the situation.

The African Peace and Security Architecture needs resource mobilisation mechanism

Resource mobilisation is key to the ability of the AU to sustain its operations. Logistical support and steady funding are key to sustain peace support operations.

Recommendations for future of peace support operations in Africa

A crystal ball assessment of the peace and security landscape in Africa shows that causes of conflict will continue, and may even worsen. Technological advances will further complicate threats.[6] Political will is likely to continue to vacillate. There will be an incremental approach to implementation. There will be competing ideas, and 'new' ideas will likely emerge before 'old' ideas have been implemented. There will be a persistent need for the AU to develop rapid deployment. Regional mechanisms will continue to be uncoordinated. For example, the Economic Community of West African States (ECOWAS) is not coordinated with the Southern African Development Community (SADC). Initiatives by lead nations or coalitions of the willing will remain the norm, based on national interest, so, there will be no predictable response to security needs. Short-term external interventions (for example, France in Mali) will continue to be undertaken, as will parallel interventions. Only marginal improvement in collaboration between UN and AU will take place. There will be slow development of management capabilities. As a way forward, below are some of the options for consideration by the UN High-Level Panel.[7]

6 For example the threats caused by piracy in the Gulf of Eden and the Gulf of Guinea as well as the Boko Haram in West Africa. See also C de Coning, L Gelo & J Karlsrad *The future of African peacekeeping: From Janjaweed to Boko Haram* (2016).

7 For more pertinent insights see also Centre for Human Rights 'Pretoria Principles on Ending Mass Atrocities pursuant to Article 4(h) of the Constitutive Act of the African Union available at http://www.chr.up.ac.za/index.php/centre-news-2013/1218-pretoria-principles-on-ending-mass-atrocities-pursuant-to-article-4h-of-the-constitutive-act-of-the-african-union.html (accessed 23 January 2017).

Rethinking mandates and a multidimensional approach to stabilisation operations

Most, if not all recent PSOs in Africa have had the mandate to stabilise the situations of conflict, such as the AMISOM, the African-led International Support Mission to Mali (AFISMA) and the African-led International Support Mission to Central African Republic (CAR) (MISCA). Drawing on the experience of the AU PSOs most notably from the long running AMISOM, at the doctrinal level, PSOs strategic guidance should be reformulated to encompass the complexity of AU missions and the changes and dynamism of the operating environment. To do this, guidelines should articulate the essence of stabilisation mandates and missions and outline the principles that govern such mandates and operations, including protection of civilians, observance of international human rights, and international humanitarian law (IHL).

By their very nature stabilisation operations are multidimensional. They involve the use of military, police and civilian instruments to address the security, socio-economic, humanitarian and political ills underlying the insecurity and violence in conflict-affected societies. Military instruments are used to support host society security forces for creating the initial security condition. This is done through security operations aimed at eliminating, deterring or controlling violent armed elements. Police and civilian instruments are deployed to enforce order, to rebuild rule of law and security institutions, to assist in efforts for the delivery of humanitarian assistance, and for the reconstruction of administrative and public service infrastructure. Clearly, integrated design and planning is key for PSOs with stabilisation mandates. The military and security components should be designed and planned together with the political, diplomatic, economic recovery and humanitarian dimensions. These different elements should be deployed together and as such, the military and security components should work together with the head of mission, the chief of the police component and other parts of civilian counter parts to establish appropriate structures and processes that will facilitate a shared understanding, integrated design and planning, and coordinated execution and assessment.

There is an overemphasis on the military dimension of stabilisation operations. Use of force is one option to tackle (new challenges); an expanded toolkit is needed such as policing. More attention needs to be given to policing and civilian components (including training in counter-terrorism and specialised skills in improvised explosive devices (IEDs), among others. The AU's doctrine for the ASF needs to become more than a military doctrine. While the AU does not aspire to replicate the full UN multi-agency or multi-dimensional capability brought to a UN mission, it does recognise that the AU must develop a politically led integrated

capability.[8] The doctrine should accordingly be multidimensional in its coverage and give strategic guidance not only to military but also to police and civilian instruments. This matters if the ASF is to have a capability, which can interoperate with, or hand over to, a UN mission. The ASF should be adapted to reflect a focus on the most common mission type (undertaken in Africa), that is to say, stabilisation missions; while retaining flexibility to conduct a wider spectrum of operations. This, in turn, creates a need to define stabilisation.

Maximise the utilisation of Chapter VIII of the UN Charter

For UN peacekeeping to quickly respond to a crisis, such as in South Sudan, or to deal with the complexity of contemporary threats faced in Mali or the CAR, there is need to strengthen the UN's partnership with member states and regional and sub-regional organisations. There is also need to enhance the cooperation between various UN or regional missions. However, Chapter VIII of the UN Charter is under-utilised. Closer partnership is required between the UN and regional organisations, without discounting the primacy of the United Nations Security Council (UNSC). It is interesting to note that in Mali and the CAR, the UN has worked closely with the AU and with sub-regional groups. The realistic division of labour among peace and security bodies and a better working relationship are needed between the UN and the AU. However, the UN should follow a more cautious approach to developing too much to the regional arrangements, especially since many of those crises are also a threat to international peace and security. There should also be a better inclusion of the AU and African regional bodies in consultations on mission mandates, as well as a better coordination between the various entities in peace operations. The AU and Africa's RECs should be consulted in order to contribute in the formulation of UN mission mandates in PSOs on the continent.

Hybridisation of peace support operations

Given the AU's lack of capacity, it needs collaborative support from external actors. However, for an AU-mandated mission, exit strategy seems to be understood in terms of conditions for UN takeover (not resolution of root causes of the conflict). While the AU is considering alternative financing, AU/UN hybrid missions or missions where the AU will deploy and later handover to the UN will be the model that is likely to be available. All AU operations (except Somalia) have been taken over by

8 R Gordon 'A comparative on doctrines and principles for multidimensional peace operations: A case for harmonized and enhanced interoperability' A commissioned paper for the International Forum for the Challenges of Peace Operations, available at http://www.marshallarmyrotc.org/documents/GordonStudyonDocandPriniples1.pdf (accessed 12 February 2015) 11.

the UN between six and 18 months. The UN cannot deploy with rapid capability. The AU will continue to be needed. ASF should be the basis for all African PSOs authorised by the AU, but not just for capacity building and force generation, but as a post-2015 framework for (integrated) operations. In this respect, all African operations should be ASF operations going forward (after 2015). Lead nations that undertake stabilisation missions, alongside other UN and humanitarian missions, that are, in turn, short-lived (handed over to the UN) and funded by the international community, which limits their ability to determine their own mandates, scale, and scope.

Establish rapid deployment capability

Rapid intervention should be seen as a means to an end, and not an end in itself, as time is a crucial factor for the stabilisation process. The priority for regional organisations should, therefore, be to develop capacity for rapid development, but at the same time, they must have the political will to see it as a phase, not a substitute for, or in contestation with, protection of civilians and restoration of stability. Given that the trend of conflicts and security threats demand deploying rapid, robust and agile interventions, it is doubtful if the ASF, made up of contributions from all member states, organised into five regional standby forces, namely, East Africa Standby Brigade (EASBRIG), ECOWAS Brigade (ECOWASBRIG), *Force Multinationale de l'Afrique Centrale* (FOMAC), North Africa Regional Standby Brigade (NASBRIG), and the SADC Brigade (SADCBRIG). The bureaucratic process to deploy the ASF involves time consuming multi-level decision-making procedures, which may not be suitable for undertaking such rapid response operations. In the light of the experience from various AU PSOs and recent challenges faced for deploying a rapid intervention force as in Mali, the ASF policy framework should be reviewed.

As the experience in Mali and the deployment of the Force Intervention Brigade (FIB) with an explicit offensive mandate within the United Nations Stabilisation Mission in the DRC (MONUSCO) attested, article 4(h) situations involving the risk or occurrence of mass atrocity crimes are not the only situations requiring rapid response capability. Rapid response capability is also required to respond to emergency situations that arise in a country or in an operating environment due to violent acts of hostile insurgent or terrorist groups. Further, there is a need to harmonise the Rapid Deployment Capability (RDC) and the African Capacity for Immediate Response to Crisis (ACIRC). The ASF needs to move from a standby to a 'just-in-time' model.[9] The ASF can deploy with support from external actors, but capacity resides at national – not regional – level. Each conflict will have its own interested parties or lead nations.

9 See generally, de Coning *et al The future of African peacekeeping* (n 6 above).

This means a pre-planned model or structure will not deliver. Pre-formed standby concept has not been used, and is unlikely to be used, because it is not flexible enough to adapt to the unique circumstances in each case.[10]

Address new and emerging security threats

Unlike the 1990s, traditional rebel groups are increasingly becoming rare and in their place a diverse and multiplicity of factionalised militant armed groups have emerged. Africa's security landscape is rapidly changing with 'old' security threats and problems mutating and transforming into 'new' and difficult challenges. Much of the threat to peace and security in Africa today arise from insurgency, acts of terrorism, proliferation of militia groups and organised criminal networks operating in fragile and conflict zones. The environments in which AU PSOs are deployed today are characterised by both sheer complexity of issues and multiplicity of groups involved. Apart from regular government forces and declining number of traditional armed rebel groups, other actors that are becoming prominent include irregular groups, such as clan militias, guerrilla forces, criminal networks, religious or ethnic militia groups, terrorist groups as well as mercenaries and warlords. Unlike intra-state conflicts involving clearly identifiable rebel groups and conventional warfare, in these complex environments, conflicts are not conducted following traditional warfare methods. Instead, conflicts increasingly take the form of asymmetric warfare in which hit and run guerrilla tactics, the use of increasingly sophisticated improvised explosive device (IEDs), targeted assassinations, indiscriminate attacks on civilians, suicide and roadside bombings, sniper fires have become common.

These combined threats are undermining societies and exposing the weaknesses of previously established national and (sub)regional economic communities, and the risk and vulnerability assessment methodologies to predict and respond to these 'new' asymmetric and hybrid security challenges. Several critical issues arise with the growing incidence of attacks by terrorist groups and the disturbing expansion of organised criminal activities. The question, therefore, is how to reconfigure the AU and its respective RECs' response strategies to be able to tackle these asymmetric and hybrid security challenges.

The context in which peace support missions operate in Africa has thus become one that calls for a multipronged approach combining robust and comprehensive mandates and tasks. As a result of the potential region-wide consequences of the prevailing hybrid and asymmetric threats, and given their complex interconnectedness, it is imperative to contextualise the discussion broadly within the interrelated spheres of politics, security, economy and society. Such a broad contextualisation of the nature and

10 Same as European Union (EU) battle groups.

characteristics of these challenges will provide a more nuanced and differentiated understanding and appreciation of what national strategies and coordinated region-wide policy responses ought to be designed towards addressing these threats. In this regard, emphasis should be placed on the need to either modify or improve the existing multidimensional approaches of the AU as well as its RECs in responding to the hybrid and asymmetric threats to security.

Focus on conflict prevention, managing and resolution (including the role of women)

The recent eruptions of violence in the Middle East, parts of Africa and Eastern Europe illustrate the high hurdles of conflict management and the rapidly shifting power dynamics. In his 1992 report, *An Agenda for Peace*, the first African UN Secretary-General, Egyptian scholar-diplomat, the late Boutros Boutros-Ghali argued for a need to re-think the balance between sovereignty and the protection of human rights.[11] Since then, there has been an increased international attention to the role of mediation in conflict resolution. Established in 2006, the UN's Mediation Support Unit (MSU) seeks to provide support to international mediators in their peacemaking efforts; and serves as a repository of mediation experiences and lessons learned. However, conflicts in Africa have their own distinct characteristics, and there is no single approach to mediation on the continent. Local ownership of mediation processes, and coordination between the UN, the AU, and the RECs as well as influential external actors, is thus important. In some instances, the UN may have the comparative advantage in mediating a dispute in Africa, while in other instances, it might be the AU or a sub-regional organisation. Good offices and mediation have been used to address conflicts in Côte d'Ivoire, the DRC, Kenya, Mozambique, and Zimbabwe, with varying degrees of success.[12]

Justice is an essential component of sustainable peace, and it is widely believed that there can be no peace without justice.[13] However, the experiences of the International Criminal Court (ICC) show that pursuing the interests of justice in conflict situations in which gross human rights atrocities have been committed can generate tensions during a peacemaking process.[14] The issue, however, is not to achieve peace at the expense of justice, but to aim for the attainment of both peace and

11 B Boutros-Ghali *An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping* (1992).

12 Centre for Conflict Resolution 'Towards a new *Pax Africana*: Making, keeping, and building peace in Africa' Concept note, Policy Research Seminar held on 28-30 August 2013, Stellenbosch, South Africa.

13 See CL Sriram & S Pillay (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009).

14 S Nouwen 'The International Criminal Court: A peacebuilder in Africa?' in D Curtis & GA Dzinesa (eds) *Peacebuilding, power, and politics in Africa* (2012) 171-192.

justice.[15] Peacemaking is a complex and fraught process, heavily dependent on various contextual factors ranging from the strategic location of a conflict situation to the adequacy of mobilised resources, and the political dynamics of the wider region, as demonstrated by the case of Somalia. The growth of international terrorism and maritime piracy have been instrumental in re-engaging the interest of the UN, regional organisations, and other key external actors in the Somali peace process after over a decade of neglect. Civilian populations, particularly women and children tend to be the worst affected by the scourge of conflicts. However, women's involvement is key to the success in peace making, peacekeeping, peace building, state-building or nation-building, and particularly, in finding solutions to the challenges of peacekeeping. Since conflicts tend to bear roots in structural and other forms of inequality, peace building must include measures that eliminate such forms of inequality in the society by addressing gender disparities, mainstream gender, and strategically focus on gender-oriented activities.[16]

Enhancing the protection of civilians

The majority of victims in contemporary armed conflicts in Africa are children, who are also taken and forced to become soldiers.[17] In today's wars, children are warlords as well as victims. Rape is used as a weapon of war such that it is now even more dangerous to be a woman than a soldier in such conflicts.[18] Survivors are often displaced, by force or for lack of choice, taking refuge in camps where they are often defenceless against armed attacks and harassment. Many are maimed by mines and other indiscriminate munitions. Many more victims die of the indirect effects of armed conflict such as disease, malnutrition and famine.[19] Humanitarian aid workers and peacekeepers have also been abducted and murdered by unscrupulous belligerents in conflict situations such as Darfur and the DRC. Although the primary responsibility to protect populations rests with states, sometimes, it is those responsible for the protection of the population who undermine the security of, and perpetrate abuses against,

15 D Kuwali 'Clash of law and politics: Why Kenyatta won't be prosecuted' *The Star* 25 April 2013.

16 E Otitodun & A Porter 'Gender and peacebuilding' in C Saunders *et al Region-building in Southern Africa: Progress, problems and prospects* (2012) 107-127107; Center for Conflict Resolution 'Post-conflict reconstruction in the Democratic Republic of the Congo (DRC)' Seminar Report No 36 10.

17 Save the Children 'Unspeakable crimes against children: Sexual violence in conflict' (2013) available at http://www.savethechildren.org.uk/sites/default/files/images/Unspeakable_Crimes_Against_Children.pdf (accessed 10 April 2012).

18 D Kuwali 'Defending the defenceless: Questions of mandate and capability to protect civilians in the Democratic Republic of Congo' in D Kuwali *et al* 'Improving the protection of civilians in situations of armed conflict' *Carr Center Working Paper Series* (2011) 17-20.

19 Citizens for Global Solutions 'Protecting civilians in armed conflicts' Fact sheet available at http://globalsolutions.org/files/public/documents/CP-Factsheet-Protecting-Civilians-in-Armed-Conflict.pdf (accessed 1 April 2012) 1.

civilians. For example, in the DRC, the most potent threat to the security and human rights of the people is said to be the Congolese Army itself.[20]

The presence in war zones of peacekeepers is one of the most effective means of guaranteeing not only the delivery of relief aid but also the protection of victims from hostilities. However, peacekeepers, who are supposed to be protecting civilians, often find themselves in these precarious situations without capacity and capability to protect civilians, which sends a wrong signal to the perpetrators as well as the populations they are supposed to protect. Further, peacekeepers often find themselves in untenable situations without proper strategy, training, doctrine or equipment to protect civilians. There is also a doctrinal deficit on how to actually protect civilians; and often, peacekeepers lack the capability to protect and the requisite tools for protection. The failure to protect civilians in armed conflicts under the watch of peacekeepers may encourage perpetrators to commit violations and discourage the victims who they are supposed to protect. This growing trend also raises disturbing questions about mandate and the political will and capability of the military forces in the protection of civilians in armed conflicts.[21]

While the integrated mission concept of PSOs are meant to offer effective protection for civilians in armed conflicts, there are still legal and ethical dilemmas of the military becoming involved in civilian protection and how to actually protect the civilians due to lack of operational guidance.[22] Protection of civilians is also viewed differently by human rights and humanitarian organisations, on the one hand, and peacekeepers, on the other hand. Human rights and humanitarian organisations envision civilian protection as a broader concept that includes humanitarian assistance and guarantees of human rights standards, whereas peacekeepers see PoC as preventing physical harm of the individuals.[23] Therefore, there is need for a clear doctrine for the ASF and the regional brigades to guide peacekeepers in civilian protection mandates to bridge the gap between monitoring the respect for human rights and humanitarian law to propagate appropriate responses by focusing on the protection of the individual and not when and who should monitor what.[24] Peacekeepers ought to have a capability to protect, which consists of capability to deter potential perpetrators from attacking civilians; clear rules for protection that may allow peacekeepers to stop the

20 Kuwali (n 18 above) 17-20.
21 Brahimi Report (n 2 above).
22 C Hunt 'Program on the protection of civilians (Background and Scope) Asia Pacific Centre for the Responsibility to Protect' March (2008) available at http://www.r2pasiapacific.org/documents/Program%20on%20Protection%20of%20Civilians%20-%20Asia-Pacific%20Centre%20for%20r2p%20-%2018%20March%2008.pdf (accessed 9 February 2015) 2.
23 Citizens for Global Solutions (n 19 above) 3.
24 D Kuwali 'Humanitarian rights: Enforcement of international humanitarian law by the African Court of Human Rights' (2011) *African Yearbook of International Humanitarian Law* 166-179.

killing of civilians, ensuring the overall protection of the peacekeeping force itself and the population and providing security to prevent the recurrence of atrocities; the capability to collect and analyse information that allows them to better anticipate, understand, and counter atrocity threats. When prevention fails, peacekeepers should be able to arrest the perpetrators and bring them to justice.[25]

Local ownership of peace building initiatives

The persistence of conflict in parts of Africa, has led to new approaches, new mechanisms and new critiques. For some authors, the problem with peace building has been the emphasis on rapid neo-liberal political and economic liberalisation in post-conflict countries, which can trigger a renewal of conflict rather than reinforce structures of peace.[26] For other authors, the problem has been top-down peace building, which ignores local level initiatives and actors.[27] Others have focused on a wide range of political constraints and the need for longer-term context-specific peace building programmes.[28] Peace building policy and practice has evolved alongside these criticisms. Three changes are particularly noteworthy.

First, there has been an expansion in the number and the kinds of activities that are considered under the rubric of peace building programmes. The shift from focusing on 'negative peace' (the absence of direct physical violence) to 'positive peace' (the absence of structural violence) has meant that many activities that were previously confined to the realm of development or justice, are now thought of as peace building.[29] Second, many peace building programmes now have a longer time-frame. Peace building is not only about the cessation of hostilities and the reconstruction of infrastructure. It now tends to encompass the longer-term regeneration of relationships and economic opportunities, thus the time-frame for peace building programmes is necessarily much longer. Third, there has been a proliferation of institutions tasked with peace building in Africa. As discussed below, these include new institutions at the global level such as the UN Peace building Commission, which came into existence in 2006, and also African-specific institutions and programmes which are increasingly starting to play an active role in peace building on the continent.[30] At the same time, local programmes and

25 D Kuwali *The responsibility to protect: Implementation of article 4(h)* (2010) 301-306.
26 See, for instance, R Paris *At war's end: Building peace after civil conflict* (2004).
27 See, for instance, JP Lederach *Building peace: Sustainable reconciliation in divided societies* (1998).
28 See for instance T Ali & RO Matthews (eds) *Durable peace: Challenges for peacebuilding in Africa* (2004); EM Cousens & C Kumar (eds) *Peacebuilding as politics: Cultivating peace in fragile societies* (2001).
29 For a discussion of positive and negative peace, see J Galtung 'Violence, peace and peace research' (1969) 6 *Journal of Peace Research* 167.
30 See the AU policy on post-conflict construction.

practices also play both formal and informal roles in peace building efforts in Africa.

Given these changes, the complex ways in which regional and global ideas about peace and peace building interact with local ideas and realities need to be carefully examined. It is widely believed that peace building policies and initiatives must be country-specific and relevant to local contexts. For instance, peace building initiatives introduced by the UN through its Peace building Commission could stall if local contexts are not sufficiently recognised and understood during the planning phase. Therefore, for external actors, a better understanding and appreciation of the culture, history and political contexts of the countries they are assisting is seen as essential for sustainable peace building. The expertise and experience of the AU, RECs as well as African civil society actors, could be critical for international actors like the UN and the World Bank.

Clear understanding of the principle of subsidiarity

At the time of conceptualisation of the ASF, it was accepted as a given that the AU Peace and Security Council (PSC) would be the sole mandating authority. However, the reality on the ground has been that not all regional economic communities (RECs) have accepted this role for the PSC, based on the principle of subsidiarity. Greater legal and political clarity (arguably, reinterpretation) is needed on the issue of subsidiarity, because no one actor can go it alone in terms of conducting effective African PSOs. Altogether, the relationship between institutions at the continental and at the regional level has *a priori* been established as a hierarchical one. In interpreting this relationship, the 2008 Memorandum of Understanding (MoU) between the AU and RECs/RMs in the area of peace and security postulates the need for 'adherence to the principles of subsidiarity, complementarity and comparative advantage, in order to optimise the partnership between the AU, the RECs and the Coordinating Mechanisms'. The principle of subsidiarity states that in a hierarchical relationship, challenges or tasks should preferably be handled by the lowest level on which an adequate result can be achieved. In practice, this often implies a rather decentralised approach. The relevance of the principle of subsidiarity and its various interpretations in each prevailing circumstances should also be analysed within a context of a paradigm shift from state to regional security and to human security. It should be looked at in line with future scenarios for a horizontal relationship rather than the vertical one, new collaboration and harmonisation models and the consolidation of the multidimensional concept of PSO towards improving human security in the best interest of effective deployment of PSOs in Africa.

If the AU's capacity to conduct PSOs is analysed through the lens of subsidiarity, the question that arises is whether RECs can mount their own

PSOs, and to which extent do RECs have a say in AU-mandated PSO? The answer will probably be that mandating a PSO is an affair to be handled solely by the PSC, and possibly by the AU Assembly. The legal and political argument is also reinforced by institutional and practical considerations: RECs will usually need AU backing to access global financial and logistical support. But, there may still be a different reading: that PSOs in a given part of the continent are in the first place a responsibility of the respective REC. This argument is based on the widely held and very plausible notion that each violent conflict is unique, and that dealing with it needs familiarity with local conditions and contact to the specific actors on the ground. These are the arguments that proponents of an AU intervention capacity use, at a different level, in comparing AU-mandated and UNSC- mandated PSOs. Moreover, this view is backed by the practical experience of ECOWAS' intervention in the Liberian civil war, widely seen as a success. Here, the political commitment was clear, and resources could be raised within the region. Possibly, the IGAD-led intervention in Somalia may also count in this regard.

Establish independent sources of funding and mission support

One assumption that underpinned the development of the ASF was that although the AU lacked resources, it will still be able to develop capabilities. It was assumed that the AU would undertake to establish military logistical depots; however, these ideas have not moved off the drawing board. The capacity of the AU and the RECs to respond to emerging threats largely depends on independent sources of funding. Currently, the AU as well as the RECs depend hugely on external funds for responding to threats. In most cases, when the interests of external funders diverge with that of the AU and the RECs, the release of funds is likely to delay unduly and consequently hamper the effectiveness of the response mechanisms in Africa. This approach needs to change by creating an independent source of funds that can be readily accessed and utilised during emergencies. AU operations have been supported by external and African actors, which have defined the scale and nature of the missions. AU operations in the same theatre as UN operations have had to do more with less. A serious attempt is underway on improving the AU funding. In this regard, the former Nigerian President Olusegun Obasanjo has made a number of suggestions (levy on flights to Africa and accommodation), but none have been implemented. If they are, the AU would have a wider range of options, beyond the stabilisation model.[31]

31 African Union 'Progress Report of the High Level Panel on Alternative Sources of Financing the African Union Chaired by HE O Obasanjo, Former President of Nigeria-Consultation with Members' Nineteenth Ordinary Session 15-16 July 2012, AU Doc Assembly/AU/18(XIX), Addis Ababa, Ethiopia available at http://ccpau.org/wp-content/uploads/2014/03/Obasanjo-Panel-Progress-Report-Assembly-AU-18-XIX-2012-_E.pdf (accessed 18 March 2015).

Increase training and capacity building

When conceptualising the ASF, there was a reasonable assumption that the AU/African countries could develop the necessary capabilities. A lot of training is taking place for the ASF but it is not coordinated or harmonised. There is a need for an architecture that clearly defines training.

The AU and the RECs should invest and increase attention on the training of the youth on the misconceptions of 'jihad', which has become a springboard for engaging in radicalisation and militancy across many countries in the region. However, for such training to be effective, effort should be made to ensure that state institutions are effective in addressing governance challenges such as corruption, unemployment and inequality, among others.

Address indirect consequence of stabilisation

The indirect consequence of policy focused on stabilisation and retaining the political *status quo*, is that it tends to contribute to the continuation and sometimes to the legitimisation of political regimes that sparked the conflict, lack democratic legitimacy and which are regularly criticised for their mode of governance. In the DRC for example, the rescue of the Kabila regime in November 2013 by the Force Intervention Brigade (FIB) was not offset by any form of compensation in terms of political openness of the acceleration of reforms.[32] There should be a deliberate effort to assess the political dimensions and geopolitics in a given situation in order to ascertain what constitutes stability in a given scenario.

Mobilise political will

The only option acceptable to African countries at the time of establishing the ASF comprised stand-by forces in individual countries. There was a lack of political will for many countries. The mantra African solutions to African problems have not been matched by an African commitment to generating resources. The AU should borrow a leaf from the ECOWAS, which has moved forward, by deciding to put aside a portion of its regular budget to peace ops; the AU has to go the same way: earmark part of its regular budget for peace support ops, and find new ways of generating revenue. In a globalised world, African crises have global implications. An enduring collective security regime in Africa needs to mobilise African resources. Responsibility cannot be assigned elsewhere. Although some

32 On the contrary, the Congolese government expelled the leading UN human rights official, Scott Campbell.

African countries are poor, other economies are doing better and can do more, if there is political will.

Conclusion

All operations in Africa since 2004 can be characterised as stability operations (in contrast to UN operations that seek to keep the peace). Push-and-pull factors converged to create this model. They are offensive in nature, and differ markedly from UN operations based on impartiality, neutrality, and non-use of force. Given their nature, UN operations are made up of personnel from countries beyond the neighbourhood, wearing distinctive blue helmets with white UN inscription. AU operations, on the other hand, are different inasmuch as troops are usually drawn from countries that have an interest in securing stability in the neighbourhood (neighbours). The high intensity of AU operations over the past decade suggests that they have a greater capacity to provide immediate stabilisation. Thus, African states must be part of PSOs in Africa. In other words, African actors, based on their knowledge of the context, must be part of any strategising on PSOs in Africa.

There is reluctance in the UN to see the joint operation as a model that, notwithstanding its imperfections, can be improved and developed. There is need to focus on Chapter VIII and genuine partnership between the UN and regional organisations. AU PSO partnership (with the UN) is unequal. Changing this is important through a number of measures, including greater use of joint assessment mechanisms, joint planning, and development of guiding principles for partnership, as well as through greater African efforts to financially contribute to African (based) operations. UN support to AU PSOs must be institutionalised, and should not be *ad hoc*. The AU has received logistical support from the UN. Notably, AMISOM received such support through the UN Support Office for AMISOM (UNSOA). This also could be a model (especially if the UN assessed contributions option is not viable/forthcoming).

Given that the nature of conflict situations on the continent, as pointed out, are complex and call for a multifaceted approach involving capabilities able to address not only the security and the military but also the political, humanitarian, developmental and legal dimensions of the conflicts, the composition of the ASF should accordingly involve all the different required instruments. The multidimensional conception of the ASF makes it amenable for undertaking stabilisation operations. Experience shows that both AU PSOs and the ASF suffer from inadequate supply or provision of police and civilian capacities. Despite the steps taken to develop a multidimensional peace operations capability, progress has been uneven, and civilian and police capacities have not received as much attention as military capacities. There should be enhanced coordination between the various entities in peace operations.

There is need to address the challenges in stabilisation missions and mandates. Firstly, stabilisation operations have been deployed and conducted in response to the prevailing conditions in areas of their deployment. Despite the fact that AU PSOs reflect clear recognition at the strategic levels for stabilisation operations and recent operations are assigned stabilisation mandates, the design and composition of the missions as well as the resources and logistics made available have been inadequate for the missions to undertake and support stabilisation activities. For example, AMISOM was designed to be, and has been implemented as, a military heavy undertaking. Such a military-heavy character seems to be more suited for undertaking military operations than the full spectrum of stabilisation activities. Some missions have not been optimally designed to provide support to stabilisation processes once military operations have been concluded.[33]

For example, AMISOM's police and civilian components were initially absent and to date remain inadequate in size and in their technical expertise for implementing effective stabilisation activities. Granted, a limited police presence, and an even smaller civilian component have been established in Mogadishu. Secondly, most such missions have not been provided with the required resources and capabilities, in terms of the composition of its personnel, availability of specialist expertise, provision of logistics and necessary funding. Thirdly, there is also little or no strategic guidance outlining the principles governing stabilisation missions and the makeup and processes of designing and managing PSOs with stabilisation mandates and tasks. Despite the increasing demand of the conflict environment for stabilisation operations and AU's emerging experience with the deployment of PSOs with stabilisation mandates and tasks, there is no established conceptual or doctrinal framework that articulates the essence of stabilisation mandates.

There is a need for adequate mission support in terms of resources and logistics. Mission support is the most critical ingredient for effective PSOs, although it is the most neglected. AU missions suffer from shortage of the required resources including for training, equipment and logistics support. AU member states lack the expertise and equipment required to undertake specialised tasks including combat engineering, logistics resupply, medical support, and vehicle maintenance. These problems facing AU PSOs generally affect the implementation of stabilisation mandates and the conduct of stabilisation operations.[34] Even with more troop surges in 2013/2014, AMISOM continues to face critical shortages in supplies of

33 Y Akpasom & W Lotze 'The shift to stabilization operations: Considerations for African peace support operations' (2014) 2 *Conflict Trends* 18 23.

34 For example, the AU stabilisation mission in Somalia refers to the multidimensional process of extending the administrative authority of the federal government, delivering services – including food and water, healthcare, shelter, policing, and de-mining – to local populations, and conducting a programme of disarmament, demobilisation and

equipment, logistics and enablers. These shortages have affected and still affect the ability of AMISOM to deliver effectively on its stabilisation role. Where stabilisation mandates have been provided to operations, the appropriate resources should be provided to missions to implement these mandates, and the appropriate capabilities should be developed for the implementation of such mandates.[35] The inconsistence in funding can be avoided by establishing strong and sustainable partnerships. Closer relations can be forged between the UN and the AU in this context, including in the development of field capacity, and shared logistics depots; and, for successful transitions or handovers, greater synergy and alignment of UN and AU/REC systems is needed. African mission support capacity needs, regardless, to be developed at the level of the AU, as well as Africa's RECs.

reintegration for Al-Shabaab and other militias that wish to lay down their arms. Yet, outside Mogadishu, 'AMISOM is hobbled by numbers of troops and police that are insufficient to stabilise its large area of operations.' See P Williams 'AMISOM under review' (2012) 157 *RUSI Journal* 34.

35 Y Akpasom & W Lotze 'The shift to stabilization operations: Considerations for African Peace Support Operations' (2014) 2 *Conflict Trends* 18 25.

CHAPTER 25

CONCLUSION

Dan Kuwali and Frans Viljoen

1 Introduction

Civilians are the most victimised group in contemporary armed conflicts, although they are guaranteed protection under international humanitarian law (IHL) in general and by the 1949 Fourth Geneva Convention, in particular. The territorial application of international human rights law (IHRL) is beyond doubt. If a state has not derogated from its IHRL obligations in terms of article 4 of the International Covenant on Civil and Political Rights (ICCPR), IHRL standards are fully applicable to that state. The duty to protect its citizens against violations by private entities and state agents is a positive obligation under IHRL.[1] It follows that when a state is unable or unwilling to protect its population from violations of fundamental human rights, the international community may become engaged, under the authorisation of the United Nations Security Council (UNSC).[2]

In so doing, the international community may take measures to prevent abuses and protect populations at risk from harm, in an effort to persuade the errant state to respect its obligations to protect civilians.[3] This reasoning is the foundation upon which the principle of intervention under article 4(h) of the Constitutive Act of the African Union (AU) and the notion of responsibility to protect (R2P) rest. The notion of the responsibility to protect is cast in the following three core pillars: first, an affirmation of the primary and continuing obligation of individual states to protect their population from mass atrocities, as well as incitement thereof; second, a commitment by the international community to assist states in

1 H Krieger 'A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC customary law study' (2006) 11 *Journal of Conflict and Security Law* 265 282.
2 UN A/60/L.1/2005 2005 World summit outcome 15 September 2005 paras 138-139.
3 See generally V Holt & T Berkman *The impossible mandate?: Military preparedness, the responsibility to protect and modern peace operation* (2006).

meeting these obligations; and third, acceptance by the United Nations (UN) member states of their responsibility to respond in a timely and decisive manner through the Security Council, if national authorities are manifestly failing to protect their populations from these mass atrocities.

As discussed by Dan Kuwali in Chapter 2 and elaborated by Conor Foley in Chapter 3, there is some debate about what is meant by protection of civilians (PoC).[4] While the UNSC has passed several resolutions allowing the use of 'all means necessary' to protect civilians, there seems to be no common understanding of the notion of protection of civilians among the military, human rights actors and other humanitarian agencies. The amorphous notion of 'protection of civilians' is often conflated with the evolving concepts of the responsibility to protect and article 4(h)-intervention. The concept of the protection of civilians still lacks clarity in both scope and content and, in this sense, it is often confused with the responsibility to protect[5] and article 4(h). The debate about protection of civilians does not only relate to conceptualisation, but also to what the practical implementation of the protection of civilians entails.[6]

Similarly, since the United Nations (UN) adopted the responsibility to protect framework as a working principle in 2005, it was agreed that it required further conceptual clarification.[7] Since then, several informal sessions and dialogues of the UN General Assembly, research publications by what Aidan Hehir refers to as the 'R2P industry',[8] and reports of the UN Secretary-General have focused on clarifying the principle in order to shed more light on what its essential characteristics and legal implications are, or ought to be.[9] Even if, conceptually, article 4(h) of the Constitutive Act of the African Union (AU Constitutive Act) appears to be free from this conceptual ambiguity, there is no doubt that the ambit of its

4 There is no generally accepted definition of the protection of civilians. There are conflicting views between what the military would view as constituting the protection of civilians on the one hand, and what humanitarian practitioners would view as being elements of the protection of civilians. The meaning currently attributed to the concept derives largely from the language and contexts in which the UN Security Council has used the term. For a conceptual analysis, see JHS Lie & B de Carvalho 'Protecting civilians and protecting ideas: Institutional challenges to the protection of civilians (2009) Norwegian Institute of International Affairs 11. See A Giffen 'Addressing the doctrinal deficits: Developing guidance to prevent and respond to widespread systematic attacks against civilians (2010) Report from an International Experts Workshop 21-24 September 2009 UK Defence Academy; PD Williams 'Enhancing Civilian Protection in Peace Operations: Insights from Africa' (2010) African Centre for Strategic Studies Research Paper No 1.

5 See Williams (n 4 above).

6 See Giffen (n 4 above).

7 See UN A/RES/60/1 (2005) World Summit Outcome Document, 24 October 2005; UN A/RES/63/308 Responsibility to Protect, 7 October 2009.

8 A Hehir *The responsibility to protect: Rhetoric, reality and the future of humanitarian intervention* (2012) 5.

9 See UN A/RES/60/1 (n 7 above) para 139. See also UN A/RES/63/308 (2009) Resolution on the responsibility to protect, 14 September 2009, where the Assembly resolved to continue its consideration of the responsibility to protect. To date, the UN

application is far from settled.[10] What, then, is the nature of these principles, what do they mean and what link, if any, exists between them?

Article 4(h) of the AU Constitutive Act provides for 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[11] If and when the African Union (AU) eventually invokes article 4(h) and a military intervention is launched, it would likely be for the protection of civilians in a non-international armed conflict (NIAC). In this context, the success or failure of such mission would be judged on the basis of the extent to which the AU would have been able to protect civilians.[12] So, the protection of civilians from mass atrocities is at the core of article 4(h). Similarly, protection of civilians is at the normative heart of the responsibility to protect.[13] The idea of re-conceptualisation of sovereignty as conferring a primary responsibility on the territorial state and a residual responsibility on the international community to protect populations from mass atrocities rests on the normative value to protect civilians from mass atrocity crimes.[14] Paragraph 138 of the World Summit Outcome Document states that

> [e]ach individual State has the *responsibility to protect its populations* from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. [15]

The centrality of the protection of populations to the principle of the responsibility to protect is made clear by the emphasis on 'protection of populations' from genocide, war crimes and crimes against humanity in the excerpt below:[16]

Secretary-General has issued six reports on the responsibility to protect. See UN A/63/677 (2009) Implementing the Responsibility to Protect: Report of the Secretary General, where the Secretary General articulates what is now known as the Three Pillars of the responsibility to protect with all three pillars focusing on the responsibility of different actors in the protection of populations from mass atrocities; UN A/64/864 (2010) Early warning assessment and the responsibility to protect: Report of the Secretary-General, 14 July 2010; UN A/65/677-S/2011/393 (2011) The role of regional and sub-regional arrangements in implementing the responsibility to protect: Report of the Secretary-General, 27 June 2011; UN A/66/874-S/2012/578 (2012) Responsibility to protect: Timely and decisive response, 25 July 2012; UN A/67/929-S/2013/399 (2013) Responsibility to protect: State responsibility and prevention, 9 July 2013; UN A/68/947/S/2014/449 (2014) Fulfilling our collective responsibility: International assistance and the responsibility to protect, 11 July 2014.

10 At least one author has argued for a peaceful deployment of art 4(h).
11 Emphasis added.
12 Williams (n 4 above).
13 Williams (n 4 above) 5.
14 Right through its initial conceptualisation by FM Deng *et al Sovereignty as responsibility: Conflict management in Africa* (1996) 17; The International Commission on Intervention and State Sovereignty *The responsibility to protect* (2001); UN A/RES/60/1 (n 7 above).
15 Emphasis added.
16 Emphasis added.

> The international community, through the United Nations, also has the responsibility to use appropriate […] means, to help to *protect populations* from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to *protect populations* from genocide, war crimes, ethnic cleansing and crimes against humanity […] We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The clause 'protect populations' appears four times in paragraph 139 alone. The emphasis here is to protect populations from mass atrocity crimes both in times of peace and during armed conflicts. States accept to deploy a wide range of tools including diplomatic, legal (including judicial and quasi-judicial tools), political and, if need be, military force to realise this objective. Similarly, the concept of 'protection of civilians' as espoused through several UNSC resolutions, reports of the UN Secretary-General, and UN-commissioned studies, is based on the protection of vulnerable populations from a wide range of threats and insecurity – from physical harm and to offer security from threats of imminent physical attacks.[17]

As a concept, PoC is closely linked to IHL, and its evolution has been supported by international humanitarian agencies. At the UN level, the Office of the Commissioner for Humanitarian Affairs 'owns the policy franchise' and acts as its 'conceptual anchor' working with a range of actors for the common purpose of protecting civilians.[18] The basic contents of the principle have been distilled to include providing safety for civilian populations; making sure that there is compliance with the principles of IHL; tackling issues of impunity and accountability for mass atrocities; guaranteeing the safety and security of humanitarian personnel and ensuring unhindered access to humanitarian relief; as well as tackling the proliferation and transfer of small arms and light weapons.[19]

17 For an overview of protection of civilians in its different dimensions, see OCHA *Aide memoire for the consideration of issues pertaining to the protection of civilians in armed conflict* (2011). To date, the UN Secretary-General has submitted ten reports focusing on the protection of civilians in armed conflicts. See UN S/RES/1265 (1999) Resolution on protection of civilians in armed conflicts, 17 September 1999; UN S/RES/1296 (2000) Resolution on protection of civilians in armed conflicts, 19 April 2000.

18 See JHS Lie & B de Carvalho 'Protecting civilians and protecting ideas: Institutional challenges to the protection of civilians' (2009) Norwegian Institute of International Affairs 9.

19 Lie & de Carvalho (n 18 above) 10.

Although the concept 'protection of civilians' is not clarified in most UNSC mandates, there is little doubt that the provision of physical safety and protection of populations from threats of physical violence by actors, at the very least, is a core and minimum requirement.[20] In Resolution 1674, the UNSC appealed to both the concept of R2P and PoC.[21] By referring to both concepts in the same resolution, the UNSC arguably significantly underscored the importance of the protection of civilians and the responsibility to protect evolving and developing hand-in-hand though they remain distinct. This is significant because it underscores the UNSC's recognition of the link between protection of civilians as a norm and the responsibility to protect as a political commitment seeking to achieve a common objective, albeit using different methods and strategies. Furthermore, it highlights the UNSC's recognition of the influence both concepts would have on each other's evolution.

From the foregoing, it is clear that there is a strand running through article 4(h), R2P and PoC, namely, the ambition to protect civilians. Although the protection of civilians is at the heart of both the responsibility to protect and article 4(h) of the AU Constitutive Act,[22] the essential difference lies in the application of the norms. On the one hand, article 4(h) is applicable only in Africa and, as a legal tool, only available to the AU for intervention in AU member states. On the other hand, R2P has normative application in and outside the shores of Africa and is amenable to implementation by different multilateral institutions, particularly the UN. As they have done in the past, these principles – article 4(h), the protection of civilians and the responsibility to protect – will continue to influence the normative evolution and reinforce one another as they develop through practice. These distinctions and linkages have been summed up as follows:[23]

20 There are a number of UN Security Council resolutions implicating the protection of civilians, including those specifically on women:
UN S/RES/1325 (2000) Resolution on women and peace and security 31 October 2000; UN S/RES/1889 (2009) Resolution on women and peace and security 5 October 2009; UN S/RES/1960 (2010) Resolution on women and peace and security, 16 December 2010; on sexual violence against civilians in armed conflicts: UN S/RES/1820 (2008) Resolution on acts of sexual violence against civilians in armed conflicts, 19 June 2008; UN S/RES/1888 (2009) Resolution on acts of sexual violence against civilians in armed conflicts, 30 September 2009; on the protection of civilians in armed conflicts: UN S/RES/1265 (n 17 above); UN S/RES/1296 (n 17 above); UN S/RES/1738 (2006) Resolution Protection of Civilians in Armed Conflict, 23 December 2006; UN S/RES/1674 (2006) Resolution on protection of civilians in armed conflict, 28 April 2006; on the protection of children in armed conflicts: UN S/RES/1612 (2005) Resolution on children in armed conflict, 26 July 2005; UN S/RES/1882 (2009) Resolution on children and armed conflict, 4 August 2009;UN S/RES/1998 (2011) Resolution on children and armed conflict, 12 July 2011; UN S/RES/2068 (2012) Resolution Children and armed conflict, 19 September 2012.

21 See UN S/RES/1674 (n 20 above) paras 4, 11, 13, 14, 16, 24.

22 See Williams (n 4 above) 5.

23 ICR to PA 'Toolkit on the responsibility to protect' 32.

> [R2P] is closely related to the broader agenda of the prevention of armed conflict, even though crimes and violations that fall under RtoP may or may not occur during armed conflict. In particular, RtoP is linked to, though distinct from, the protection of civilians in armed conflict [PoC] agenda, a framework for UN diplomatic, legal, humanitarian, and human rights activities directed at the protection of populations during armed conflict. However, where [as PoC] addresses protection issues more broadly in specific cases of armed conflict, [R2P] applies only to cases where populations are threatened by genocide, crimes against humanity, war crimes and ethnic cleansing regardless of whether or not the situation can be characterized as an armed conflict.

At a practical level, quite unlike the responsibility to protect, which has both the elements of prevention and reconstruction, article 4(h) is a reactive tool only, which gives the AU the right of military intervention in a member state in order to protect civilians from mass atrocities. While judicial means of protection of civilians could be deployed as part of the prevention, reaction and reconstruction phases of the responsibility to protect (especially Pillars 1 and 2), it is its role and usefulness as part of the reactive element of the responsibility to protect (Pillar 3) that will be examined further in this Chapter, particularly when deployed in a situation of armed conflict, similar to article 4(h). For practical purposes, the concept of the protection of civilians could be applied to reactive military intervention to protect civilians from the four crimes in situations of armed conflict just like article 4(h) and the responsibility to protect. To this extent, all three principles share this common characteristic in that they could be deployed in situations of armed conflicts.

However, it is important to point out that, while both article 4(h) and the responsibility to protect are limited to specified crimes, the protection of civilians has a much broader scope and application.[24] Perhaps, this explains why judicial tools for PoC tasks form part of the preventive or so-called 'upstream' mechanism and therefore, mainly come under Pillars 1 and 2; and when invoked under Pillar 3 of the responsibility to protect as 'downstream', it is limited in utility and scope of its application when an armed conflict has already begun. The question then is: What judicial mechanisms exist and how can they be utilised to protect civilians during an armed conflict? The role of judicial protection tools under Pillars 1 and 2 of the responsibility to protect are not engaged in this Chapter since they are basically preventive. Rather, this Chapter focuses on judicial tools as a 'direct' and reactive tool for the protection of civilians during an armed conflict – Pillar 3.

24 Williams (n 4 above) 4.

Thus, as Kuwali explains in Chapter 2, intervention under article 4(h) is similar in implementation as the third pillar of the responsibility to protect, being a form of mass atrocity response operations.[25] Article 4(h)-intervention and the responsibility to protect are related to the broader agenda of the prevention of armed conflict although the atrocities that fall under article 4(h) and the responsibility to protect may occur in peace time or during an armed conflict. Both article 4(h) and the responsibility to protect are linked to, although distinct from, the protection of civilians in armed conflict agenda, which is a framework for UN diplomatic, legal, humanitarian, and human rights activities directed at the protection of populations during armed conflict.[26]

However, the difference is that 'protection of civilians' addresses protection issues more broadly in specific cases of armed conflict while article 4(h) and the R2P are confined to cases where populations are threatened by war crimes, genocide and crimes against humanity regardless of whether or not the situation can be characterised as an armed conflict.[27] This distinction should be clearly understood. In this vein, Foley in Chapter 3 warns that confusing the notion of protection of civilians with the responsibility to protect risks undermining the practical protection that peace support operations (PSOs) provide. Foley further recommends that for protection to be effective, there must be a common understanding as to who should be protected, from what, by whom and until when.

Foley's analysis shows that the first step to understand the meaning of 'protection' is to acknowledge that the protection of civilians during armed conflict situations and such violent crises in the sense of providing physical safety is not the job of humanitarian agencies, but rather the military.[28]

25 However see S Sewell *et al Mass atrocity response operations: A military planning handbook* (2010); UN Missions such as the UN Organisation's Stabilisation Mission in the DRC (MONUSCO has innovatively developed the Joint protection teams (JPTs) to reinforce its capacity to prevent future mass atrocities. These draw on a broad range of the Mission's military, police and civilian resources. The JPTs aim at enhancing preventive and responsive action towards civilians at risk. See also B Martin 'The protection of civilians in the Democratic Republic of the Congo' (2012) 2 *Conflict Trends* 33 38; C Hunt 'Program on the protection of civilians (Background and Scope)' Asia Pacific Centre for the Responsibility to Protect March 2008 http://www.r2pasiapacific.org/documents/Program%20on%20Protection%20of%20Civilians%20-%20Asia-Pacific%20Centre%20for%20r2p%20-%2018%20March%2008.pdf (accessed 14 April 2012).

26 D Kuwali 'Humanitarian rights: Bridging the doctrinal gap between the protection of civilians and the responsibility to protect' (2013) 4 *Journal of International Humanitarian Legal Studies* 5-46.

27 International Coalition for the Responsibility to Protect 'A toolkit on the responsibility to protect http://responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect%20high%20res.pdf (accessed 30 April 2016) 32. See also United Nations 'Framework of analysis for atrocity crimes – A tool for prevention' 2014 available at: http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf (accessed 30 April 2015).

28 M Du Bois 'Protection: Fig-leaves and other delusions' Humanitarian Exchange Magazine March 2010.

Thus, a generally accepted approach of defining 'protection' is the 'rights-based definition', which recognises that individuals have rights and that the authorities who exercise power over them have obligations to protect those rights. This approach implies defending the legal existence of individuals, alongside their physical existence.[29]

Going by this approach, protecting civilians in armed conflict and other situations of violence relates to violations of IHL and IHRL, and is not limited to mere physical security but rather encompasses the broader spectrum of human security and human dignity. This 'rights-based definition' has also sometimes been used by UN peacekeeping missions with PoC-mandates to define 'protection' as including those activities in distributing humanitarian assistance, monitoring for violations of IHRL and IHL, and liaison and advocacy with the national authorities.[30] In this regard, Jan Mutton in Chapter 11 draws attention to the destruction of cultural property and its effect not only on civilians in the conflict, but also on future generations. This form of protection, which is increasingly enjoying recognition under international law, illustrates the more expansive reach of PoC. Under R2P and article 4(h), destruction of cultural property may inform or be constituent elements of mass atrocity crimes, but does not in itself trigger intervention.

As argued by Kuwali in Chapter 2, since the conditions for intervention under article 4(h) and Pillar 3 of the responsibility to protect are *jus cogens* crimes subject to universal jurisdiction, the objective of using military force for the protection of civilians should be to apprehend or defeat the perpetrators of such atrocity crimes and not for regime change. States need to continuously disseminate the principles of IHL, not only to combatants but to the general public as well. As the discussion of Dire Tladi in Chapter 4 suggests, the goal of the interpretation and implementation of the protection of civilians mandates should be the protection of populations at risk, and not a pursuit of ulterior motives.

In light of the *raison d'être* of article 4(h) and R2P, in Chapter 5, Thomas Chengeta confirms that article 4(h)-intervention and the responsibility to protect have the potential to bridge the gap in the implementation and monitoring mechanisms to prevent willful killing of civilians, especially in armed conflicts. By understanding the reasons behind willful killing and other forms of violence against the civilian population in armed conflicts, states may be able to formulate effective preventative measures. Chengeta observes that in most cases, willful

29 F Bouchet-Saulnier *The practical guide to humanitarian law* (2002) 308.

30 See UN S/2001/331 (2001) Report of the Secretary-General on the protection of civilians in armed conflict 30 March 2001); UN S/2002/1300 (2002) Report of the Secretary-General on the protection of civilians in armed conflict, 26 November 2002 (discussing the humanitarian rights-based concept of protection and failed to even mention the role of internationally-mandated forces in protecting civilians against violence).

killing and other worst forms of violence against the civilian population occur at the instance of non-state actors within a functioning state. As the recent case of Burundi has shown, no matter how bad the situation may be, it is difficult for outside states to undertake any meaningful intervention as long as the concerned state continues to claim to be in control.

The massacre of innocent citizens and the kidnapping of helpless individuals raise grave concerns about the protection of civilians from violent extremism and radicalisation in communities around the world today.[31] These scourges are borderless in their effects, and countering them is in the interest of all states. However, according to Kuwali in Chapter 6, using force alone to curb violent extremism can exacerbate the problem. Therefore, there is a need for a multi-pronged approach, which includes methods to win hearts and minds by encouraging dialogues across faiths, cultures, political groupings and countries. The idea is to cultivate a culture of peace, tolerance, and acceptance of unity in diversity. In doing so, governments should provide for conducive fora to debunking and correcting misinterpreted political and religious ideologies as well as cutting access to funding by potentially violent extremist groups. States should confront socio-economic grievances by promoting broad-based economic growth and development, fighting corruption, job creation for the youth including women and girls, without discrimination and devoting more resources to education, which is one of the most effective tools that can eradicate extremist attitudes.

Involvement of children in armed conflicts, whether voluntarily or involuntarily, is one of the pressing concerns of the international community today. In Chapter 7, Cephas Lumina reveals that hundreds of thousands of children are currently involved in more than 30 armed conflicts in various regions around the world. The most effective way of protecting children from associating with armed forces or armed groups is by preventing their recruitment in the first place. Nevertheless, in the event that parties to hostilities flout the prohibition on the recruitment and use of children in armed conflict, the perpetrators should be held accountable, particularly through the prosecution and punishment for their crimes.

Apart from death and deprivation of fundamental rights, some of the challenges brought about by armed conflicts include the phenomenon of refugees and internally displaced persons (IDPs). In Chapter 8, Cristiano d'Orsi is of the view that, since armed conflicts represent the central reason at the origin of the forced movement of populations, it is imperative to curb the illicit flow of arms and ammunition on the continent within the

31 United Nations 'First report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes, Counter-Terrorism Implementation Task Force' para 1 http://www.un.org/en/terrorism/pdfs/radicalization.pdf (accessed 5 January 2015). See also TP Chimimba 'Defining terrorism under the United Nations system' (2013) *Zanzibar Yearbook of Law* 51-94.

framework of conflict prevention in order to offer a better protection to populations, including refugees and IDPs.

Sexual and gender-based violence (SGBV) is one of the most pervasive yet least recognised human rights abuse in the world. SGBV constitutes a profound human rights violation, which has the potential to impact severely on the mental and physical health of the survivors, both in the short and long term. In Chapter 9, Kuwali, Catherine Nakirya and Grace Amuge suggest that the prevention and suppression of SGBV should be one of the primary missions in any protection of civilians-mandate given its adverse effects on peace, security and development. Not only do the legal mechanisms have to be in place to curb impunity for acts of SGBV to end, but attitudinal and behavioural changes are needed in cultures where widespread sexual violence is tolerated and the political will to end the epidemic is absent.[32]

According to Kuwali, Nakirya and Amuge, effective prevention of and response to the manifestation and impacts of SGBV requires a three-fold approach built on prevention, protection and prosecution that is informed by research and analysis. Prevention of SGBV requires close engagement and communication with the local population as well as women's groups and networks to ensure that women's interests are represented and to help identify and protect the most vulnerable people to SGBV. Protection of victims of SGBV should be part of an effective response to incidences of SGBV. Protection must also include the provision of medical care and psycho-social treatment as well as follow-up. Prosecution of offenders and effective data collection and reporting on SGBV to ensure accountability and allow for prosecution.[33] A legal response in terms of prosecution, truth and reconciliation can redress crimes and serve as a deterrent. To this end, the Rome Statute of the International Criminal Court (ICC) has been fundamental in underlining rape as a war crime as well as a crime against humanity.

The greater risk of regional insecurity has increased the likelihood of generating peacekeeping capacity from neighbouring countries in Africa. Somalia and Mali indicate this shift from PSOs meant to saving strangers to PSOs meant to saving neighbours.[34] In Chapter 10, Kuwali and Gudmundur Alfredsson observe that while kin-states can provide assistance and fill capacity gaps to protect populations at risk, their frequent interference and intervention in the domestic affairs of other states has a propensity to destabilise internal and regional peace and security.

32 IRIN Global 'Our bodies, their grounds' available at http://www.irinnews.org/InDepthMain.aspx?InDepthId=20&ReportId=62823 (accessed 27 February 2012).

33 Pearson Peacekeeping Centre 'Sexual and gender based violence' available at http://www.peaceoperations.org/index.php/peacekeeping-resources/topics-of-interest/sexual-and-gender-based-violence/lang/en/ (accessed 1 March 2012).

34 D Kuwali & G Alfredsson 'The responsibility to protect minorities: The question of protection by kin-states' (2014) 71 *Europa Ethnica* 62-68.

The reason is that neighbouring or nearby states usually have strong ethnic, cultural, religious or linguistic links to the minority population across their borders. If the international community – both the human rights and security mechanisms – fails in this responsibility, the danger of kin-states proceeding unilaterally and taking issues of protection of kin-minorities into their own hands will increase. As such, global and regional organisations must build the domestic capacity of states to protect populations, including the rights of minorities, while at the same time, strengthening the tools and political will to deliver timely collective responses when states fail in their responsibilities. Prevention of massive violations of minority rights of the scale of Rwanda in 1994 requires accurate risk assessment and early warning for minority-related conflicts.

In Chapter 12, Anna Larsson and Kuwali plead that safety and security policies should also cater for all humanitarian aid workers, including both national and foreign staff. By way of offering advice to humanitarian agencies, Larsson and Kuwali suggest that humanitarian relief should be provided in the best interest of the beneficiaries, which requires humanitarian agencies to establish solidarity with beneficiaries. As the protection of civilians and provision of humanitarian relief require a secure space to access by the victims, humanitarian agencies should earn the humanitarian space by engaging with, and building relationships to be accepted by, local communities. Larsson and Kuwali further counsel that humanitarian actors should also maintain an apolitical image so that they should be viewed as beneficial contributors to local communities instead of being seen as enemies or strategic military targets. Humanitarian agencies should systematically collect and share relevant information to help avoid future incidents. An important component of this information gathering is a sound understanding of the cultural, political, and socio-economic contexts of the attacks.

In Chapter 13, Thomas Probert advocates the importance of the UN Human Rights Council, by pointing out that the value added by Special Procedures is that of an independent expert in a political body. In this way, Probert states that Special Procedures act as a filter to this political body – with their reports treated as independent evaluations of the significance of a problem in any given situation, offered without politicised bias or agenda. In Chapter 14, John-Mark Iyi's analysis is that since the 1990s, attention has shifted to international criminal tribunals to hold accountable those responsible for perpetrating atrocity crimes, and in doing so, protect civilians during armed conflicts. However, the cases of Rwanda, Sierra Leone, Côte d'Ivoire, and the Central African Republic show that judicial mechanisms as a tool for the protection of civilians in armed conflicts have produced mixed results. If judicial mechanisms are to be effective, particularly in Africa, in Iyi's view, there is a need for a paradigm shift in current institutional arrangements away from the 'global' to the 'regional', whereby judicial mechanisms are located within regional institutions at an intermediate level. For many reasons, regional judicial mechanisms hold

better prospects for the effective protection of civilians in armed conflicts in Africa. It can be argued that justice delivered close to the affected societies may encourage post-conflict reconciliation and emerging democratic forces far more effectively than justice delivered outside the continent.[35]

According to Mphatso Boti-Phiri, in Chapter 15, the fundamental problem in conflict prevention in most African countries has been the lack of an institutional framework and coordinated approach to conflict management. There is a proliferation of a culture of impunity and lack of accountability and transparency in most African countries. For this reason, Boti-Phiri recommends that the strengthening of R2P and article 4(h) should focus on democratic institutions and addressing root causes of internal conflicts that put populations at risk of mass atrocities. Thus, apart from ensuring accountability, long-term preventive efforts focused on reforming institutions within the security sector, the judiciary and electoral management bodies is one of the best routes to the prevention of mass atrocities on the continent. This view is supported by Kuwali, who in Chapter 24 recommends focusing on conflict prevention, managing and resolution, including increasing the participation of women in such processes; local ownership of peace building initiatives, which should include measures that eliminate such forms of inequality in the society and strategically focusing on gender-oriented activities.

In agreement with Nkrumah and Busingye above, in Chapter 16, Neville Dastoor and Kuwali assert that the UNSC is entitled to intervene, or to authorise intervention, in order to prevent or stop atrocity crimes. The UNSC is duty-bound by its role in the maintenance of international peace and security to put on the agenda – and then deal with – those crises that have been referred to it by the Secretariat as urgent. The UN member states, particularly the veto-holders, have a responsibility to enable the UN to fulfil its purposes under the UN Charter. Dastoor and Kuwali commend the adoption of the 'code of conduct' by some P5 members for using the veto with respect to actions needed to stop or avert significant humanitarian crises. This concept, termed 'responsibility not to veto' (RN2V), requires that the P5 should make a commitment not to exercise the veto power in clear situations of mass atrocities.

Dastoor and Kuwali are of the view that to better protect populations, the UNSC should also improve R2P-activation foundations by enhancing its early warning monitoring capabilities, information consolidating capacity, and institutional focus on burgeoning mass atrocities. Although the UNSC has the primary responsibility for the maintenance of peace and security, it has been criticised for inconsistency in discharging its

35 D Kuwali 'From promise to practice: towards universal jurisdiction to deter the commission of mass atrocities in Africa' (2010) 19 *African Security Review* 48-61 49.

responsibility.[36] For example, it was quick to intervene in Libya and has been ambivalent or unwilling to intervene in Syria when the scale of crises has surpassed that of Libya. In Chapter 18, Bright Nkrumah and Godard Busingye encourage the UNSC to establish clear criteria to be used for invoking the R2P to protect civilians from mass atrocities in order to remove a continued perception of selectivity in the operationlisation of the responsibility to protect. In our view, the most pertinent attempt to address these concerns lies in the notion of RN2V,[37] and on-going attempts to muster international support around this issue should be supported – also by African states.

Focusing on the Economic Community of West African States (ECOWAS), in Chapter 17, Buba Bojang provides insights that can be replicated by other regional economic communities to enhance protection of civilians. For example, graduating assessment of a conflict with a comprehensive report of the situation and constantly updating such information; continually engaging the UN Office for the Coordination of Humanitarian Affairs (OCHA) on the implementation of the key components of the civilian protection mechanism; adopting tailored programmes towards enhancing the capacity of the military in the protection of civilians that should include conducting mobile sessions in all participating countries; and establishing an institution of an effective civilian machinery to supervise and monitor troops to ensure accountability, including where there is a failure to perform a specific legal duty to protect civilians.

As noted by Chengeta in Chapter 5, although there is potential for the AU to use tools such as economic sanctions, the AU must take into consideration the low levels of economic dependence among African countries which affect the effectiveness of economic sanctions. At the same time, there is need to take into account the limitations that exist as far as military intervention is concerned. In Chapter 19, Paul Phiri argues that interventions are only meant to produce short term outcomes to assist victims and to end conflicts whereas long term outcomes tend to contribute to resolving conflicts and in rebuilding initiatives. Military can hardly assist in conflict resolution processes, but rather only provide a conducive environment for conflict resolution. For this reason, military interventions

36 D Kuwali 'R2P: Why Libya and not Syria?' available at http://www.css.ethz.ch/content/specialinterest/gess/cis/center-for-securities-studies/en/services/digital-library/publications/publication.html/141088 (accessed 7 April 2017).

37 See 70th General Assembly of the United Nations, Political statement on the suspension of the veto in case of mass atrocities, presented by France and Mexico, open to signature to the members of the UN, in which it is proposed that the principle be agreed upon that the UNSC will 'not be prevented by the use of veto from taking action with the aim of preventing or bringing an end to situations involving the commission of mass atrocities', based on the contention that the veto is 'not a privilege, but an international responsibility'. By the end of 2015, 86 UN member states have subscribed to this statement, of which only 17 were from Africa (see https://onu.delegfrance.org/France-and-UN-Reform (accessed 7 April 2017)).

should be conducted concurrently with conflict resolution processes for their assistance to be effective and in order to achieve both negative and positive peace. Where military interventions take place without the consent of those involved in the conflict, it becomes problematic for the belligerents to actually accept the interveners especially where force is used.

In Chapter 20, Joe Stork asserts that accountability for serious violations of IHL and IHRL is key, both to provide redress to victims and to deter future crimes. For this reason, states should provide justice for the victims by establishing accountability mechanisms for systematic human rights crimes by prosecuting perpetrators. Accountability for violations by state and non-state actors alike is a long-term project requiring human rights defenders, politicians, community activists, religious leaders and scholars, among others, to speak out against atrocities targeting civilians, to counter enabling political environments and to condemn the political aims of the perpetrators of such atrocities.

Drawing lessons from past interventions, in Chapter 22, Noel Morada proposes that the UNSC should adopt mandates that are clear and achievable on the ground and also emphasises the importance of providing more resources, appropriate equipment, and increasing training and capacity building for protection forces. This point is further elaborated by Kuwali in Chapter 24, where he also recommends for a clear understanding of the principle of subsidiarity between the AU and the UN; the provision of adequate mission support, especially resources and logistics; and establishing independent sources of funding for African PSOs. Morada also recommends for the need to ensure safety and security of peacekeeping troops in volatile situations.

In Chapter 23, Gilbert Mittawa suggests that in order to effectively 'save strangers', any protection mission must adopt a political framework that addresses fears of domination and creates incentives for local population to withdraw their support for armed or terrorist groups. It is necessary to mobilise adequate financial resources, and generate robust peacekeeping forces, which includes well-trained and adequately equipped troops. There is also need to cultivate a culture of respecting human rights and humanitarian norms during armed conflict by warring factions through both punitive and preventive measures. To this end, as suggested by Chengeta in Chapter 5, dissemination of IHL to the general public is important because, in most non-international armed conflicts, some of the civilians who have not received any formal military education relating to IHL find themselves participating in hostilities – in particular on the side of armed groups. For those states that are not doing it already, there is a need for integration of IHL into military doctrines, manuals and issues relating to rules of engagement.

Looking at the crystal ball of protection of civilian missions, in Chapter 24, Kuwali recommends that such missions should be reformulated at strategic level to encompass the complexity of missions and the dynamism of the operating environment by balancing military, diplomatic and political assets; establishing a rapid deployment capability; adopting a multidimensional approach to stabilisation operations including enhanced coordination between the various entities in PSOs. More importantly, there is a need to mobilise political will to act and fulfill the mission to protect civilians. Kuwali candidly contends that African actors should go beyond discussing African solutions to African problems and focus more on finding effective solutions, mobilising resources and garnering political will to act decisively.

Taking a holistic view of its contents, it is fair to conclude that this book sheds some light on how to close the conceptual and operational gap that exists as a result of different perceptions of the term 'protection' among the key actors involved in the implementation of various protection of civilians-mandates. Interventions when conflict has decimated whole populations, and holding to account and punishing perpetrators are clearly of great importance, but are – due to their after-the-fact nature – of limited utility to the immediate plight of civilians. Therefore, more attention should continue to be paid to the factors that trigger mass atrocity crimes in the first place. In Africa, the root of all atrocities that trigger article 4(h)-intervention and the responsibility to protect are political and not judicial in nature.

All three types of atrocities that trigger article 4(h)-intervention and the responsibility to protect border on discrimination and political exclusion. Therefore, the solution requires political rather than judicial interventions. To prevent these crimes, there is a need to address factors such as restructuring, and political and economic empowerment of certain disadvantaged classes or groups of people. Unless the political, socio-economic and cultural issues are addressed, neither the use of all necessary means under the twin notions of article 4(h) and the responsibility to protect, nor the ICC will be able to provide a lasting solution to the different abuses that the victims of mass atrocities have witnessed in Africa. As such, instead of focusing on intervention and prosecution as curative medicine after conflicts have erupted and mass atrocities have occurred, the international community should assist Africa to address the urgent political, social and economic problems that incite and ignite these conflicts.[38]

38 See O Okafor-Obasi 'The International Criminal Court and human rights enforcement in Africa' (2005) 12 *ILSA Journal of International and Comparative Law* 87.

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