

## The African Union and the Challenges of Implementing the “Responsibility to Protect”

The concept of the “responsibility to protect” (“R2P”) was endorsed by the world’s leaders sitting at the 2005 World Summit level in the UN General Assembly. The World Summit Outcome Document affirmed that every sovereign government has a responsibility to protect its citizens and those within its jurisdiction from genocide, war crimes, “ethnic cleansing” and crimes against humanity (UN 2005 paras. 138–139). The concept of R2P is cast in the three core pillars: first, an affirmation of the primary and continuing obligation of individual states to protect its population from genocide, war crimes, ethnic cleansing, 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 re-

sponsibility 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. R2P is a restatement of positive binding obligations of states to protect their citizens from mass atrocity crimes; and the collective responsibility to the international community to prevent mass atrocity crimes. R2P is about taking effective action at the earliest possible stage (Evans 2008). These obligations are particularly relevant to Africa in the face of crises such as those in Sudan (Darfur), parts of the Democratic Republic of Congo (DRC) and Somalia. It is, however, rather early to pass definitive judgement on the relatively young notion of R2P without addressing some of the challenges confronting its implementation in Africa.

### The congruence of R2P and the right to intervene under Article 4(h) of the AU Act

The African Union (AU) incorporated the right to intervene in a member state as enshrined in Article 4(h) of the Constitutive Act of the African Union (2000). This 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 (Murithi 2008:16), the outbreak of conflicts involving immense human suffering in the Great Lakes region, the DRC and the Mano River Basin region of West Africa, and the determination to deter the illegal seizure of power in African countries that contributed to the adoption by the AU of a security culture of non-indifference (Williams 2007:253–279). It was within the new peace and security architecture of the AU that the norm of a responsibility to protect was embedded. Acting under this norm, the AU intervened in crises in Burundi and Darfur region of Sudan in 2003. Thus, by 2005, when R2P was adopted at the United Nations a normative basis had been set for the congruence between R2P and Article 4(h).

This applies in respect of the fact that Article 4(h) has the same thresholds for intervention as R2P, although

it does not use the innocuous term “ethnic cleansing”. These thresholds are not only serious international crimes subject to universal jurisdiction but are also crimes that invariably involve a government’s action against its own citizens. The notable differences between the formulation of R2P and Article 4(h) are that: (a) the implementation of R2P is “through the Security Council” whereas the AU Act is silent on the authorisation of the Security Council; (b) R2P can be triggered when the 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; (c) while R2P is a political commitment, Article 4(h) is a legal obligation.

### Challenges to Actualising R2P and Implementation of Article 4(h) of the AU Act

The challenges are basically fourfold. The first challenge is conceptual – that is, to ensure that the scope and limits of Article 4(h) and R2P are fully and coherently understood given that the extent to which R2P has been internalised within African states is highly varied. There is need for a common understanding of what R2P, and by extension Article 4(h), is and what it is not. R2P is not a euphemism

for “humanitarian intervention”, which is coercive military intervention for humanitarian purposes. R2P concerns effective preventive action based on the principle of “sovereignty as a responsibility”. R2P is also distinguishable from “human security”, which is broader in that it encompasses the security of the people, not just state security. Since intervention under Article 4(h) and R2P aims at the prevention of mass atrocity crimes, it seems contradictory to require “grave circumstances” before lives are saved. Preventive intervention is particularly pertinent in cases of impending mass atrocity crimes. This militates against the option to wait for legal ascertainment of Article 4(h) and R2P thresholds.

The second challenge is institutional preparedness – that is, to build the operational capacity within the international institutions, governments and regional organisations, so as to ensure capability to respond to mass atrocity crimes. Although the AU has early warning mechanisms and early response mechanisms, it does not have adequate preventive mechanisms; that is, despite the thresholds for intervention being serious human rights violations, there is no proper coordination between human rights institutions and the mainstream AU organs. For example, Article 19 of the Peace and Security Council (PSC) Protocol provides that the PSC should “seek close cooperation” with the African Commission on Human and Peoples’ Rights (African Commission) “in all matters relevant to its objects and mandate” and that the African Commission should “bring to the attention” of the PSC “any relevant information”. However, it is unclear how and in what form the African Commission should “bring to the attention” of the PSC such information (Levitt 2003:124).

The African Standby Force (ASF) is established, among others, for rapid deployment pursuant to Article 4(h). It constitutes standby multidisciplinary contingents, with civilian and military components in their countries of origin. However, the ASF is not yet capable of regional force projection or sustained, intense combat operations. In particular, most militaries in the region are weak in respect of the maintenance of complex equipment, strategic mobility, advanced command, control, and intelligence, as well as airpower and naval power. There is no doctrine for responding to mass atrocities. While emphasis is placed on early warning, what is needed most is corresponding early action at the sub-regional and regional levels, and the resources and capacity to prevent mass atrocity crimes. The evidence from the African Union’s intervention in Burundi, Somalia and Darfur underscores these challenges as they are relevant to an effective implementation of the AU’s Article 4(h) and the R2P.

Another critical challenge is political will and preparedness to generate effective responses. The AU member states appear to operate according to the norm that the mutual protection of ruling elites is of greater priority than the protection of civilians (Powell and Baranyi 2005). Although Article 4(h) gives the AU the legal mandate to intervene in a member state, AU states may not easily agree to such interventions. Political will to act is the *conditio sine qua non* for any effective intervention. It is political will, not sovereignty considerations, that actually determines whether or not states intervene. Nonetheless, political will may be driven by Article 4(h) which imposes legal responsibility on AU states

to end mass atrocity crimes. This legal duty is strengthened by the political commitment of R2P, which is a mobilisation tool for timely action (CCR 2007:7). Also connected to this is the challenge of mobilizing the political will of AU member states to be proactive in intervening to prevent mass atrocity crimes. It also involves paying attention to the strengthening of national democratic institutions and values, civic education, and the protection of human rights. In post-conflict and transitional states, it will also involve effective peace-building processes and social policies that protect particularly vulnerable groups.

### Beyond Article 4(h) and R2P: From Peer Review to Persuasive Prevention

Development, security and human rights are intertwined in a symbiotic relationship. For this reason, intervention pursuant to Article 4(h) and R2P should be part of a long-term project of conflict resolution and political, economic, and social reconstruction in Africa. Intervention under Article 4(h) and R2P should not be equated with, or be seen through the prism of, military force but rather focus on the entire spectrum of preventive strategies. The challenge for the AU is to develop a political-normative framework and institutional capacity that promotes a culture of prevention and a climate of compliance with international obligations. Since the causes of mass atrocity crimes are complex, they need to be addressed in a comprehensive and coherent manner.

The thresholds for intervention under Article 4(h) are mass atrocity crimes that are subject to universal jurisdiction; international criminal prosecutions may therefore be the most appropriate form of intervention. In this regard, military force may be used to pursue perpetrators of such crimes. However, there are limits to these responses. For example, international criminal accountability is not an answer to the longer-term stability of a target state. Although military intervention can save lives and create short-term security, it cannot necessarily address the underlying causes of mass atrocities. This is where the New Partnership for Africa’s Development (NEPAD 2001) may come in, as it recognises that: “Peace, security, democracy, good governance, human rights, and sound economic management are conditions for sustainable development.” It proposes systems for monitoring adherence to the rule of law to promote respect for human rights, in addition to serving as a check to prevent conditions in a given country from deteriorating into a conflict. Of relevance is the African Peer Review Mechanism (APRM), a voluntary system of self-assessment on the basis of indicators of good (democratic) governance and economic growth, established by the AU, which provides a basis for encouraging and sharing “best practices” among member states.

Unlike membership of NEPAD which is voluntary, all AU states are members of the Conference on Security, Stability, Defence and Cooperation in Africa (CSSDCA 2000). While non-APRM members can be held accountable through other general mechanisms of the AU, under the APRM, however, offending members are deprived of foreign assistance which is conditional on all NEPAD elements of

which good governance and peer review are crucial components. Yet this deprivation is not by itself a panacea for atrocities. The APRM and CSSDCA do not cover non-state actors although these could be responsible for a vast majority of atrocities. This signifies the utility of the concept of “persuasive prevention”, to guide and ensure the consistent compliance by states with their international obligations to prevent mass atrocity crimes, and to prosecute and punish perpetrators of such heinous crimes. The essence of “persuasive prevention” is to secure the full implementation and enforcement of international human rights and human law treaties in a measured way, to prevent mass atrocity crimes under Article 4(h). It is more cost effective to respond when early warning shows that people are vulnerable, than fire-fighting to manage an emergency response.

The “responsibility to persuade” is therefore an important corollary to the responsibility to prevent future mass atrocities. With regard to Africa, the political leadership in African countries needs to work harder to demonstrate belief in, institutionalize, and undertake the processes for implementing the tenets of Article 4(h) and the R2P. Although the institutions of the AU are still relatively young and confronted by challenges of capacity and adequate resources, African leaders will need to devote more attention over time to address these problems. In addition organizations within civil society across the continent have a share in this responsibility for dissuading violent non-state and state actors, while mobilizing the pressure necessary to get the leadership to act in ways that prevent the committing of mass atrocity crimes on the continent.

### Conclusion and Recommendations

The widespread usage of the notion of R2P and Article 4(h) should not obfuscate the principle of state sovereignty in an increasingly integrated and interdependent world. The AU should reduce the need for costly intervention pursuant to R2P and Article 4(h) and focus more on dealing with the causes of crisis than its symptoms. Peer pressure against, and peer review of, oppressive regimes may help close the gap and deter perpetrators and consequently prevent violation. This is not to suggest that the APRM should be part of Article 4(h) and R2P framework. Given the challenges confronting the AU in implementing Article 4(h) and R2P, the idea behind persuasive prevention is to stigmatise the committing of mass atrocities and ostracise the perpetrators, “Persuasive prevention” can fill the void between early warning and early reaction.

#### *Recommendations to the AU and AU Member States:*

- Adopt a broader term of “mass atrocity crimes” for purposes of intervention, while limiting the legal definition for purposes of prosecution; the reasoning being that the thresholds are high, tend to elude proof and leave much room for political discretion. Further, there is an overlap between these thresholds. The downside of a generic term is that it adds a new meaning to the thresholds which the signatory states did not intend and may also open too

culpability of national authorities in causing, allowing, or lacking the capacity to prevent such atrocities. In cases where non-state actors commit heinous crimes, the state, as the primary protector of the rights of its citizens, should act to stop such crimes. Atrocities against citizens are evidence that sovereignty is no longer an absolute shield against international intervention (Stacy 2006:1).

- Ensure a systematic linkage with the United Nations Security Council regarding information sharing, emergency consultation, periodic joint meetings or placement of issues on the agenda to ensure authorization by the Security Council for intervention under Article 4(h) (Murphy 1996:349). The authorization by UN Security Council is a necessary precondition for any enforcement action under the UN Charter regime. However, given that AU states endorsed Article 4(h), when the AU is taking such an enforcement action, within the AU membership, AU states are deemed to have consented to such action. Thus, intervention pursuant to Article 4(h) is treaty-based whose legal consequences are beyond the scope of Article 53 of the UN Charter.
- Provide legal clarity by devising a legal framework for governing intervention under Article 4(h). If the AU decides on intervention without Security Council authorisation, the legal framework should encompass a cumulative checklist of caveats including the criteria and justification for such interventions in accordance with international law (Kuwali 2009).
- Adopt a Protocol on universal jurisdiction in relation to crimes under Article 4(h) and urge member states to adopt universal jurisdiction in their national laws in relation to war crimes, genocide and crimes against humanity in order to facilitate the prosecution and extradition of perpetrators of such crimes under Article 4(h) and to ensure deterrence.
- Urge member states to sign the additional declaration to the Protocol establishing the African Court of Justice and Human Rights (“Single Protocol”), accepting the competence of the African Court of Justice and Human Rights (ACtJHR), to hear cases from NGOs and individuals (Article 8 of the “Single Protocol”; Article 30(f) of the ACtJHR Statute) to ensure the full protection of human rights.
- Urge key governments to persuade and mobilise the international community to take the necessary action when appropriate (Evans 2008:224).

#### *Recommendations to African Regional Economic Communities (RECs):*

- Ensure that support channeled bilaterally and to the RECs does not undermine the AU’s strategic framework (Powell and Baranyi 2005:8).
- Support consistent normative approaches to R2P among the RECs and between the RECs and the AU (Ibid).

*Recommendations to the International Community:*

- Assist the AU in promoting its integrated conception of prevention, reaction and rebuilding among AU member states and other actors (Powell and Baranyi 2005:5).
- Set out clear tasks and timelines to develop the AU's conflict prevention and resolution capacity as a central objective of assistance, while maintaining AU's ownership of the Mechanism (Ibid).
- Strengthen national human rights institutions and ensure that they function under the 1991 Paris Principles that determine international standards for human rights in order to avoid abuse by governments (CCR 2007).
- Provide significant assistance to the African Court of Justice and Human Rights and the African Commission and strengthen interaction between the AU system and African Court and the African Commission.
- Assist to develop the ASF and RECs in peacekeeping capacities and non-peacekeeping tasks such as observation and monitoring, preventive deployment and post-conflict disarmament and demobilisation (Powell and Baranyi 2005:5).
- Promote political will through bilateral policy dialogue (Powell and Baranyi 2005:5).
- On its part the UN Peacebuilding Commission needs to further develop its symbiotic partnership with the AU framework for Post-Conflict Reconstruction and Development based on complementation (Murithi 2008:22).
- The UN should develop the ASF's capacity and capability to protect through the "Ten-Year Capacity-Building Programme for the AU". To avoid tipping fragile civil-military balances, strengthening military institutional capacity should be linked to proportionate investments to ensure that the military is democratically accountable to civilian authorities (Powell and Baranyi 2005:4).

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