

Roundtable on the Responsibility to Protect in Africa:

Concept Paper

1) Overview

Over the past two decades, there has been increasing recognition of the responsibilities of states to protect the populations on their territory from serious violations of international human rights and humanitarian law. In what was widely hailed as a historic breakthrough, the heads of state and government gathered at the 2005 World Summit unanimously affirmed the concept of the responsibility to protect (“RtoP”). According to UN Secretary-General Ban Ki-moon, RtoP, as agreed in the Summit Outcome Document, rests on three pillars.¹ Under the first pillar, the Member States accepted the primary and continuing legal obligations of states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement.² Through the second, more innovative, pillar, they also committed themselves to helping states meet these obligations. By the third, and most discussed, pillar, the world leaders acknowledged the responsibility of the international community to respond in a timely and decisive manner, in accordance with the Charter of the United Nations, to help protect populations where states are manifestly failing to do so. As paragraphs 138 and 139 of the Outcome Document make abundantly clear, that response could draw from the wide range of UN tools, including pacific measures under Chapter VI, coercive ones under Chapter VII, and collaboration with regional and sub-regional arrangements under Chapter VIII of the Charter.

African states have developed their own instruments of national and international law relevant to these situations, and these should be taken into account in considering how RtoP can be operationalized in the African context. Among these are the African experience of decolonization; the 1957 Ethiopian Penal Code’s unusual definition of genocide that includes political groups; Article 4(h) of the African Union’s (AU’s) Constitutive Act of 2000, which specifies the Union’s right of intervention in cases of genocide, war crimes and crimes against humanity (as well as a 2003 amendment, yet to take effect, that provides for intervention in the case of threats to “legitimate order”); Article 30 of the Constitutive Act, under which the AU can refuse to recognize unconstitutional changes in government; and emergent practices and principles of African peacekeeping. Taken together, these provide both the context and a framework for Africa’s distinctive approach to RtoP.

This concept paper is intended to help stimulate discussion of RtoP, including genocide prevention, in the African context at a roundtable to be held in Addis Ababa, Ethiopia, which will be co-sponsored by the Inter-Africa Group, the International Peace Institute, and the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide. This paper briefly outlines conceptual and institutional developments with respect to RtoP at the UN and then explores a number of related issues in Africa.

¹ UN Secretary-General Ban Ki-moon, Address in Berlin, 15 July 2008, U.N. Doc. AG/SM/11701.

² U.N. Doc A/RES/60/1, paragraphs 138 and 139.

2) **Conceptual and Institutional Developments at the United Nations**

An early step in the institutionalization of these conceptual and normative developments at the UN occurred in April 2004, on the 10th anniversary of the Rwandan genocide, when then Secretary-General Kofi Annan established the office of the Special Adviser on the Prevention of Genocide (SAPG) and appointed Juan Méndez to the post at the level of Assistant Secretary-General and on a part-time basis. The Special Adviser's responsibilities are: to collect information on massive and serious violations of human rights and international humanitarian law that, if not prevented, might lead to genocide; to act as a mechanism of early warning for the Secretary-General and the Security Council; to make recommendations to the Council (through the Secretary-General) on preventing or halting genocide; and to liaise with the UN system on activities to prevent genocide and on enhancing its capacity to manage information related to genocide and other serious violations.³

The adoption of RtoP in paragraphs 138 and 139 of the 2005 Summit Outcome Document, and in subsequent resolutions of the General Assembly and Security Council, provided the opportunity to build on this existing architecture.⁴ However, this significant development has not yet been matched by comparable progress either in enhancing the existing international machinery or in generating the necessary political will for effective and timely action. To help remedy this situation, Secretary-General Ban Ki-moon at several points in 2007 underlined his intention to move this agenda forward by “operationalizing” RtoP and turning the Member States’ “words into deeds.” Over the course of 2007-2008, he has taken several steps to begin to address these institutional and conceptual gaps.

In May 2007, he appointed Professor Francis Deng, with a dozen years experience as Special Representative on Internally Displaced Persons (IDPs), to build, on a full-time basis, on the work done by Mr. Méndez.⁵ In December, he upgraded the post of the SAPG to the Under-Secretary-General level. In February 2008, the Secretary-General appointed Professor Edward C. Luck, a long-time student of UN affairs and an adviser during his campaign and the ensuing transition period, as a Special Adviser to the Secretary-General (SASG), at the Assistant Secretary-General level and on a part-time basis, to focus on RtoP.⁶ The SASG's role is three-fold: to lead the efforts to develop a UN system-wide conceptual and policy framework for RtoP based on paragraphs 138 and 139 of the Outcome Document; to identify a series of practical institutional recommendations for improving the performance of the UN and its partners on

³ Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council, Annex: Outline of the mandate for the Special Adviser on the Prevention of Genocide, U.N. Doc. S/2004/567, 13 July 2004.

⁴ In 2006 the Security Council reaffirmed RtoP as set out in the Outcome Document in Resolution 1674 on the protection of civilians in armed conflict – the first official Council reference to RtoP, see U.N. Doc. S/RES/1674, 28 April 2006, para 4. In Resolution 1706 of the same year, the Council recalled its earlier statement in support of RtoP in the specific context of the deployment of the UN Mission in Sudan, see U.N. Doc S/RES/1706, 31 August 2006.

⁵ Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/721, 7 December 2007.

⁶ U.N. Doc. SG/A/1120 – BIO/3963, 21 February 2008.

RtoP; and to engage Member States in an ongoing, substantive dialogue in light of paragraph 139's reference to the need for the General Assembly to continue its consideration of this issue. Professors Luck and Deng will share a joint office, reflecting the close and mutually reinforcing nature of their mandates.

By June 2008, system-wide agreement on a conceptual approach to RtoP had been obtained. It is based not on humanitarian intervention, but on the broader and more positive notion of sovereignty as responsibility, initially developed by Francis Deng and his colleagues at the Brookings Institution in the mid-1990s.⁷ It poses RtoP as an ally, not adversary, of sovereignty, given that protection of populations has always been one of the core duties of the state and a prime rationale for its very existence.⁸ The “bedrock”⁹ of RtoP, according to Secretary-General Ban Ki-moon's first pillar, is the affirmation by the heads of state and government assembled at the 2005 Summit that they accept the responsibility to protect their populations from the four crimes and violations, as well as their incitement, and “will act in accordance with it.”¹⁰ In his words, under the second pillar, “our goal is to help States succeed, not just to react once they have failed to meet their prevention and protection obligations. It would be neither sound morally, nor wise policy, to limit the world's options to watching the slaughter of innocents or to send in the marines. The magnitude of these four crimes and violations demands early, preventive steps.”¹¹

The tough question remains, however: what to do if the first two pillars, which stress prevention and assistance, fail? As both the Outcome Document and the Secretary-General have emphasized, the whole range of tools available to the UN and its regional, sub-regional, and civil society partners could come into play. Under Chapter VIII of the UN Charter, there is a preference for pacific settlement by regional arrangements before bringing local disputes to the Security Council (Article 52(2)). The one, big, caveat is that enforcement action is not to be taken by regional arrangements without the Council's authorization (Article 53(1)). Beyond these legal hurdles, the challenge of building regional and sub-regional capacity for enforcement action remains largely unanswered. As the Secretary-General has rightly noted, “the key lies in an early and flexible response, tailored to the specific needs of each situation.”¹² But until regional and sub-regional capacities are strengthened and global-regional institutional ties enhanced, international responses will be severely handicapped even on those too rare occasions when there is sufficient political will to act. The latter is bound to be undermined, as well, by

⁷ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothschild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: The Brookings Institution, 1996).

⁸ These themes are developed in greater detail in Edward C. Luck, *The United Nations and the Responsibility to Protect* (Muscatine, IA: The Stanley Foundation, September 2008) and Edward C. Luck, “The Responsible Sovereign and the Responsibility to Protect,” in Joachim W. Müller and Karl P. Sauvant, eds., *Annual Review of United Nations Affairs* (Oxford: Oxford University Press, forthcoming 2008).

⁹ Berlin Address, op. cit.

¹⁰ Outcome Document, op. cit., para. 138.

¹¹ Berlin Address, op. cit.

¹² Ibid.

prevalent perceptions of weak capacity or of strains in UN-regional relations. Put another way, one way to strengthen will is to strengthen capacity.

At the UN, Africa is widely seen not only as the birthplace of RtoP as a concept, but also as the place where it was first applied as UN doctrine. The conceptual roots are described in the following pages. In terms of practice, both the Secretary-General and his predecessor, Kofi Annan, saw the post-election violence in Kenya in January-February 2008 through an RtoP lens. Kofi Annan described his approach to his successful mediation efforts there as follows:

I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people. I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say ‘intervention,’ people think military, when in fact that’s a last resort. Kenya is a successful example of R2P at work.¹³

3) The African Context

The post-World War II international architecture, as well as the principles and purposes it was meant to forward, were developed and adopted with little reference to or involvement of Africa, with the notable exception of Ethiopia. The Ethiopian exception warrants closer examination, as it offers the sole available lens through which to view African concerns about, and intentions relating to, the prevention of genocide and other principles of international human rights and humanitarian law underlying the concept of RtoP. Subsequently, Africa’s main engagement with issues relevant to genocide concerned decolonization, and African approaches to genocide prevention also should be seen in this light.

The Organization of African Unity (1963-2002) was, like the UN, largely premised on non-intervention in the internal affairs of Member States. Under the 2000 Constitutive Act of its successor, the African Union (AU), individual Member States are not to interfere “in the internal affairs of another” (Article 4(g)). That is not necessarily the case for the Union, however, as Article 4(h) 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.’ The reference here is to the ‘right of [humanitarian] intervention’ rather than RtoP, but the motivation and force of the provision are similar and arguably clearer. This is an important departure from the non-interference principle and a reflection of how African thinking on sovereignty and the prevention of atrocity crimes had progressed since the completion of the decolonization process.

Despite Article 4(h), African states remain deeply ambivalent about intervention and, to some extent, this has conditioned their approach to the emerging RtoP doctrine. The Euro-American campaign for intervention in Darfur has been met with skepticism and resistance in many quarters, while France’s military operations in Chad are reviving fears that the UN Security Council will use the doctrine of RtoP as a cloak for neo-colonial interventions.

¹³ Roger Cohen, “How Kofi Annan Rescued Kenya,” *The New York Review of Books*, vol. 55, no. 13, August 14, 2008.

The right to intervene in the AU's Constitutive Act should be understood alongside two other important developments in the AU's principles and practice. One is Article 30 of the Constitutive Act, which prohibits the participation of governments that have come to power through unconstitutional means in its activities. The second is the development of the Common Security and Defense Policy and the emerging practices of African peacekeeping. These two developments are discussed further below.

4) Genocide Prevention and African Decolonization

An Ethiopian representative participated in the drafting of the 1948 Genocide Convention, signing it on the first day it was open for signature. Meanwhile, Ethiopian lawyers were already working on a new penal code for the country (promulgated in 1957) that included provisions on genocide, crimes against humanity, war crimes, and provocation and preparation for these acts (Articles 281-286). Working from an earlier draft of Raphael Lemkin's proposed definition of genocide, they included 'political groups' among the list of groups whose attempted destruction could be considered genocide. Thus the "Red Terror," a campaign of political violence aimed at specific political groups, came to be defined as genocide. Prosecutions were mounted only after the overthrow of the Mengistu government in 1991, when the incoming government decided to use the law to hold those responsible to account. On 13 December 2006, former President Mengistu was convicted in absentia of genocide, the first former head of state to achieve this distinction. To date, the Ethiopian case is an anomaly in international legal interpretations of genocide. However, as the sole case in which an African government participated in the drafting of the Genocide Convention and contemporaneously adopted its own national legislation, this case merits serious study.

One of the reasons for the Ethiopian interest in the Genocide Convention was Lemkin's own scholarly work and his definition of the crime. Genocide scholars have tended to focus on the context of the Holocaust and the way in which Nazi crimes influenced Lemkin personally and the international community more broadly. But an examination of Lemkin's writings reveals that he saw the Holocaust as just one instance of genocide among many, and in some ways as an aberration from a paradigm that is actually better suited to imperial conquest and colonial subjugation. Lemkin saw Nazi rule in occupied Europe as an extension of a European tradition of overseas expansion, domination and extermination of indigenous cultures and societies, with notable examples including the Americas, Australia, southern Africa and Algeria.

A fair and expansive application of the Genocide Convention would have brought its provisions to bear on some of the means used by colonial and racist governments to maintain control of subject populations in Africa and elsewhere. Given the locus of power in the UN, of course, this was a political impossibility. However, the impetus for African political mobilization was the principle of self-determination and the potential use of the decolonization mechanisms of the UN to promote sovereign independence.

Africa's liberation from racist rule was completed in April 1994 when South Africa held its first free and fair national elections. It is a tragic irony that the very same month marked the genocide in Rwanda and the beginning of a chorus of calls for international military intervention to halt genocide. That intervention began with the French Operation Turquoise, regarded by many as an exercise motivated more by self-interest than genuine humanitarian concerns. Africa's ambivalence about genocide intervention reflects this sensitivity to perceived Euro-

American double standards and to fears about the implications of abrogating sovereignty, whatever the reason.

5) Understanding the AU Right to Intervene

What is meant by the right of the AU to intervene and how should it be interpreted?¹⁴ The first thing to note is that Article 4(h) stands alone in the Constitutive Act. This reflects the way in which the Constitutive Act followed the EU model rather than the UN model, with the Peace and Security Council only established at the very last moment. Similarly, Article 4(h) was introduced relatively late into the drafting process. Neither the Libyan nor the Malian drafts mentioned the principle.

According to Ben Kioko of the AU's legal department, the clause was framed specifically in the light of the experience of Rwanda in 1994. As the rest of this discussion illustrates, hard cases make bad law – Rwanda is a poor basis from which to draw generalizations. Like all attempts at trying to legislate for the exceptional, Article 4(h) is handicapped by a number of significant tensions and contradictions with other relevant provisions and practices of international law. Among these are the following:

1. Intervention is specified as a right not a duty. The AU as a body possesses an element of discretion, although that is clearly bounded by the three instances noted in 4(h) in which intervention is permitted.
2. It is unclear whether intervention should be described as enforcement action (i.e. as parallel to Chapter VII actions authorized by the UN Security Council in response to a threat to international peace and security) or as a treaty-based obligation. (Alemu prefers the latter.)
3. The relationship between the AU and the UN in such matters needs further explication. For instance, can the AU alone authorize such action or is Security Council authorization needed as well? As noted above, Article 53(1) of the UN Charter suggests the latter. However, while the UN Charter devotes a whole chapter (VIII) to regional arrangements, the AU Constitutive Act only mentions that among the Union's objectives is to "encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights." (Article 3(e)) Neither the AU Constitutive Act nor the earlier OAU Charter make specific reference to Chapter VIII of the UN Charter.
4. According to the protocol establishing the Peace and Security Council (PSC), that body is tasked with recommending intervention to the Assembly, which has the final decision. Article 7(1) of the Constitutive Act specifies that, for non-procedural matters, "the Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union." This procedure is likely to be too time consuming and cumbersome to be operative in urgent instances, such as Rwanda, particularly given the time it normally takes to gather a sufficient international force and to deploy it to where it is most needed once a decision is reached.
5. It is open as to whether Article 4(h) includes non-military measures. They are neither specified nor ruled out.

¹⁴ The following discussion of Article 4(h) draws on the work of Girmachew Alemu, Ben Kioko, and Chidi Odinkalu.

6. Article 4(h) does not pertain to peacekeeping or peace support operations, which are dealt with elsewhere in the AU's legal framework. This leads to a lack of clarity as to how the right is to be exercised. It is important to emphasize that neither AMIS nor AMISOM was authorized under Article 4(h).¹⁵

In July 2003, the AU Assembly proposed an amendment to Article 4(h), using language drawn from the Common African Security and Defence Protocol, adding a fourth circumstance under which the right of intervention could be exercised, namely 'a serious threat to legitimate order [in order] to restore peace and stability to the Member State of the Union.' This amendment will enter into force when two thirds of the Member States have ratified it. It introduces new complications (specifically defining 'legitimate order') and may indicate a shift in the thinking of African leaders towards a state-based order rather than an individual human rights-based one.

5) Constitutional Order in Africa

Article 30 of the AU's Constitutive Act specifies that governments that 'come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.' Unlike the right of intervention, which has not been exercised, this Article has been utilized on several occasions to deter coups d'état or to insist that the instigators of a coup hold elections. Article 30 is part of a tradition of African multilateral statecraft that emerged in the 1990s of refusing to recognize military coups. Through its application in several instances, this principle can be considered part of customary international law in the African context.

The concern motivating Article 30 was the repeated phenomenon of military coups and the growing tendency of incumbents to alter national constitutions so as to enable them to remain in power indefinitely. It has had practical impact on the former and only limited moral suasion against the latter. It should be noted that Article 30 was relevant to Rwanda in 1994, though it would not have specified military intervention. Nowhere in the Constitutive Act are democratic elections specified, although there is an implicit preference for them. Article 30 reflects Africans' deepening recognition of the importance of stability achieved through constitutional order and, as such, is a manifestation of the pressure towards establishing order and the rule of law on the continent.

The proposed amendment to Article 4(h) introduced in 2003 is closer to the spirit of Article 30 than the human rights-inspired wording of the original Article. It brings the Constitutive Act to bear on situations of state collapse as well as grievous violations of human rights and unconstitutional changes in government. It therefore attempts to fill an important gap in the principles and practices of the AU, and is relevant to cases such as Somalia today and, in recent decades, to Liberia and Chad. It is also born of a recognition that the gravest threats to human rights on the continent often arise not because of the abuse of state power (the locus classicus of this is Rwanda 1994) but rather from the breakdown of state power ('legitimate order'). Responding to such situations is every bit as complex a task as halting the kinds of

¹⁵ According to Article 9(1)(g) of the Constitutive Act, among the functions of the Assembly is to "give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace."

grave abuses specified in Article 4(h) and demands a holistic political and security approach to any AU operation or intervention.

When such abuses occur during a period of state collapse, then the policy challenges for the international community are especially acute. The locus of the third pillar of RtoP in African thinking should therefore be sought, in part, in this intersection of intervention, constitutional order, and the restoration of peace and stability in the case of a breakdown of legitimate order. Military intervention alone cannot guarantee constitutional principles, ensure judicial reform, or restore faith in governmental institutions.

6) Emergent Doctrines of African Peacekeeping

Africa is the site of the largest number of peacekeeping operations in the world. The AU has taken the lead in developing a Common African Security and Defense Protocol and in dispatching peacekeepers to some of the most difficult conflicts in Africa, including Burundi, Darfur, Somalia and the Comoros. Through an analysis of these cases of African-initiated peace-related operations, the outlines of an evolving African practice of peacekeeping and protection begin to emerge. As noted above, none of these interventions was authorized under Article 4(h).

The four African peace-related operations comprise a variable geometry of classic peacekeeping (i.e. ceasefire monitoring), expanded peacekeeping and coercive protection, and the restoration of legitimate authority where order has broken down. The most significant innovations in African peace operations have come at the field level, where force commanders have improvised on their mandates to deter abuses (as in Darfur) or to protect and assist civilians (as in Somalia). Such flexibility and creativity in interpreting mandates is significant and is implicitly recognized as such by the AU, which has stood by its field commanders.

The importance of this practice is that it recognizes that the operationalization of the third “response” pillar of RtoP occurs at the tactical level. In real situations of conflict, state breakdown and gross abuses of human rights, civilian protection can be successfully undertaken as an adjunct to the pursuit of other objectives, such as monitoring or enforcing a ceasefire, reconstructing legitimate authority, or implementing provisions of a peace agreement. The fulfillment of RtoP is therefore at once both part of a holistic approach to peace operations and an ad hoc and tactical exercise given the operational constraints on peace support forces.

7) Roundtable on RtoP in Africa

The planned roundtable will bring together leading policymakers and specialists in law, politics and peacekeeping to address the responsibility to protect, including genocide prevention, in the African context. The agenda includes seven sessions: 1) The Responsibility to Protect (RtoP) at the United Nations: The Secretary-General’s Three Pillars; 2) Prevention, Capacity Building, and Rebuilding: Lessons Learned from Kenya, Rwanda, Sierra Leone, and Burundi; 3) The Right to Intervene Under the Constitutive Act; 4) Emerging Principles and Practice in Peace Operations in Africa: Global, Regional, and Sub-regional Perspectives; 5) Protection of Women and Children in RtoP Situations; 6) RtoP in the Horn of Africa: Actual and Potential Collaboration between the UN and Regional and Sub-regional Partners; and 7) Concluding Discussion and Next Steps. As the agenda suggests, the roundtable will consider a number of specific cases in seeking to draw broader lessons about RtoP-relevant prevention, protection, and

rebuilding work on the continent as a whole. By situating RtoP and genocide prevention within these broader currents of debate and governance development in Africa, it is hoped that the roundtable will contribute both to the continuing and intensive discussion of these issues on the continent and to the ongoing debates over how to institutionalize RtoP and genocide prevention in the UN system through the work of the two Special Advisers.