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ASPECTS OF THE EMERGING LEGAL FRAMEWORK BOLSTERING THE RESPONSIBILITY TO PROTECT IN EAST AFRICA AND THE GREAT LAKES REGION

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On various occasions over the past three years, members of the international community, in particular states in the West, have recognized Darfur as the site of the world's worst humanitarian crisis. The United States senate declared the ongoing tragedy "genocide." Non-Western powers and regional bodies have generally not echoed these characterizations. In July 2004, the African Union (AU) explicitly stated that it did not consider the crimes occurring in Darfur to be genocide. Similarly, the League of Arab States did not find "any proof of allegations that ethnic cleansing or the eradication of communities had been perpetrated."¹ Such differing portrayals of the conflict have allowed the Sudanese government, along with other regional actors, to claim that the characterization of "genocide" is a Western attempt to demonize a Muslim state, possibly as a pretext for invasion. The government of Sudan has also made strenuous efforts to control the information that reaches the outside world regarding the reality in Darfur. Sudanese officials have prevented journalists from going to or reporting on Darfur and have arrested and detained several and charged others with "spying."

However, it seems that African leaders although slow to react, have begun to hear the cries from Darfur and around the world. At an AU meeting in October 2006, President Obasanjo of Nigeria noted, "it is not in the interest of Sudan, nor in the interest of Africa, nor indeed in the interest of the world for us all to stand by and see genocide being developed in Darfur." Similarly, in an October 17, 2006 address at Georgetown University, Ellen Johnson Sirleaf, President of Liberia, argued, "civilized nations must not be indifferent to any conflict – internal or external – regardless of the factors that fuel it." This mounting political will around the Darfur crisis thus represents an opportunity for Africa to deliver on the responsibility to protect (R2P).

R2P is an emerging norm of international law which provides that states have primary responsibility to protect their citizens from crimes against humanity, ethnic cleansing, genocide and war crimes, however when a state fails the responsibility falls on the international community. R2P expresses a commitment to action along a continuum, from prevention to rebuilding, with a focus on prevention. The principle was first

¹ See "Report Abstract, League of Arab States Mission to Sudan, 29 April to 15 May 2004": informal English translation.

articulated by the International Commission on Intervention and State Sovereignty in a 2001 report entitled “The Responsibility to Protect.” In September 2005, the international community endorsed central aspects of R2P in the United Nations’ 2005 Summit Declaration. The importance of the principle for Africa has been recognized by the AU and other African regional bodies in East Africa and the Great Lakes region. Such recognition and how it has been converted into practice by the AU, the International Conference on the Great Lakes Region (ICGLR), the East African Community (EAC) and the Inter-Governmental Authority on Development (IGAD) form the subject of this short paper. Whether the emerging regional legal frameworks described herein deliver on the responsibility to protect for Darfur remains a test for them and for Africa.

The African Union

The world summit decision in 2005 was historic, but by 2000, African nations had already moved to enshrine the responsibility to protect in African law. When the AU was founded in 2000 to replace the old Organization of African Unity, African leaders stipulated that achieving the protection of human rights would be a defining principle. With their failure to prevent and halt the Rwandan genocide fresh on their consciences, African leaders agreed that sometimes sovereignty should yield to the principle of protection. The members of the African Union therefore established as a matter of law “the right of the Union to intervene in a member state pursuant to a decision in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”² In making this decision, the AU built upon the steps individual states in Africa had taken in the previous decades to use humanitarian grounds (among others) as a basis for intervention in situations such as those in Uganda and Sierra Leone. The challenge now facing Africa and the African Union is whether it can turn this new rhetoric into reality.

The AU Constitutive Act has reconceived the protection of individuals from grave criminal harm as a collective responsibility of African states. First, the Constitutive Act defines the promotion of peace, security and stability and the promotion and protection of “human and peoples’ rights,” as core objectives of the Union. Second, it identifies “respect for democratic principles, human rights, the rule of law and good governance,” “respect for the sanctity of human life” and “condemnation and rejection of impunity” as among some of the core values which will guide the achievement of those objectives. Most significantly, the Constitutive Act asserts a new, complementary principle aimed at ensuring that interventionist action – of unspecified scope but encompassing a range of possible measures – may be taken “by the Union” in situations where grievous harm is threatened to individuals and populations. Article 4(h) of the Constitutive Act provides for “the right of the Union to intervene in a Member State... in respect of grave circumstances, namely war crimes, genocide and crimes against humanity,” if it is determined necessary by the Assembly of Heads of State and Government, the governing body of the African Union. Taken together, and notwithstanding the prohibition on the use of force and the principle of “non-interference by any Member State in the internal

² *Constitutive Act of the African Union*, art. 4(h).

affairs of another,”³ the adoption of these principles marks a clear normative break with the emphasis by post-colonial Africa on the sanctity of state sovereignty.

The embrace by the African Union of these principles, and the creation of new organs such as the African Court of Justice and the African Court on Human and Peoples’ Rights, which will soon be merged to form one judicial mechanism, the African Court of Justice and Human Rights, have established a fresh foundation for the realization of the Union’s vision that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.”⁴ The challenge now facing the AU is how these principles, powers and mechanisms can be harnessed to both prevent and ensure accountability for international crimes in Africa, against the background of complex political and economic realities on the continent. What is less well known, however, is whether the sub-regional mechanisms echo this continental undertaking.

The International Conference on the Great Lakes Region

First mooted in the aftermath of the 1994 genocide in Rwanda, since the mid-1990s the multi-stage ICGLR process has convened state and non-state actors from across the region, alongside supportive members of the international community, to formulate a plan for the re-generation of the region which recognizes both the interconnectedness of the region’s populations, insecurities and economic instabilities, and the imperative of seeking regional solutions. The first phase of the ICGLR process culminated in December 2006 with the signing of the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact), a comprehensive package of new laws, programs of action and mechanisms, which laid a framework for real change in the region.

The Pact on Security, Stability and Development in the Great Lakes Region

The text of the foundational document of the Great Lakes Pact was signed by the eleven heads of state in December 2006. Article 3(1) of the primary Pact document notes that each of the six core elements⁵ of the Pact forms an “integral part” of the Pact. The Pact comprises therefore not just the primary instrument of the Pact itself but also the Dar es Salaam Declaration (the ICGLR foundation stone signed in December 2004), ten Protocols, four Programs of Action (including 33 priority projects), and a set of implementing mechanisms and institutions (including the Special Fund for Reconstruction and Development). These instruments reflect an ambitious package of undertakings around issues including economic integration, mutual defense, resources development and human rights.

³ *Constitutive Act of the African Union*, Article 4(g).

⁴ *African (Banjul) Charter on Human and Peoples’ Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁵ These six elements include the primary Great Lakes Pact document, its Protocols, Programmes of Action, the Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region.

Central to the Pact is a series of ten Protocols which contain the necessary additional legal framework elements for achieving the four priority areas identified in the Pact's primary document: economic development and regional integration, democracy and good governance, humanitarian and social issues and peace and security. An integral part of the Pact is also the Programme of Action, a collection of inter-linked projects designed to ensure that the new legal standards are converted into practice and that the objectives of the Pact are achieved.

The Pact and R2P

The Pact is a huge instrument with multiple elements and a full analysis is not possible in this short reflection. What follows is an overview of selected elements of the Pact, which relate most directly to the R2P imperative.

At least five of the 10 Protocols that form the legal backbone of the Pact deal with aspects of ensuring the responsibility to protect, in all of its three progressive stages of obligation (preventing, reacting, rebuilding). Taken together, the Pact's Protocols furnish new, regionally specific tools to fight impunity for international crimes, seek solutions to burgeoning conflict, better protect the displaced and create sustainable solutions and intervene in situations of mass atrocity. The scope of the Pact with respect to the potential to bolster R2P in the region is clear from a simple reading of the names of the ten Protocols:

- Protocol on the Protection and Assistance of Internally Displaced persons (IDP Protocol);
- Protocol on the Property Rights of Returning Persons (Property Protocol);
- Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (Sexual Violence Protocol);
- Protocol on the Prevention and Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity (IC Protocol);
- Protocol on Democracy and Good Governance;
- Protocol on Judicial Cooperation;
- Protocol on Non-Aggression and Mutual Defense in the Great Lakes Region (NA Protocol);
- Protocol on Management of Information and Communication;
- Protocol Against the Illegal Exploitation of Natural Resources; and
- Protocol on the Specific Reconstruction Zone.

The R2P Principle Acknowledged

The Protocol on Non-Aggression and Mutual Defense in the Great Lakes Region explicitly acknowledges the prior obligation of states in the region with respect to the principle of the responsibility to protect. Article 4(8) of the NA Protocol notes that the prohibition on the threat, or use of force in the Protocol "shall not impair the exercise of their [member states'] responsibility to protect populations from genocide, war crimes,

ethnic cleansing, crimes against humanity, and gross violations of human rights committed by, or within a State.”⁶ The contours of the circumstances which may trigger the exercise of the responsibility to protect set out in Article 4(8) of the NA Protocol could be interpreted as more expansive than those described in the AU Constitutive Act. Further, the Protocol comes close to suggesting that R2P may be exercised by a group of states acting of their own initiative (the requirement to act “collectively” under the NA Protocol is not explicit in requiring “all” Great Lakes member states to act and does not seem to require prior authorization): viz “[t]he decision of the Member States to exercise their responsibility to protect populations in this provision shall be taken collectively, with due procedural notice to the Peace and Security Council of the African Union and the Security Council of the United Nations.”⁷

Notable also is the need acknowledged in the NA Protocol for collective action to disarm and dismantle rebel groups in the region alongside the “joint and participatory management of state and human security” on common borders.⁸ Article 5 of the Pact instrument refers to, and lays out the principle elements of the NA Protocol. Uniquely with respect to the discussion of the Protocols in the Pact instrument, the Pact stipulates explicitly that if states fail to comply with both Article 5 of the Pact and the NA Protocol itself, then an extraordinary summit may be convened to consider appropriate action.⁹ Article 28 of the Pact reinforces the principle that states undertake to settle their disputes peacefully, including through good offices, investigation, mediation, conciliation or any other political means within the framework of the ICGLR’s regional follow-up mechanism.

The Protocol on Democracy and Good Governance should also be read in tandem with the provisions for R2P in the NA Protocol. In particular, Chapter X of the Protocol provides for the convening of an extraordinary session of the heads of state in the event of “threats to democracy and a beginning of its breakdown by whatever process and in the event of massive violations of human rights in a Member State.”¹⁰ Article 49 of the Protocol provides that a series of “urgent and appropriate measures” should be taken by the summit to put an end to the situation, including sanctions against the responsible member state, “with a view to returning to normal institutional life and the respect of human rights.” This potential scope of this summit mechanism should be explored in tandem with the responsibility to protect principle as expressed in the NA Protocol, which does not seem to circumscribe the types of action that could be contemplated by states acting collectively.

⁶ *Pact on Security, Stability and Development in the Great Lakes Region*, Protocol on Non-Aggression and Mutual Defense, art. 4(8).

⁷ *Pact on Security, Stability and Development in the Great Lakes Region*, Protocol on Non-Aggression and Mutual Defense, art. 4 (8).

⁸ *Pact on Security, Stability and Development in the Great Lakes Region*, art. 5(1)(c).

⁹ *Pact on Security, Stability and Development in the Great Lakes Region*, art. 5(1)(d).

¹⁰ *Pact on Security, Stability and Development in the Great Lakes Region*, Protocol on Democracy and Good Governance, art. 48.

Impunity and the Prevention and Punishment of Mass Atrocity

The elements of R2P that seek to prevent and combat impunity for mass atrocity are also addressed by the Pact. It is entirely appropriate that the Great Lakes Pact contains a Protocol on the prevention and punishment of serious international crime: the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity (IC Protocol). The genocide in Rwanda in 1994 and the massive failure of the international community to respond with effective measures of prevention and accountability, both prior to the disaster and then to the outflow of refugees which followed, was the spark which ignited a decade of conflict in the Great Lakes region. Finding ways to prevent such atrocities in the future, and ensuring that those who commit them will be held responsible, was from the beginning of the Great Lakes process recognized as an essential element in constructing long-term solutions. As the African experts who looked at the implications of the Rwanda genocide for the future of the region urged, “a culture where all human rights abuses are punished must replace a culture where impunity for such abuses flourishes.”¹¹

The IC Protocol constitutes a remarkable effort to deal with the question of serious international crime in the region a comprehensive manner. It contains a mix of criminal law and human rights law provisions, dealing not just with the prosecution of offenders (particularly with regard to identifying the appropriate jurisdiction for prosecution), but also with the systematic or contextual root causes of such crimes, including through setting up early warning mechanisms and addressing the need to combat “discriminatory ideologies and practices.”¹² The Preamble to the IC Protocol recognizes the inextricable linkages between impunity, insecurity and under-development, expressing deep concern about “the endemic conflicts and the persistent insecurity aggravated by the massive violations of human rights, the policies of exclusion and marginalization, the impunity of the crime of genocide, war crimes and crimes against humanity.” It also emphasizes each state party’s duty to “exercise its criminal jurisdiction over the perpetrators of the crime of genocide, war crimes, and crimes against humanity.”

The Protocol on Judicial Cooperation (JC Protocol) complements the IC Protocol. In agreeing the JC Protocol, states were animated by deep concern about “the upsurge in crime aggravated by impunity which together exacerbate a climate of insecurity in the Great Lakes Region.”¹³ The objectives of the JC Protocol, as expressed in its Preamble, are, therefore, to combat impunity for crime in the Great Lakes region, extend reciprocal judicial and police cooperation between states, particularly with respect to extradition, and fill the institutional gaps and enhance the protection of citizens of the countries of the region and their property. The JC Protocol creates a framework for the handling of extradition requests in respect of such crimes covering a range of issues such as

¹¹ “Rwanda: The Preventable Genocide,” Report to the OAU by the Panel of Eminent Persons, Chapter 24, III, para II.

¹² *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*, Chapter II, Article 5.

¹³ *Pact on Security, Stability and Development in the Great Lakes Region*, Protocol on Judicial Cooperation, Preamble.

procedures relating to the accused and convicted persons (Article 7), concurrent requests by states (Article 12), the regulation of preventative detention and release (Articles 8 and 9) and cooperation in respect of investigations and prosecutions (Chapter III) including the creation of joint investigation commissions (Article 17) and exchange of information (Article 21).

The East African Community and IGAD

The Great Lakes process is not the only sub-regional process or organization with the capacity to contribute to enhancing the legal framework for advancing R2P in the region - the EAC and IGAD also have their part to play.

The East African Community

Although not an organization primarily devoted to peace and security issues or founded as a conflict resolution forum, elements of the EAC legal framework do resonate with the R2P principle. First, the Treaty for the Establishment of the East African Community upholds the principles of respect for human rights in accordance with the African Charter on Human and Peoples Rights. Article 6 and Article 123(3)(c) clearly state that promotion and protection of human rights is one of the fundamental principles that shall govern the achievement of the Community's objectives. The EAC Development Strategy 2006-2010 reinforces this and provides for the development of strategies and programs towards the promotion and protection of human rights in East Africa.

There is much energy around reinforcing these commitments through legal amendments to the Treaty both at secretariat level and in regional civil society. The Ugandan organization Kituo Cha Katiba has led advocacy efforts around the formulation of a regional bill of rights that would be enforced by the Community's Court of Justice. Extension of the jurisdiction of this Court is also under consideration, which could, it has been suggested, be extended to embrace individual criminal responsibility (whether through an occasional mechanism or permanently). A draft Protocol on Conflict Early Warning and Response Mechanism, which references coordination and collaboration with the other regional economic communities and the AU, is circulating and joint meetings on small arms and light weapons and joint exercises for peace operations training, counter-terrorism and disaster management have been undertaken.

There may be fertile ground here to pressure the Community to enshrine principles that recognize collective obligations in situations where gross violations of human rights are being committed. As the Community advances towards a Federation, other countries such as Sudan will be agitating to join and there is expected to be an ever-greater emphasis on human rights imperatives. On September 18, 2007, in discussions on the possibility of incorporating a Bill of Rights into the Treaty, Ambassador Juma Mwapachu, the Secretary-General of the East African Community, commented that although the EAC has in the past concentrated on economic integration, the need to address good governance and human rights issues had come to the fore. He said the draft Bill of Rights initiative was "the beginning of tackling the human rights and good governance issues

that we should have done in the past 10 years.” He also suggested that the network of the existing national human rights commissions in member states could be formed into an East African Human Rights Commission, which would be the first port of call for preventing human rights violations and protecting victims, with the East African Court of extended jurisdiction the last resort.

Inter-Governmental Authority on Development

Regional peace and security has always been an “area of cooperation” for IGAD, however a full strategy has yet to be developed. The objectives of the draft IGAD peace and security strategy are:

- Facilitation of the development of appropriate national-level mechanisms to promote national peace and security within the context of common core values;
- Appraisal of structures and mechanisms for conflict early warning, management and resolution within the region and across its boundaries;
- Achievement of consensus on aims, principles and benchmarks for the promotion of regional peace and security; and
- Monitoring and supporting post-conflict transitions.

Two significant initiatives related to these objectives have already emerged. First, in furtherance of the appraisal of structures and mechanisms for conflict early warning, IGAD has implemented a Conflict Early Warning Response Mechanism (CEWARN), with a mandate to “receive and share information concerning potentially violent conflicts as well as their outbreak and escalation in the IGAD region, undertake analysis of the information and formulate options for early response.”¹⁴ CEWARN is developing incrementally and is initially focused on pastoralist conflicts, in particular those in the “Somali cluster” and the “Karamoja cluster.” CEWARN is clearly relevant to the prevention aspect of the responsibility to protect, and it will be interesting to watch as it develops beyond its initial focus on pastoralist conflicts. Second, in connection with conflict management and resolution within the region and across its boundaries, IGAD has taken on a number of mediation roles, in particular in relation to the Sudanese Comprehensive Peace Agreement, for which IGAD appointed Kenyan General Lazaro Sumbeiywo to lead mediation efforts, and in relation to the Somali conflict. While embryonic in its development, the emerging IGAD strategy around peace and security represents a further aspect of the regional legal framework for delivering on the responsibility to protect in Africa.

Conclusion

The importance of delivering on the responsibility to protect is perhaps nowhere more pronounced than in East Africa and the Great Lakes region, in particular in Darfur. African regional bodies have endorsed the principle, have the legal capacity to deliver on it, and have begun generating the legal architecture within which to do so. However, the

¹⁴ *Protocol on the Establishment of a Conflict Early Warning and Response Mechanism for IGAD Member States*, Annex, Part I, art. 1(a).

development of the legal framework to bolster the responsibility to protect in East Africa and the Great Lakes region exists along a spectrum: it is clearly articulated in the case of the AU, slightly less so in the case of the ICGLR, and it continues to take shape in the cases of the EAC and IGAD. There is thus a clear role for civil society to play in fostering the emergence of a legal framework responsive to the responsibility to protect, and which delivers on it in practice. It is hoped that the proceedings of the present conference will contribute to the production of, among other things, key suggestions on how civil society might shepherd the development of a regional legal framework for the responsibility to protect, and will energize participants in this regard.