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POSITION PAPER

PRETORIA SYMPOSIUM ON PREVENTING ATROCITIES AND PROTECTING CIVILIANS IN AFRICA “All Means Necessary”: Bridging the Gap between the Doctrine of R2P and the Actual Protection of Civilians in Armed Conflicts

Introduction

The Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa, with the assistance of the United States Africa Command (AFRICOM) through the Africa Military Law Forum (AMLF), held a symposium at the University of Pretoria, South Africa, from **18 to 19 September 2014** on the theme: **“All Means Necessary”: Bridging the Gap between the Doctrine of R2P and the Actual Protection of Civilians in Armed Conflicts**. The Symposium brought together over 80 high ranking military officers of African states, academics, policy makers, and other practitioners in the field of protection of civilians who discussed, shared experiences and provided lessons learnt in order to find solutions to the legal, policy, and practical challenges involved in the drafting and adoption of the mandates for the protection of civilian (POC) by the United Nations (UN) Security Council and their implementation on the ground.

The objective of the Pretoria Symposium was to identify innovative and effective means of preventing mass atrocities, and in the event of failure to prevent, explore how the humanitarian agencies and 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 goal of the Pretoria Symposium was to contribute to cultivating ‘culture of protection’, the reduction of the vulnerability of civilian populations, and to ensuring greater compliance with International Human Rights Law (IHRL) and International Humanitarian Law (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 conflicts. The Symposium provided recommendations to guide military and humanitarian actors in the protection of civilians and prevention of mass atrocities, focusing on the African continent.

Key Legal and Policy Issues

The following are the key legal and policy issues that emerged from the Pretoria Symposium:

Providing Legal Clarity on Protection of Civilians, Article 4(h)-intervention and the Responsibility to Protect:

- The protection norms of POC, Article 4(h) and R2P raise concerns of misinterpretation and misuse. The norms are evolving – sometimes in parallel, sometimes diverging and sometimes converging – with varying degrees of institutionalization and acceptance. POC is not only a moral imperative to save lives but it is also rooted in IHRL and IHL obligations to

prevent harm to endangered civilians and ameliorate their suffering in armed conflicts. The duty to protect its citizens against violations by private entities and State agents is a positive obligation of a State under IHRL. For humanitarian agencies, POC involves the protection of vulnerable population from widespread threats of violence, coercion, and the deliberate deprivation of aid. In this sense, POC includes all activities aimed at ensuring the full respect for the rights of the individual. Physical protection is a matter of power, especially the police and the military and not NGOs or humanitarian organisations, as it is beyond their capacity.

- 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. The right of intervention in Article 4(h) is conferred on, and should be carried out by, the AU as a continental body—not individual States or Kin-States. Similarly, R2P provides that, if national authorities are manifestly failing to protect their populations from genocide, war crimes and crimes against humanity (including ethnic cleansing), the international community has the responsibility to respond in a timely and decisive manner through the UN Security Council. The notion of R2P is cast in the following three core pillars. First, an affirmation of the primary and continuing obligation of individual States to protect its population from mass atrocities, as well as incitement thereof. Second, a commitment by the international community to assist States in meeting these obligations; and third, the international community's responsibility to respond in a timely and decisively manner, using appropriate diplomatic, economic, humanitarian and other peaceful means to protect populations, including collective enforcement measures under Chapter VII of the UN Charter.
- AU's Article 4(h)-intervention is similar in implementation as the coercive component of the third pillar of R2P. Both Article 4(h) and R2P are linked to, although distinct from, the POC agenda, which is a framework for UN diplomatic, legal, humanitarian, and human rights activities directed at the protection of population during armed conflicts. POC addresses protection issues more broadly in specific cases of armed conflict, Article 4(h) and R2P apply only to cases where populations are threatened by genocide, war crimes, and crimes against humanity regardless of whether or not the situation can be characterized as an armed conflict.

Rationale for Protecting Civilians in Armed Conflicts:

- States, third States, non-State actors and the international community as a whole have legal obligations to respect and ensure respect of IHRL and IHL. While IHL is *lex specialis* in armed conflicts, IHRL is still applicable in armed conflicts subject to derogation. To ensure respect of, and compliance with, the law, soldiers should be trained in both IHL and IHRL, which should be translated into domestic laws and implemented holistically, with strengthened compliance mechanisms at the international and regional levels.
- The only legitimate targets in armed conflicts are combatants and military objectives. Civilians and civilian objects must be spared from attacks at all times. Wilful killing in international armed conflicts and murder in non-international armed conflicts are prohibited. Those responsible are subject to prosecution. Dehumanisation of individuals on the basis of identity should be prohibited and criminalised.

Implementation of Article 4(h)-intervention and Pillar Three of R2P in Accordance with the Law

- Members of the UN 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. The UN Security Council has the primary (but not exclusive) responsibility for the maintenance of international peace and security. The endorsement of Article 4(h) by AU

Member States and the commitment of R2P by UN Member States may curtail the discretion of the UN Security Council to remain indecisive in the face of mass atrocity crimes in the form of genocide, war crimes, and crimes against humanity. Where there is a legitimate case of Article 4(h) and R2P, intervention to protect populations from mass atrocities may be undertaken by the AU, if, and only if, the UN Security Council is either unwilling or unable to act due to extraneous factors and in situations where such enforcement action may serve as a last resort (*ultimum remedium*) if other diplomatic means would clearly be inadequate. However, military intervention without the authorization of the UN Security Council, is unlikely for an intervention to gain credibility and international support including funding.

Means and Strategies for Protecting Civilians and Prevention of Atrocities

- Since Article 4(h), R2P and judicial means tend to be reactive, more focus should be on proactive means to protect endangered populations on the continent through respect for, and compliance with, IHRL and IHL obligations. Where domestic courts are dysfunctional, international courts should be engaged to avoid impunity and ensure accountability of perpetrators of atrocities. Regional courts form an important component of the Africa's Peace and Security Architecture (APSA) and should be proactive in the protection of civilians and prevention of atrocities, including eradication of structural causes of conflicts and post-conflict peacebuilding.
- The ready availability of, and access to, small arms and light weapons (SALW), including prevalent use explosive and indiscriminate weapons with wide impact in densely populated areas, occasion excessive incidental death, injury and destruction of vital civilian objects further fuelling displacement and inhibiting return of IDPs and refugees. Africa should enhance its disarmament and non-proliferation strategies in order to better protect civilians on the continent.
- Conflict prevention in Africa requires country specific interventions with effective early warning and rapid response mechanisms. States should eradicate the structural causes of conflicts through, among others, strengthening the rule of law and democratic institutions, reducing youth unemployment through skills development, transparency and accountability in resource management and eradicating impunity within political elites.

Protection of Specific Populations at Risk

- Genocide and crimes against humanity (ethnic cleansing) have illustrated the dangers of failing to protect minority groups. Achieving effective participation of minorities and ending their exclusion requires embracing diversity through the promotion and implementation of international human rights standards. 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. But unilateral interference by Kin-States can raise tensions with host-states, thereby endangering international peace and security.
- Fanning the flames of ethnic, religious and sectarian hatred and violence exacerbates conflicts, thereby increasing the perennial instability and fragility of many conflict-affected States. Governments should accord to minorities the same rights accorded to other citizens, and identify the conditions that tend to disenfranchise certain minorities and by enacting legislation that addresses those conditions. However, legislation alone cannot end discrimination against minorities without changing attitudes and prejudice. Majorities must rid themselves of the assumption of entitlement, and minorities must eventually break free of the helplessness and suspicion induced by prolonged discrimination. States and non-State Actors should make a deliberate effort to promote equality and non-discrimination. Armed

conflicts have serious impact on children, often creating both physical and emotional scars, for those who survive. Recruitment of child soldiers will remain a major challenge despite an extensive legal framework prohibiting this scourge unless underlying socio-economic factors facilitating the use of child soldiers are addressed such as extreme poverty and lack of education.

- States should address the root causes to eradicate the scourge of sexual and gender based violence (SGBV), including addressing societal attitudes which regard women as being of lower value than men. Perpetrators of SGBV must be held accountable and to avoid impunity. Soldiers must be held accountable not only for violations committed directly by themselves but also if they do not report violations of which they are aware. Training, awareness raising and discipline are key interventions for armed forces to prevent SGBV from their ranks.

Protection of Civilians in Armed Conflicts

- Third States often do not have altruistic reasons for intervention in other countries. The best verification of right or noble intentions (*recta intentio*) is to avoid unilateralism and to proceed by collective, multilateral interventions. Differences in mandates (Chapter VI and Chapter VII) within the same mission area may cause confusion to the troops on the ground and create problems which may include jeopardizing the safety of the troops with a lesser mandate.
- Understanding of the background and the nature of the conflict is key when the UN Security Council is creating a mandate to protect civilians. Intervening force/s should be able to balance the typologies and the strategies once on the ground in order to accomplish their mission. In a protection of civilians' mandate, typologies of saving victims of atrocities and defeating perpetrators would encompass strategies of deterrence and compellence. Intervention forces should be independent, neutral and objective in order to gain the trust and confidence of the victims.

Strengthening the Role of Humanitarian Institutions in Protection of Civilians

- The overt politicization of aid and polarization of States around humanitarian issues require a distinction and separation of principled humanitarian action from other aid initiatives. As protection of civilians and provision of humanitarian relief require a secure space to access the victims, humanitarian agencies should earn the humanitarian space by engaging with, and building relationships to be accepted by, local communities. Humanitarian actors should maintain an apolitical stance so to as beneficial contributors to local communities instead of being seen as enemies or strategic military targets. Humanitarian agencies should also 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 socioeconomic contexts of the attacks. Security policies should cater for all humanitarian aid workers, including both national and foreign staff. It is crucial that parties to the conflict allow and facilitate humanitarian access so that the needs of affected people may be addressed in an impartial manner.
- Civil Society has a crucial role to participate in, or lead the effort of, protecting civilians. Civil Society should promote awareness of protection of civilians and prevention of atrocities as well as contribute to the designing of policies and strategies and strengthening State institutions in protecting civilians and prevention of mass atrocities.

- The protection of civilians is a shared responsibility. The primary responsibility is that of the individual sovereign state. If this State is unable or unwilling to protect its population, the residual responsibility transfers to the international community. To ensure a coherent and coordinated approach to protection of civilians and prevention of atrocities, regional and sub-regional actors should work closely with, and in partnership with, international actors, particularly the United Nations.

Strengthening Accountability for Protecting Civilians in Armed Conflicts

- States should strengthen their national investigating and judicial structures to close the impunity gap. It remains the rule that States have the primary responsibility to exercise jurisdictions over mass atrocity crimes. Where the State is oblivious to international pressure and fails to comply with its human rights obligations, perpetrators of those atrocities are not likely to be punished. An effective way to deter mass atrocity crimes in such cases may be to expose the individual perpetrators to risk of international prosecution. Pursuing individual accountability contributes not only to comforting victims, but also to reconciliation and the restoration of peace, as well as deterrence and the prevention of future crimes. Institutionalising universal jurisdiction can spread the web of jurisdiction to fill any jurisdictional vacuum and diminishing safe havens for perpetrators of serious crimes under international law such as those stipulated in Article 4(h) and R2P. Hence States should enact legislation unequivocally providing for universal jurisdiction for Article 4(h) and R2P crimes.

Ensuring Accountability and Responsibility while Protecting

- Implementation of Article 4(h) and R2P Pillar Three should focus on saving lives from mass atrocity crimes. 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. Stretching the concept or abusing the concept to disguise regime would result in withering international consensus. The intervening forces should – not overstep but rather – implement any given mandate according to the letter and spirit of the relevant mandate.
- A military humanitarian campaign should be conducted strictly in accordance with the principles of IHL. An intervening force must have adequate personnel, training and equipment to dominate any force that might challenge it. 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. Troops that commit offences against the very same victims they are saving should be held accountable.

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