The Responsibility to Protect IDPs in Africa

This paper explores the responsibility to protect (R2P) as an organizing concept for preventing, addressing and finding durable solutions to internal displacement in Africa. Whilst the most innovative norms for protecting the forcibly displaced have been conceptualized in Africa, they have not durably addressed displacement due to limitation in implementation. R2P has similarly faced criticisms emanating from lack of clarity and distrust. Restated norms underlying Internally Displaced Persons (IDPs) frameworks and R2P complement each other, and can be simultaneously operationalized, through a more credible regional approach, to encourage effective protection of IDPs in Africa. Pillar one, two and non-coercive elements of pillar three of R2P, and its underlying moral principles are explored whilst employing Kenya as a case study in the process of seeking to secure state responsibility for the protection of displaced civilians victimized by mass atrocities.

Keywords

IDPs, R2P, Africa, Kenya, post-election violence,

INTRODUCTION

This article argues for marrying existing and emerging normative and institutional mechanisms related to the concepts of Responsibility to Protect (R2P) and internal displacement in Africa. It seeks to identify their convergency and, or complementarity, and utilises this to set out a conceptual argument for state responsibility, within the context of preventing and responding to internal displacement. The Kenyan 2008 post-election violence is explored as a pivotal case study on how the convergence of R2P norms and Internally Displaced Persons (IDPs) protection mechanisms, can be employed to collectively prevent, or address the plight of the internally displaced in Africa. This final section also draws out the limitations and possibilities of such approach. First, it highlights the relevance of political interest and the importance and viability of a regional as opposed to a purely internationally driven operationalization. Secondly, it emphasizes the limited replicability of this approach, due to its dependence on very particular contextual factors.

Engaging R2P within an internal displacement context is not new. [1] However, most scholarly work has focused on either one or the other, failing to simultaneously centre them both within a civilian protection context. Despite sovereignty as responsibility being recognised as an antecedent to R2P, and IDPs often being victims of crimes that fall within the ambit of R2P, the uptake of the R2P norm in IDPs protection has been slow.[2] Notwithstanding these gaps, the spirit of R2P is reflected in normative and institutional frameworks for civilian protection in Africa, including those on internal displacement.[3] This best reflects Francis Deng's work

[1] E Mooney "Something Old, Something New, Something Borrowed … Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection" (2010) 2/1 *Global Responsibility to Protect* 60 at 63; R Cohen "Reconciling R2P with IDP protection" (2010) 2 *Global Responsibility to Protect* 15 at 20.
[2] Mooney ibid.
[3] The African Union (AU) Constitutive Act, 2001 OAU Doc. CAB/LEG.23.15 adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July 2000 - Lome, Togo, art 4h; Protocol relating to the Establishment of the Peace and

which pioneered both IDPs protection and R2P through the concept of sovereignty as responsibility, eventually underpinning the Guiding principles on internal displacement.

The Guiding principles are the conceptual and legal foundations for a system to protect IDPs.[4]They comprise what has been described as minimum international standards for the treatment of IDPs, by clarifying gaps and covering all phases, and causes of internal displacement.[5] The IDPs system was contested from the outset, but it was eventually agreed that a distinctive regime for their protection was needed.[6] IDPs protection needs emanating from civil wars, forced relocations and serious human rights abuses required a rethink in approaches to sovereignty, humanitarian action and operations.[7] Francis Deng, the first United Nations Secretary General's (UNSG) Representative on the Human Rights of IDPs negotiated for a protection system that balanced out the above concerns by emphasising the need to re-configurate and re-understand sovereignty, not just as a right, but also a duty.[8]

> Sovereignty as responsibility posits primary responsibility for the welfare and safety of IDPs with their governments. However, when governments are unable to fulfil their responsibilities, they should request and accept offers of aid from the international community. If they refuse or deliberately obstruct access and put large numbers at risk, the international community has a right and even a responsibility to take a series of calibrated actions. These range from 'diplomatic demarches to political pressures, sanctions, or, as a last resort, military intervention.' State failure to provide protection and life-supporting assistance 'legitimized the involvement of the international community'.[9]

The concept of responsibility to protect, first conceptualized as sovereignty as responsibility, assigns the main responsibility for welfare and safety of civilians (including IDPs) on their states, in pillar one.[10] If unable to fulfill their obligations, these states are required to request, be offered and accept support from the community of nations, as pillar two prescribes.[11] Pillar three dictates that any unwillingness or deliberate obstruction of access, resulting in protection or material risks of civilians, including IDPs, is grounds for timeous and decisive

---

Security Council of the African Union (PSC Protocol), adopted at First Ordinary Session of African Union Assembly 9 July 2002- Durban, South Africa, art 7e; The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the Special Summit of the Union, adopted 23 October 2009- Kampala, Uganda, art 8; International Conference on the Great Lakes Region, Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to Internally Displaced Persons (GLR IDP Protocol), adopted 30 November 2006-Nairobi, Kenya; E Luck "Sovereignty, choice and the responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 10 at 15; UN Guiding Principles on Internal Displacement, 1998 (E.CN.4/1998/53/Add.1) (E/CN.4/1998/53/Add.2) principles 3, 25; The Guiding principles reflect a wider ambit of human rights protection than the R2P Principle, or Article 4 (h) of the AU Constitutive Act which are limited to mass atrocities; For a disambiguation of the relationship between R2P, art 4 (h) and the protection of civilians, see D Kuwali, "Article 4 (h), the responsibility to protect and the protection of civilians" in D Kuwali and F Viljoen (ed) *By All means Necessary: Protecting Civilians and Preventing Mass Atrocities in Africa* (2017, PULP) 16 at 24-26.

[4] 'IDPs' is not a closed description, but a factual state which triggers legal consequences; Brookings Institution, *Protecting Internally Displaced Persons: A Manual for Law and Policy Makers* (2008, Brookings) at 11.

[5] L Juma "The narrative of vulnerability and deprivation in protection regimes for internally displaced persons (IDPs) in Africa: An appraisal of the Kampala Convention" 2012 (16) *Law Democracy and Development* 219 at 226; Guiding principles introduction, para. (3) above note 3; These gaps included consensus, applicability, and ratification gaps; F Deng "The plight of the internally displaced: a challenge to the international community" (2004) at 2 available at: http://www.brookings.edu accessed on 12-09-2020.

[6] UNHCR "Internally displaced persons" *The State of the World's Refugees: Human Displacement in the New Millennium* (2006, Oxford University Press) 153 at 166-167; Cohen above at note 1 at 17; See S Ogata *The Turbulent Decade: Confronting the Refugee Crisis of the 1990s* (2005, W.W. Norton & Company) at 38; See also Javier Perez de Cuellar, former UN Secretary general, as quoted in R Cohen and F Deng *Masses in Flight: The Global Crisis of Internal Displacement* (1998, Brookings Institution) at 1.

[7] T Weiss and D Korn *Internal Displacement: Conceptualization and its Consequences* (2006, Routledge) 11 and 29.

[8] Deng and Cohen above note 6 at 24; F Deng "The impact of state failure on migration" (2004) 15/4 *Mediterranean Quarterly* 16 at 17; Id at 17.

[9] Cohen and Deng id at 7; F Deng *Protecting the Dispossessed: A Challenge for the International Community* (1993, Brookings Institution) at 14-20; Deng et al *Sovereignty as Responsibility: Conflict Management in Africa* (1996, Brookings Institution), at 2-19, 27-33.

[10] Protection against mass atrocities such as genocide, war crimes, and crimes against humanity, including ethnic cleansing

[11] Cohen above at note 1 at 20.

intervention from the international community within the confines of the United Nations Security Council (Chapter VII), possibly cascading through to regional organizations.[12] Such intervention could range from diplomatic efforts, political pressure and sanctions, to military efforts. The legal obligation to protect civilians lies with their government as its state responsibility. R2P facilitates owning up to such responsibility. Accordingly,

> …the obligation imposed on states by humanitarian and human rights law to refrain from refusing reasonable offers of international assistance, makes it difficult to dispute the existence of a duty to accept such offers.[13]

The reconciliation of these analogous principles of sovereignty and fundamental human rights was institutionalised through international norm setting initiatives,[14] and eventually reflected in African frameworks.[15] R2P norms within African Union (AU) frameworks are more than an organizing political principle. They generate collective legal obligations for member states of the AU to respond to mass atrocity crimes because they are embedded in the AU Constitutive Act, which all its member states have signed.[16]

This elevates state obligations for civilian protection and non-discrimination which underpin the AU framework.[17] It also emphasizes that within the context of the framework, including the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), there is outright acknowledgement that states take primary, but not exclusive responsibility for protecting and assisting the internally displaced.[18] This recognizes that in certain cases, states may be unable or unwilling to do so.[19] Such states are required to request support and cooperate with necessary actors in order to protect and assist IDPs, failure of which justifies collective action.[20] Such action would be operationalized within the context of article 8 (1) and (2) of the Convention, which prescribes AU intervention.

The Convention is largely based on provisions of the Guiding principles, integrating international human rights and humanitarian law norms as they relate to internal displacement. It also incorporates principles from African regional instruments such as the African Charter on Human and Peoples' Rights (ACHPR), and the International Conference of the Great Lakes (GLR) IDP Protocol, giving it an African character, in response to the unique African context.[21] The GLR Process which occasioned the 2006 Pact on Security, Stability and

---

[12] AU Constitutive Act, above at note 3 art 3(f).
[13] Cohen and Deng above at note 6 at 277.
[14] K Annan, Annual Report of the Secretary General to the General Assembly SG/SM/7136 GA/9596 20 September 1999 at 20; Report of the International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (2001, IDRC) at 6; UN General Assembly, World Summit Outcome 2005 Resolution A/RES/60/1, 24 October 2005, para. 138-139; UN Resolution 1674 of April 2006; Resolutions 1261 and 1325 condemning the deliberate targeting of internally displaced children and women and Resolution 1400 extending the mandate of the United Nations in Sierra Leone (UNAMSIL) for the protection of IDPs which specifically mentions R2P in this context.
[15] A Bellamy "Realizing the responsibility to protect" (2009) 10/2 *International Studies Perspective* 111 at 122; R Thakur *United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (2006, Cambridge University Press) at 255; G Evans *The Responsibility to Protect:Ending Mass Atrocity Crimes Once and For All* (2009, Brookings Institution) at 36-38.
[16] Kuwali, above at note 3 at 22, 23; Kampala Convention above note 3 art 4 (h, j).
[17] P Orchard *Protecting the Internally Displaced: Rhetoric and Reality* (2019, Routledge) at 7; C Beyani "State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law" (1995) 7 *International Journal of Refugee Law*130 at 132; Art (9 and 10) of International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Supplement No. 10 (A/56/10); Abebe *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017, Routledge) at 10; Kampala Convention above at note 3 arts 5(1), 9(1)(a); Guiding principles above note 3 principle 3(1).
[18] Kampala Convention id preamble and art 5(1); Guiding principles ibid.
[19] Kampala Convention id arts 5 (2) (3) (6), (7).
[20] Ibid; This happens where there are mass atrocity crimes proven to have been systematic and planned. Not all IDP situations justify R2P action. The GLR intervention framework offers wider protection than the AU intervention framework.
[21] M Asplet and M Bradley "The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)" (2013) 52/1 *International Legal Materials* 397 at 397; Kampala Convention above at note 1 at preamble; The

Development in the Great Lakes Region (GLR Pact) and IDP protocol, was an intergovernmental process set up to address peace, security and development. As a collectively binding norm making platform, accountability measures accompanied its framework to ensure adoption, domestication and implementation.[22] The GLR has taken noteworthy steps in attempting to redress the protracted and cyclic crises of internal displacement. The sub-region is also the first in Africa to have done so. Subsequently, lessons from the process and initiatives thereof have influenced the AU continent-wide framework on international justice, peace and security, including responses to internal displacement.[23]

This article highlights that evolving R2P and IDPs regimes within the African context have conceptually, legally and morally presented a crucial and distinctive contribution to the development of law in this area. It shows that such efforts predate global responses to internal displacement and are influenced by the genealogy of African states, which was always conscious of, and highly fraught by the crisis of displacement. The article goes beyond existing work in this field by using Kenya as a case study to show how developments of both R2P and IDPs regimes have been uniquely elaborated and implemented in Africa to enhance civilian protection. Simultaneously, this case study highlights the protection potential, effectiveness and limitations of rallying for IDPs protection through R2P. The 'successful' invocation of the norm in Kenya is widely contested.[24] Criticisms focused on the failure to anticipate and prevent the post-election violence, whilst overlooking the nuanced responsibility to react and rebuild. This article posits that while prevention is an important aspect of protection, including, under certain circumstances, obligating the due diligence of states to take all reasonable measures of prevention,[25] Kenya teaches us not to overlook other dimensions of R2P short of military intervention, when prevention is no longer possible, especially within displacement contexts.

CHASTENED SOVEREIGNTY AND COLLECTIVE RESPONSIBILITY IN AFRICA

Reconciling sovereignty with collective responsibility to protect civilians in Africa

Conflict-led mass atrocities in Africa, like in other parts of the world, precipitated the process of reconciling sovereignty with the protection of civilians, by committing to collective intervention.[26] In some of these conflicts, including in Rwanda, African countries were forced to fend for themselves, due to delayed and politicized responses from the international community.[27] Consequently, the Organisation of African Unity

---

African Charter on Human and People's Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3, rev.5; GLR IDP Protocol above note 3.

[22] These included ensuring IDPs participation in norm domestication; Regional programmes of action, Regional follow up mechanisms and a coordinating committee; D Clancy "Lessons from a State of Flux: The International Justice Laboratory of the Great Lakes Pact" in L Oette *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (2016, Routledge) at 199.

[23] Clancy ibid.

[24] Cohen above at note 1 at 21; S Sharma "The 2007-2008 Post-Election Crisis in Kenya: A success story for the Responsibility to Protect" in J Hoffman and A Nollkaemper (ed) *Responsibility to Protect: From Principle to Practice* (2012, Pallas publication) at 30.

[25] S Rosenberg "Responsibility to Protect: A Framework for Prevention" (2009) 1 *Global Responsibility to Protect* 442 at 443.

[26] S Dersso "The African Union's agenda on the protection of civilians: A review of its ambition and practice' in D Kuwali and F Viljoen (eds.) *By All means Necessary: Protecting Civilians and Preventing Mass Atrocities in Africa* (2017, PULP) at 396; Cases in point: Somalia, Democratic Republic of Congo, Liberia, Sierra Leone, and Rwanda.

[27] A Adebanjo *The Curse of Berlin: Africa After the Cold War* (2010, Hurst) at 40.

(OAU) Summit in Tunis,[28] presented an opportunity for the OAU, the AU's predecessor, to articulate for the first time, a system of collective response to prevent, respond to and rebuild after mass atrocities:

> [R]wanda stands out as a stern and severe rebuke for 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.[29]

In the years that followed, when Africa's Peace and Security Architecture was being set up, the above views were reiterated by the first AU Commissioner for peace and security:

> No more, never again. Africans cannot watch the tragedies developing on 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.[30]

The acknowledgement of responsibility to protect by African governments has evolved substantially. Sub-Saharan African states with the exception of Zimbabwe[31] were significantly avid supporters of the adoption of resolution 1674[32] which reaffirmed the UN World summit's provisions on the doctrine of responsibility to protect.[33] States like Rwanda insisted on the 'necessity of collective R2P', whilst Benin 'signaled its full support' and Tanzania, with some reserve, endorsed R2P insisting that 'when governments fail or are unable to offer such protection, we should have a collective responsibility to protect humanity'.[34] A similar view was shared by South Africa, Ghana, and Republic of Congo.[35]The above approach has resulted in a strong civilian protection agenda, including frameworks set up to address internal displacement in Africa.

Normative and institutional aspects of collective responsibility in Africa

Starting with the transformation of the OAU to the AU, the centrality of the agenda for collective protection of civilians has been echoed in the institutional and normative systems of the African Union, as it has at the global stage.[36] The institutional aspect has been reflected through the architecture for African Peace and Security. The main pillar of this architecture is the Peace and Security Council, provided for by the 2002 Protocol to the AU Constitutive Act on Peace and Security (PSC Protocol).[37] The normative aspect emphasizes the re-

[28] A Abass and M Baderin "Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union" (2002) 49/1 *Netherlands International Law Review* 1 at 6.
[29] N Mandela, as quoted in R Omaar and A De Waal *Rwanda: Death, Despair and Defiance* (African Rights, 1995) 1138; Dersso above at note 26 at 398.
[30] Ambassador S Djinnit, AU Peace and Security Commissioner quoted in K Powell, "The African Union's Peace and Security Emerging Regime: Opportunities and challenges for delivering on the Responsibility to Protect" (ISS Monograph No. 119, 2005); Dersso ibid.
[31] Bellamy above at note 15 at 113.
[32] S/RES/1674 April 28 2006.
[33] Bellamy above at note 15 at 114.
[34] Ibid.
[35] Id at 114, 115.
[36] OAU Sirte Declaration of 9 September 1999; AU Constitutive Act above note 3 at preamble, art 3(h, g), art 4 (o, m, h) and PSC Protocol above note 3 at preamble; OAU 37th Summit, Report of the Secretary-General on the Implementation of the Sirte Summit Decision on the African Union, OAU Doc. AHG/Dec. 1 (v) (July 9-11, 2001).
[37] PSC Protocol adopted in line with art 5(2) of the AU Constitutive Act.

conceptualization of sovereignty, echoing provisions of the International Commission on Intervention and State Sovereignty (ICISS) framework which conceptualized sovereignty as follows:

> …Sovereign states have the primary responsibility for the protection of their people from avoidable catastrophe, from mass murder, rape, starvation…but when they are unable or unwilling to do so, the responsibility must be borne by the wider community of states.[38]

This framework reflects Deng's three pillars, which became a cornerstone of his conceptualization of 'sovereignty as responsibility', as a basis for garnering global consensus on IDPs protection, and eventually collective responsibility through R2P.[39] For African states, collective responsibility is re-constituted regionally, as anticipated under the UN Charter.[40] Echoed within the Common African position on R2P (Ezulwini Consensus), African states have clarified their commitment to implementing R2P through the AU.[41] So far, such implementation has prioritized pillar one and two, as well as non-coercive elements of pillar three which are less political, over the often-forceful militaristic elements.[42]

This development has constituted a drastic turn away from earlier interpretations of principles of sovereignty and non-intervention, which had prioritized state security, territorial integrity and political authority to the detriment of human security.[43] The definition of sovereignty has strongly metamorphosed to reiterate, reassert and re-emphasize obligations and duties of individual and collective sovereign states towards the protection and upholding of citizens' and residents' rights.[44] Responsible sovereignty, which is the political and intellectual capital of the R2P doctrine, departs from the narrower idea of humanitarian intervention, which is state-centred.[45] Instead, R2P is victim oriented, it introduces a culture of national and international accountability and is a mobilization tool to effect timely reaction to humanitarian crises.[46]

In Africa the re-conceptualization of absolute sovereignty is also rooted in the African Charter on Human and Peoples' Rights.[47] Traces of this view can be found in the Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) among others. [48] Unlike under the OAU Charter, the AU Constitutive Act now reflects in its objectives and principles, a strong democratic and human rights content found in the above human rights instruments, where it emphasizes, the promotion and protection of human and peoples' rights and the sanctity of human life, dignity and

[38] ICISS Report above at note 14 at 6.
[39] 2005 World Summit Outcome Resolution above at note 14 at Para 138, 139; Kuwali above at note 3 at 21; The 2005 World Summit outcome resolution also notes the possibilities of the R2P framework for the question of IDPs, and the bolstering of their protection through the Guiding principles.
[40] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VIII article 52(2) and 53 (1).
[41] The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus, Executive Council 7th Extraordinary Session, 7–8 March 2005 Addis Ababa, Ethiopia. Ext./EX. CL/2 (VII) 6.
[42] J Iyi "Emerging powers and the operationalisation of R2P in Africa: The role of South Africa in the UNSC" (2014) 7/1 *African Journal of Legal Studies* 149 at 160.
[43] Charter of Organization of African Unity (OAU) adopted on 25 May 1963 in Addis Ababa, Ethiopia and entered into force on 25 October 1965, art 3 (para.1, 2, 3 and 5); C Clapham *Africa and the International System. The Politics of State Survival* (1996, Cambridge University Press) at 110-111; D Wemboue, "The OAU and International Law" in Y El Ayouty, *The Organization of African Unity After Thirty Years* (1994, Praeger) 15 at 17; Abbas and Baderin above at note 28 at 9-13.
[44] Deng 2004 above at note 8 at 3.
[45] A Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009, Polity Press) at 111.
[46] Center for Conflict Resolution (CCR) "Africa's responsibility to protect" (Policy Advisory Group Seminar Report, 23-24 April 2007 Somerset West, South Africa) at 7.
[47] B Kioko "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention" (2003) 85 *International Review of the Red Cross (IRRC)* 807 at 820; ACHPR above at note 21, art 20 (1); The Charter affirmed the right to equal protection of the law, without discrimination (art 3.2, 2), the right to freedom of movement and residence (art 12.1), the right to the respect of human dignity, and prohibited all forms of exploitation and degradation of man (art 5). It also affirmed the right to liberty and security
[48] The Universal Declaration of Human Rights, GA Res 217 A(III) of 10 December 1948, art 21 (3); and the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) of 16 December 1966, art 1.

freedom.[49] These instruments refer to the will of the people as a basis for government authority and good governance.[50] This has further made it necessary to re-assert the self-determination doctrine which in effect demands respect for people's sovereign rights over a state's sovereignty. As Depaigne puts it:

> The sovereign is no longer the king, but the nation. Sovereignty is tied to human rights. The sovereign derives its legitimacy from the freedom and well-being of its constituent parts, the individuals. This relation is reciprocal, human rights legitimize the sovereignty of a nation and, in turn, this sovereignty legitimizes human rights.[51]

The new institutional framework of the AU requires all its members to observe the above fundamental values and standards, in addition to democratic governance and the discouragement of unconstitutional changes of government.[52] A state that fails to do so may face among others, political and economic sanctions.[53] The AU Assembly which is the supreme organ[54] of the Union is responsible for deciding on intervention through article 4 (h) of the Constitutive Act. The article sets out a new paradigm of human rights, collective responsibility and intervention within the context of peace, security and international justice, specifically in cases involving genocide, crimes against humanity and war crimes (mass atrocities). A co-relating duty is placed upon states to request intervention from the Union in order to restore peace and security.[55]

The Constitutive Act's amending Protocol closely mirrors the above norms by empowering the Peace and Security Council (PSC) to make recommendations to the AU's Assembly to intervene where the necessary and usual provisions for intervention do not apply, but circumstances require it.[56] This has effectively widened the ambit of intervention, going beyond mass atrocity crimes, to include situations that are not classic R2P, but where there is a threat to legitimate order or peace and security. The Protocol establishing the PSC reiterates these provisions for intervention in its article 7 (e), 4(j) and 4(k).[57] These norms are eventually reflected in the Kampala Convention which cross-references the intervention right and duty of the AU.[58] Cross-reference between the AU civilian protection and intervention framework, and the Kampala Convention, strengthens arguments for collective responsibility as an implementation tool for IDPs protection regimes. This has created a normative, institutional and enforcement system for civilian protection, including what could be considered a duty to ensure favorable conditions for finding durable solutions to internal displacement.

In-depth African conceptualization of responsibility to protect is also seen in the way the AU Constitutive Act embraces the three levels of action prescribed by the report of the ICISS. These include prevention, reaction and post conflict reconstruction within the three pillars of responsibility; at state level,

---

[49] Article 3 (e) (h) and (g), art 4 (m), (o), (h), and (j) of the AU Constitutive Act; Deng et al. above at note 9 at 1.
[50] Deng above at note 28 at 4.
[51] V Depaigne "Dis-locating sovereignty? states, self-determination and human rights" (2007) 10 *The Bologna Center Journal of International Affairs* 35 at 37.
[52] Kioko above note 47 at 807.
[53] AU Constitutive Act, art 23 (2).
[54] Id art 6.
[55] Id art 4(j).
[56] Serious threats to legitimate order or restoring peace and security; Kioko above note 47 at 815; Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 3 February 2003 and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003; Kampala Convention above note 3, art 8 (1).
[57] Similar principles are recognized within it as a basis for intervention, including, where the Assembly deems so, in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (as per art 4(h) of the Constitutive Act), or where there is a request by a member state in order to restore peace and security, in accordance with Art 4(j) of the Constitutive Act.
[58] Spells out obligations of the African Union, including reiterating its rights to intervene as per art 4(h) of the AU Constitutive Act, and the obligation to respect a member state's right to request intervention as a way of contributing to the creation of favourable conditions for finding durable solutions to the problem of internal displacement.

through support and capacity building, and finally collective action on inability or unwillingness to act.[59] Pursuant to this, the AU PSC was created in 2004.[60] The fifteen-member council supports prevention, management and resolution of conflicts on the continent. It functions as a form of collective security and early warning system that provides timely and effective responses by the AU to conflict situations.

The PSC is a source of authority on intervention on the basis of civilian protection against mass atrocities, during times of crisis and peace, as an implementer of article 4(h) and 4(j) of the Constitutive Act. PSC subsidiary bodies set up to support this task include the Peace Fund, Early Warning System, the Panel of the Wise and Africa's Standby Force. These institutional capacities of the AU's PSC are collectively the foundation for implementing the two dimensions of the responsibility to protect, namely prevention and reaction.[61] Article 14 of the PSC Protocol outlines the institutional capacity for peace-building, which reflects the third R2P dimension of post conflict reconstruction, in line with the AU Policy on Post Conflict Reconstruction and Development (PCRD). Under this article, the PSC is empowered to undertake activities which include, the resettlement and reintegration of refugees and internally displaced persons, as well as providing assistance to vulnerable persons, closely mirroring the role of the UN Peacebuilding commission.[62] The PSC's role reflects a common understanding that protection, assistance and finding durable solutions to displacement, can prevent further displacement and future crises, thus maintaining peace and security.

R2P AND THE EVOLVING DISPLACEMENT FRAMEWORK IN AFRICA

The OAU had co-existed with humanitarian crises and forced displacement from its inception. Consequently, in June 1969, the OAU adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa, which was anchored in the then exemplary African culture of generosity and solidarity, as a Pan-African solution to the refugee crisis on the continent.[63] The 1979 Arusha conference and follow-up international conferences and high-level meetings on refugees in, and on Africa, reinforced basic humanitarian and solidarity principles elaborated in the OAU convention on refugees.[64] Since then, the OAU/AU has convened several sessions,[65] to elaborate these humanitarian and solidarity principles.[66] These efforts culminated in the 2009 Kampala Plan of Action on Forced Displacement in Africa pronounced through the Kampala Declaration.[67]

The Declaration became a foundation for the Kampala Convention.[68]The convention is a landmark instrument that has established common regulatory standards for IDPs in Africa by consolidating existing

[59] CCR above note 46 at 20.
[60] PSC Protocol above note 3.
[61] CCR above note 46 at 20.
[62] The protocol recognizes the relationship between conflict and forced displacement, provides for the role of the PSC in humanitarian coordination and also explicitly acknowledges that conflicts have forced millions of people in Africa, including women and children to flee.
[63] Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969, entered into force 20 June 1974, 1001 UNTS 45; M Sharpe *The Regional Law of Refugee Protection in Africa* (2018, Oxford) at 5.
[64] Arusha Recommendations; ICARA I Recommendations- Report of the Secretary-General: International Conference on Assistance to Refugees in Africa (ICARA I), Geneva 11 June 1981, A/36/316; ICARA II Recommendations- Report of the Secretary-General: Second International Conference on Assistance to Refugees in Africa, Geneva 9–11 July 1984, A/39/402; Oslo Declaration and Plan of Action, adopted 9 June 1999; OAU, Khartoum Declaration on Africa's Refugee Crisis, 24 September 1990, BR/COM/XV/55.90.
[65] The Addis Ababa Document on refugees and IDPs, 1994, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8-10 September 1994, Addis Ababa, Ethiopia.
[66] The Kampala Convention came into force on 6 December 2012, with 31 ratifications and 40 signatures as of 18/06/2020.
[67] The Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa calls on and declares the intention of the African Union to address various facets of displacement, including that of internal displacement.
[68] The Kampala Convention is the first binding legal framework in the world related to IDPs.

norms, whilst breaking new ground. It relies heavily on the Guiding principles and reflects them in its preamble, whilst regarding them as a legal source of its principles and objectives. It goes beyond them to non-exhaustively provide for displacement factors unique to the African context including, harmful practices, unregulated development projects and people with special attachment to land.[69] Lastly, it clarifies obligations for states, the African Union, international and humanitarian organisations, as well as non-state actors, grounding itself on state responsibility and the responsibilities of other actors and entities.[70]

Elaboration of the right not to be arbitrarily displaced, underscores the novelty of these provisions. By broadly and non-exhaustively outlining acts that are deemed a violation of the right, the Convention goes beyond delineations of this existing right in international law, to specifically respond to forced displacement in Africa. Even though arbitrary displacement is considered a harm rather than a crime under the Convention, acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity are required to be declared by states as offenses punishable by law. A corresponding obligation is placed on states to ensure responsibility for acts of arbitrary displacement.[71] In emphasising IDPs rights, the responsibilities of governments and the international community, the right not to be arbitrarily displaced elevates IDPs protection from a moral imperative to a legal duty whose violation calls for state accountability. [72]

The obligations the Convention places on relevant actors are in line with the principles underlying R2P, starting with obligating member states to protect populations from internal displacement and prevent it.[73] It then obligates member states as foremost bearers of responsibility for protection and assistance during displacement, to ask for support where they are incapable of providing what is required.[74]This is coupled with placing obligations on the AU to: support member states in protection efforts, respond to member states that request intervention in accordance with article 4(j), or take bold steps to intervene pursuant to article 4 (h) where the states are unwilling to request support, but IDPs needs require it.[75] Embedded within these provisions are core pillars of R2P, first shouldered by the state, then a duty to support and assist by a collective of African states, followed by a collective responsibility to react and intervene where the circumstances call for it in accordance with relevant law. The responsibility to reconstruct and rebuild, while not so obvious, can be extrapolated from provisions of the convention on durable solutions and compensation.[76]

The Africa-wide approach on preventing and addressing internal displacement through collective responsibility owes it genesis to initiatives taken within the GLR. The region was indeed, the first in Africa where, in the mid-1990s, the UN Security Council invoked Chapter VII powers to authorize humanitarian intervention to respond to the internal displacement of persons, refugees and civilians at risk.[77] Internal displacement within the sub-region has been persistent, protracted, cyclic and a constant consequence of conflict and unregulated projects. These realities have led to the sub-region's responses preceding and influencing the AU continental approach. The sub-region is not only one of the parts of the world most affected by the phenomenon of IDPs, but it is also one of the few regions which sought to develop a legal and political

[69] Kampala Convention above note 3 art 4 (4), 10, 4(5).
[70] Id art 2 (d, e), 3, 4, 5, 6, 7(5), 8 and 9.
[71] Id art 3 (1)(g)(h)(i).
[72] Principle 3, 25 and 27 of the Guiding principles; Id art 3, 4.
[73] Id art 3 and 4.
[74] Id art 5-9.
[75] Id art 8 (1,2,3).
[76] Id art 11 and 12; Clancy above note 22 at 198.
[77] S/RES/925 (1994) 8 June 1994 Para 4 and 5; S/RES/929 (1994) 22 June 1994 Para 3 and 4.

framework for holistically addressing matters of peace, security and development, including the issue of internal displacement.[78]

The GLR Pact consists of a set of legal frameworks, programmes of actions, and mechanisms that bear amongst other things, collective commitments to integrate economically, but also undertake mutual defence, and responsibility to protect within the context of international criminal justice.[79] At least ten of the protocols that make up the Pact reflect responses to mass atrocities, including R2P trigger factors, which are consequences or causes of forced displacement.[80] These, and the peace and security elements of the Pact, present a toolbox for preventing and addressing mass atrocity for member states of the GLR individually and collectively.[81] The GLR IDP protocol was the first common sub-regional binding framework in Africa and globally to define roles and responsibilities for a wide range of stakeholders operating in displacement settings. Its objective is to establish frameworks in which the Guiding principles can be adopted. Together with the GLR Pact, it obligates member states to incorporate IDPs Guiding principles into their national legislation as a goal for achieving commonality in peace and stability, reconstruction and development.[82] The Kampala Convention heavily drew on the Guiding principles, but also borrowed from the GLR IDP protocol, taking its provisions a step further. In addition to defining who an IDP is, the convention defines the process of internal displacement as

> The involuntary, or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized State borders.[83]

Both the Guiding principles and the GLR protocol failed or avoided to define the process of displacement itself. Defining the process takes into recognition additional factors such as forced evacuation or relocation, and thus easily provides for situations of forced eviction or transfers which are hardly recognized as internal displacement triggers, but are prohibited under international humanitarian law.[84] Thus, the convention provides wider protection in line with international law, and this extends to its recognition of environmental disasters and development as displacement factors.[85] The IDP protocol incidentally extends on this by definitively including development within its definition of IDPs, [86] unlike the Guiding principles, [87] or the Convention.

The GLR pact has been instructive for the wider Africa process of intervention to protect civilians at risk by incorporating special provisions for the forcibly displaced. This has included addressing atrocity crimes

[78] UN Security Council Resolution 1291 and 1304 on the establishment of the International Conference of the Great Lakes Region (ICGLR).
[79] International Refugee Rights Initiative (IRRI) Report, In the Interests of Justice? Prospects and Challenges for International Justice in Africa. (IRRI, 2008) p. 45 available at: http://www.vrwg.org/downloads/in-the-interests-of-justice.november-2008.pdf accessed on 23-04-2020.
[80] These are the Protocol on the Protection and Assistance of Internally Displaced Persons; the Protocol on the Property Rights of Returning Persons; the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children; the Protocol on the Prevention and Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity; the Protocol on Democracy and Good Governance; the Protocol on Judicial Cooperation; the Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region; the Protocol on Management of Information and Communication; the Protocol Against the Illegal Exploitation of Natural Resources; and the Protocol on the Specific Reconstruction Zone.
[81] International Refugee Rights Initiative (IRRI), "Some Reflections on the Legal and Political Mechanisms Bolstering the Responsibility to Protect: The African Union and the Great Lakes, Eastern, Southern and Horn of Africa Sub-Regional Arrangements," http://www.refugeerights.org/Publications/2008/R2P%20RECs%20Discussion%20paper.102108.pdf, accessed 2-11-2020.
[82] L Mulamula "Genocide Prevention: Experience of the International Conference on The Great Lakes Region (ICGLR) Regional Forum on Genocide Prevention" (3rd -5th March 2010) Arusha, Tanzania, available at http://www.icglr.org/images/LastPDF/GENOCIDE_PREVENTION_Mulamulapaper_2.pdf (accessed on 23-04-2020).
[83] Kampala Convention above note 3 art 1(i).
[84] The Fourth Geneva Convention bans individual or mass forcible transfers in article 49 below; See Protocol Additional to the Geneva Conventions below at note 113; and art 17 of the Second Geneva Protocol below at note 113.
[85] Kampala Convention above note 3 art 9 and 10.
[86] GLR IDP Protocol above note 3 art 1; Deng and Cohen above at note 6 at 17.
[87] Principle 6(2) (c) of the Guiding principles above note 3.

like genocide, war crimes and crimes against humanity, including ethnic cleansing which constitute R2P trigger elements, and are displacement causing factors. For instance, in terms of these atrocity crimes, the pact through relevant laws, including the Genocide protocol,[88] collectively obligates states to refrain from causing, and to prevent and punish such crimes, whilst ensuring strict observance of the said undertakings by all national, regional and local public authorities and institutions.[89] The GLR Protocol on Non-aggression and Mutual Defence also provides a legal basis for regional action against non-state armed forces within the region who are responsible for committing some of the crimes outlined above, and thus contributing to displacement. These frameworks set out regional cooperation platforms to fight negative forces, in recognition of the responsibility to protect civilians from serious violations.

In addition to introducing a protocol to deal with IDPs, the GLR process also introduces a protocol on the property rights of returning populations, a protocol on sexual violence and protocols to address some of the root causes of flight in the GLR.[90] This has worked towards ensuring effective transitional justice processes, reinforcing stability, security, setting pace for peacebuilding processes and reconstruction.[91] These are important for maintaining peace and preventing any future displacements, whilst supporting durable solutions to displacement. The process is not perfect, or rather, as a laboratory for international justice, the GLR process is not yet perfected. Major setbacks stem from political contestations, that are heightened by racialised, ethnicised and sectarian policies of discrimination. This feeds into, and results from marginalisation and exclusion dating back to the colonial project of state building within the region.[92] This has paired with the incomplete transition to democracy, and state-polarity, reflected strongly in cross border ethnic strife, to create a difficult cycle of pockets of instability. This volatility is exacerbated by the proliferation of small arms, exploitation of abundant natural resources and related impunity, which altogether remain a challenge to the successful completion of peacebuilding, reconstruction and finding durable solutions to internal displacement.[93]

Yet the GLR process also offers great opportunity, if it its core strengths are promoted and appreciated. The imperfect early warning mechanism reflected in the follow up institutions of GLR such as the Regional and National Committees whose work feeds into each other, can be properly employed to ensure conflict prevention and the prevention of atrocity crimes by bolstering proper and rapid response capacities.[94] These mechanisms can support implementation follow-up of the GLR undertakings, and ensure compliance with peace agreements and other legal obligations, reflecting preventive dimensions of R2P.[95] So far, the R2P reactive and by extension reconstructive dimension, is reflected in the engagement on accountability for international crimes (including those resulting in, or arising from forced displacement) within the GLR. This has been a springboard for international justice processes, including referrals to the International Criminal Court (ICC), and building

[88] GLR Protocol on the Prevention and Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity, 29th November 2006, preamble and chapter II, art.
[89] Mulamula above at note 82 at 4.
[90] GLR Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, Nov. 30, 2006; GLR Protocol on the Property Rights of Returning Persons, Nov. 30, 2006.
[91] Clancy above at note 22 at 207-208.
[92] Mulamula above at note 82 at 9 and 10.
[93] Ibid
[94] Regional Committee for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination provided for by art 26 of the International Crimes (Genocide) Protocol as a collective early warning and prevention strategy; Clancy above at note 22 at 203.
[95] Mulamula above at note 82 at 9, 10; see The Auschwitz Institute for Peace and Reconciliation (AIPR) "National Mechanisms for the Prevention of Genocide and other Atrocity Crimes: Effective and Sustainable Prevention Begins at Home" (2015) at 2-3 available at http://www.auschwitzinstitute.org/wp-content/uploads/2015/06/AIPR_National_Mech_Booklet_2015.pdf (accessed on 23-04-2020).

national accountability frameworks, for instance, in Uganda and to an extent Kenya.[96] The normative and ideological space created by the GLR pact's undertakings has been influenced by, and precipitated continental shifts in tackling impunity for international crimes, including the AU normative and institutional systems. Even though a link cannot easily be made, one can recognise the spirit of the pact within the AU Constitutive Act's interventionist stance, the AU Convention on Internal Displacement, the PSC architecture, and the AU humanitarian framework.

The GLR Pact has set forth a path for regionally addressing impunity related to international crimes (that in one way or another result in internal displacement). It has been a trailblazer in linking forced displacement to international crimes and has embraced the principle of collective responsibility for the protection of the most vulnerable civilians, including the displaced.[97] For instance, when it comes to the triggers of responsibility to protect, its protection ambit is wider than similar norms within the AU Constitutive Act and framework. In addition to referring to mass atrocity crimes triggering R2P, it also refers to situations of gross violations of human rights, reflecting wider international law protection. This ensures that most situations of internal displacement can fall directly within the protection ambit of the GLR framework. This is a significant achievement, limited only by the fact the GLR framework does not specify what actions can be collectively taken by member states to address such violations when they occur, leaving discretion to an extraordinary summit. Whatever action is to be taken, complementarity with AU and UN peace and security frameworks is emphasised.[98]

KENYA AND THE RESPONSIBILITY TO PROTECT IDPS

The IDPs framework and R2P principles in Africa reflect a restatement of existing international norms[99] with a purpose and intent to highlight states' responsibility for the protection of vulnerable civilians, including the displaced. Acknowledging the relationship between conflict, forced displacement and the viability of peace and security, calls for the prescription of responsibility as a means of bolstering implementation of protection for the displaced, and accountability for mass atrocities that lead to forced displacement. This emphasis could bolster states' responsibility and collective accountability for IDPs protection in Kenya.[100]

Despite criticisms, collaboration between regional and global efforts to halt the 2008 post-election violence worked quite well in Kenya, the one place where the UN has arguably discretely and successfully exercised the responsibility to protect.[101] African regional and sub-regional operationalization of R2P, including efforts by the AU PSC's Panel of the Wise, were key to this. Equally, humanitarian efforts, which cascaded from Kenya's request for assistance within pillar two of R2P, addressed impacts of the crisis on civilians. The dimension to rebuild is reflected in peace-building efforts implemented through local and international collaboration. Some critics have overlooked these reactive and reconstructive dimensions of R2P, only

[96] Clancy above at note 22 at 209.
[97] Ibid.
[98] Id at 207; see art 4 (8) of The GLR Protocol on Non-Aggression and Mutual Defence; GLR Pact, art. 5(1)(d).
[99] International human rights law, international humanitarian law and international criminal law.
[100] Evans above at note 15 at 31-34 and 37-38; Bellamy above at note 45 at 31-32.
[101] Cohen above at note 1 at 21; Sharma, above at note 24 at 30.

highlighting the failure to prevent. Others narrowly focus on international elements,[102] labelling Kenya a case of post-hoc R2P, or concluding that the principle only served as background inspiration.[103]

Response strategies based on R2P recognize that regional and sub-regional institutions are important in meeting prevention and protection goals. [104] The possibility of such a partnership between the UN Security Council and regional institutions, was contemplated by the UN Charter.[105] Settlement of disputes, and or enforcement action had been provided for within subsidiarity settings.[106] Thus, addressing internal displacement within the African regional and sub-regional framework for advancing peace and security is logical. More importantly, paralysis within the UN on decisive and timely responses to mass atrocity crimes, has necessitated regional organisations to step in. Their familiarity with frameworks and regional contexts, proximity to issues being addressed, and the human rights obligations and international justice apparatus found within them, better-place them for operationalizing R2P. [107]

Characterizing R2P in Kenya

Since independence in 1963, and long before that, Kenya has repeatedly experienced protracted violent internal displacement, triggered by politicized ethnic, border and land-related violence as well as banditry, natural disasters and development or conservation projects.[108] Political violence in particular, or the threat, or anticipation of it, has preceded and followed every election since Kenya's first multi-party elections in 1992.[109] The worst occurred in the aftermath of disputed presidential elections in December 2007. At the height of this post-election violence, more than a 1,113 people were killed and about 600,000 displaced.[110] The riots, rape, assault murder and forced displacement along ethnic lines, reflected atrocity crimes.[111] These crimes can be committed in all circumstances, but consist of specified acts, which can occur during widespread, or systematic attacks directed against a civilian population. Mass atrocity crimes constitute R2P trigger factors, even though they are not the only causes of internal displacement. Conceptually, international law provides a wider ambit for displacement relevant R2P than the one reflected in the R2P doctrine.[112] This wider ambit reflects protection responding to development induced displacement, climate change and socio-economic rights. It also encompasses apartheid, the persecution of an identifiable group and even the 'deportation or forcible transfer of

[102] United Nations Chapter VII Security Council authorized intervention; International political pressure, including sanction threats, UNSGs comments and characterization of ethnic clashes as R2P; See also Cohen above note 1 at 22.
[103] J Junk "Bringing the non-coercive elements of R2P to the fore: The case of Kenya" (2016) 30/1 *Global Society* 54 at 57; T Weiss "Halting atrocities in Kenya" (2010, Global Centre for the Responsibility to Protect Great Decision Series No. 2) at 24.
[104] Report of the Secretary-General "Implementing the Responsibility to Protect" UNGA A/63/677 (2009) at 9.
[105] P Orchard "Making States Accountable for Deliberate Forced Displacement" (2019, World Refugee Council Research Paper No 17) at 8; Kuwali above at note 3 at 22.
[106] Lyi above at note 42 at152; A Bellamy and P Williams "The New Politics of Protection: Cote d'Ivoire, Libya and the Responsibility to Protect" (2011) 87 *International Affairs* 825 at 846; Chap VIII of the UN Charter, art 52(2) and 53(1).
[107] Luck above at note 3 at 63; Lyi id at 169.
[108] See Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other parts of Kenya (The Kiliku Report) (1992, Government Printers) at 67.
[109] Ibid
[110] Reports on this number vary, assessments only considered camp IDPs, leaving out urban IDPs, those supported by relatives and those who crossed borders; Office of the AU Panel of African Eminent Personalities *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (2008, African Union) at 19; T Muriithi "Between reactive and proactive interventionism: The African Union Peace and Security Council's engagement in the Horn of Africa" (2012) 12/2 *African Journal of Conflict Resolution* 87 at 103; Government of Kenya, Report of the Commission of Enquiry into the Post Electoral Violence (CIPEV-The Waki Commission) (2008, Government Printers) at 282;
[111] Mulamula above at note 82 at 4; Kuwali above at note 3 at 22, 23.
[112] Mooney above note 1 at 67; See L Arbour "The Responsibility to Protect as a Duty of Care in International Law and Practice" (2008) 34/3 *Review of International Studies* 445 at 458.

population', meaning the 'forced displacement of the persons concerned by expulsion, or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.[113]

Kenya is a member of the AU and the GLR. It has domesticated provisions of the GLR Pact, including a legally binding IDP protocol based substantially on the Guiding principles.[114] It has also ratified the Kampala Convention, even though it is yet to implement it. Thus, in responding to the post-election violence, both organisations played an intervention role, though at varying degrees, and within different dimensions. The GLR response came from its representative, who initiated the first attempt to pacify the political crisis by characterizing what was happening in Kenya as 'threats of genocide'.[115] This reflected the ethnic driven killings, displacements and hate campaigns taking place at the time, which would later be echoed in R2P calls by the UN Secretary General.[116] This statement was issued as the ambassador and the GLR Troika representatives swiftly arrived in Nairobi in preparation for wider international initiatives to halt the violence. They simultaneously pushed for conflict resolution couched within the confines of the GLR Pact and its Protocols.[117] Unlike the AU, the GLR did not have an advanced institutional mechanism to engage with the situation. Whilst it is likely that its normative framework influenced the post-crisis reconstruction frameworks and accountability approach employed, the political settlement came through AU structural efforts.[118] After several unsuccessful initial negotiation attempts by African leaders, the AU team, led by Kofi Annan and set up within the AU intervention framework, successfully took over.[119]

The AU Panel of the Wise (Panel) is an organ of the PSC, operating alongside the African Standby Force (ASF) and the Continental Early Warning System (CEWS).[120] Together these organs of the PSC support the AU's mandate to intervene.[121] The Panel was set up to prevent and peacefully resolve conflicts on the continent by diplomatically assessing and intervening in situations to prevent further escalation. Together with the CEWS, an information gathering facility, the Panel is meant to work as a proactive conflict prevention resource. Yet, the Kenyan response was more reactive than proactive, only inevitably taking place after the conflict had escalated. The mandate of the PSC, especially the use of the Panel, could and should have been used to prevent the escalation all together. The Panel has been underutilized as a proactive intervention mechanism. Its strength lies in its political neutrality and independent modalities which widen its remit for preventative diplomacy. If the Panel is supported with more political by-in from wider AU peace and security structures, and not limited by political sensitivities, it can be a powerful tool for non-coercive collective responsibility within the wider AU intervention framework.[122]

---

[113] Mooney id at 65; Geneva Convention (IV) Relative to the Protection of Civilians in Time of War art. 49, Aug. 12, 1949, 973 U.N.T.S. 75; Protocol Additional to the Geneva Conventions of 12 August 1949; and the Second Geneva Protocol Relative to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 17, June 8, 1977, 1125 U.N.T.S. 609; The Rome Statute considers forcible population transfers as an act that may be a crime against humanity-Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 90.

[114] Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No 56 of 2012.

[115] L Mulamula "Escalating violence, loss of lives and property in post-election Kenya" (4 January 2008) ICGLR Press release, available at https://reliefweb.int/report/kenya/escalating-violence-loss-lives-and-property-post-election-kenya (accessed on 10-07-2020).

[116] UNGA Report above at note 104 Para 55.

[117] Mulamula above at note 115.

[118] Clancy above at note 22 at 211.

[119] Archbishop Desmond Tutu; Ahmad Tejan Kabbah of Sierra Leone; Joaquim Chissano of Mozambique, Benjamin Mkapa of Tanzania, Ketumile Masire of Botswana and Kenneth Kaunda of Zambia; leaders of the Africa Forum of Former Heads of State; and Jendayi Fraser, US Assistant Secretary of State for Africa.

[120] Provides analysis which can assist with preventive diplomacy and conflict prevention initiatives.

[121] Muriithi above at note 110 at 90.

[122] Id at 107

R2P's reactive dimensions were operationalized through mediation by the Panel, in line with intervention provisions of article 4(h) of the AU Constitutive Act, and article 11 of the PSC Protocol. Its mandate was 'to support efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention'.[123] Since the conflict had escalated, the mandate also involved preventing further escalation and halting the crisis. The mediation was endorsed by the UN, and supported by critical diplomatic efforts that encouraged and pressured the feuding parties to mediate, giving momentum to the mediation.[124] For instance, during the UNSG's Kenyan visit, he characterized the post-election ethnic clashes in Kenya as an R2P situation:

> The people and leaders of Kenya, particularly political leaders, have the duty, and the responsibility, to wake up and reverse this tragic path before it escalates into the horrors of mass killings and devastation we have witnessed in recent history. I have come to emphatically reiterate my fullest support to…Kofi Annan.[125]

As a politically mediated diplomatic solution, the response fell within the non-coercive dimension of responsibility to react, leaving out sanctions or military options, and making UNSC authorization unnecessary.[126] A peace agreement between the two feuding parties, known as the Kenya National Dialogue and Reconciliation (KNDR) Agreement, was signed on 28 February 2008. The settled accord became a basis for a shared government and a nation building process, with Mwai Kibaki as President and Raila Odinga as Prime Minister. Characterized as covert R2P, with the exception of a statement from the French Foreign Minister,[127] Mr. Annan concluded proudly when it was done

> [W]hen we talk of intervention, people think of the military…But under R2P, force is a last resort. Political and diplomatic intervention is the first mechanism. And I think we've seen a successful example of its application [in Kenya].[128]

Agenda 2: Addressing internal displacement as prevention and reconstruction

Kenya had to set up a system to respond internally to the political crisis, ensure that its security institutions and criminal justice framework were effective, thus promoting accountability, and then respond to the humanitarian crisis, including issues of internal displacement. The National Accord and Reconciliation Agreement.[129] was

[123] Ibid
[124] This rapid and coordinated reaction and pressure was praised as "a model of diplomatic action under the Responsibility to Protect." Albeit post-hoc; See Junk 2016 above at note 103 at 56-61; at the AU summit in Ethiopia, US Assistant Secretary of State for African Affairs, Jendayi Fraser, issued the first threat of forceful action against the oppositional Kenyan parties by warning them: "We'll find an international mechanism if they can't find it internally".
[125] United Nations "Secretary-General's Press Conference in Nairobi" (1 February 2008) Unofficial transcript, available at http://www.un.org/apps/sg/offthecuff.asp?nid=1127 accessed on (09-07-2020); UNGA Report above at note 104 Para 55.
[126] R Thakur "Law, legitimacy and United Nations" (2010) 11/1 *Melbourne Journal of International Law* 1 at 5.
[127] Bernard Kouchner, French Embassy in Nairobi 31 January 2008 "In the name of the responsibility to protect, it is urgent to help the people of Kenya. The United Nations Security Council must take up this question and act".
[128] R Cohen "African Genocide Averted," (3 March 2008) *New York Times* available at http://www.nytimes.com/2008/03/03/opinion/03cohen.html (accessed on 12-05-2020).
[129] Kenyan National Dialogue and Reconciliation (KNDR) process.

underpinned by the National Accord and Reconciliation Act (2008) (NARA)[130] and it identified four critical areas for addressing causes of the crisis:

▪Agenda 1: Immediate action to stop violence and restore rights and liberties;
▪ Agenda 2: Immediate action to address the humanitarian crisis and promote reconciliation;
▪ Agenda 3: Overcoming the political crisis; and
▪ Agenda 4: Addressing long term issues, including constitutional and legal reform matters.

The KNDR-led political agreement consequently established three commissions of enquiry to assess the electoral process, investigate the violence and promote accountability and reconciliation:

1) The Truth, Justice and Reconciliation Commission (TJRC)
2) The Independent Review Commission on the General Elections (IREC-The Kriegler Commission)
3) The Commission of Inquiry on Post-Election Violence (CIPEV-The Waki Commission).

Internal displacement was highly recognized within Agenda 2 as a key aspect of the humanitarian crisis and it had to be resolved immediately to halt humanitarian suffering and promote reconciliation as a way of preventing future conflicts. This aspect closely ties into the peacebuilding and civilian protection agenda of the AU, as well as the international justice framework of the GLR process. These frameworks recognize that addressing forced displacement, including individual and collective accountability, is an important approach for reconciliation and reconstruction, thus preventing future conflicts. The Guiding principles on internal displacement reflect this by promoting durable solutions for internal displacement as a means to ensuring peace and stability, above and beyond preventing displacement and addressing it. Implementation of agenda 2 was thus aimed at mitigating the effects of displacement and ensuring that internal displacement did not become protracted.[131] The process of building peace in post-conflict or post-crisis, is closely tied to how the situation of displacement within such a society is addressed. This emphasizes that in building stable societies, issues of forced displacement must be addressed durably, and the internally displaced as well as host communities must be involved in devising processes to address such.[132] Most importantly, determination of peace processes and peace agreements, cannot be complete without engaging with the issue of internal displacement or any other form of displacement, whilst ensuring that the communities themselves are at heart of this discussion. The displacement-peacebuilding nexus ties in very well with the third dimension of R2P on rebuilding.

Protection of civilians within this context must reflect finding durable solutions to internal displacement, whether as return, local integration or resettlement. Agenda 2 of the KNDR agreement thus prioritized dealing with the displacement crisis by mandating an investigation into the post-election violence that caused mass displacement. CIPEV was to investigate the facts and surrounding circumstances related to the

[130] National Accord and Reconciliation Act 2008 (Nairobi: Government Printer); Entrenched in the 2010 Constitution and enacted by Parliament as the Constitution of Kenya (Amendment) Act 2008.
[131] P Kamungi "National Response to Internal Displacement: Achievements, Challenges and Lessons from Kenya" In E Ferris, E Mooney and C Stark *From Responsibility to Response: Assessing National Approaches to Internal Displacement* (2011, Brookings-LSE) at 236; Annotated Agenda II, Measures signed by the parties on 14 January 2008.
[132] W Kälin *Durable Solutions for Internally Displaced Persons: An Essential Dimension of Peacebuilding* (Brookings, 2008) at 8; Guiding principle 28 (2); GLR IDP Protocol art 28 (2); Kampala Convention art 11 (2).

violence that followed the elections and make recommendations to the TJRC to prevent any recurrence of the violence in future, including issues of displacement. In the process, IDPs legal and policy frameworks were adopted, and criminal justice accountability for those who were involved in instigating crimes was recommended. The latter would lead to an ICC referral and precede what would become an international criminal justice option within the R2P toolkit.[133] Both the IDPs and accountability systems emanated from the GLR process and its frameworks, emphasising its normative and conceptual contribution to rebuilding Kenya.

The CIPEV report highlighted that finding durable solutions for internal displacement was key for achieving peace and addressing the humanitarian crisis. Prioritising IDPs needs and rights (protection) and providing proper support for return, re-integration and resettlement was important. CIPEV considered IDPs as the human face to the consequences of post-election violence, and the resolution of their plight would be a measure and indication of the government's response to the post-election violence as part of its state responsibility. Accordingly, a team was put together to forge a National Reconciliation and Emergency Social and Economic Recovery Strategy.[134] As part of the strategy, and in line with the KNDR settlement agreement, government undertook to provide protection, security and encourage local integration, return or resettlement and rehabilitation of IDPs. It would also provide basic services for those in camps, provide information, including ensuring close linkages and work with national and international assistance to enhance effective response, national dialogue and reconciliation.[135]

Return was obviously more prioritized than other solutions because it was easier, quicker and cheaper. However, this political enthusiasm did not translate into effective processes, in fact the way return was implemented left a lot to be desired. The operation was from the beginning marred by haste, coercion, inefficiency, nepotism, corruption and lack of consideration or even consultation with the affected populations going against legal requirements.[136] To this end, the return process failed the durability test, seeing that most IDPs eventually got re-displaced upon return, or did not effectively benefit from return packages. This coupled with unresolved and outstanding land, property and security issues forced them to eventually settle within the urban poor.[137] Due to this, the question of preventing future displacement remains open. Perhaps clearly situating the response within the KNDR settlement agreement would have elevated the R2P spirit underlying the agreement and emphasized effective prevention, protection and accountable rebuilding, including return, thus lending credence to the process. When one weighs this part of the Kenyan response against the R2P framework, it fails miserably.

Responsibility to protect emphasizes a dimension to prevent crisis. Within the context of internal displacement that reflects identifying and preventing trigger factors that lead to displacement. The future of protecting the most vulnerable during crisis is most dependent on the capacity of the state to identify and prevent or halt possible atrocity crimes. For this matter, national bodies have been set up to provide early warning support within the GLR. These bodies reflect the GLR regional follow up mechanisms, specifically the

[133] CIPEV Report above at note 110 at 271 and 473; Kenya International Crimes Act No. 16 of 2008 (domesticating ICC Rome Statute); Special Tribunal for Kenya.
[134] National Accord Implementation Committee "National Reconciliation and Emergency Social and Economic Recovery Strategy" (March 2008, Government of Kenya) at iv.
[135] CIPEV Report above at note 110 at 282; Launched initiatives to encourage IDPs return: Operation Return Home (Rudi Nyumbani), Operation Reconstruction (Tujenge Pamoja) to reconstruct damaged houses and infrastructure and Operation Good Neighbourliness (Ujirani Mwema) to promote healing and reconciliation.
[136] Kampala Convention art 11(1, 2); Kamungi above at note 131 at 232.
[137] Kamungi ibid; Guiding principles, principle 28, 29; and GLR IDP Protocol art 29 (2); Kampala Convention, art 11(4, 5); P Kamungi "The Politics of Displacement in Multiparty Kenya" in P Kagwanja and R Southall *Kenya's Uncertain Democracy: The Electoral crisis of 2008* (2010, Routledge) at 96-97; See also norms on remedies and restitution in the Kampala Convention, art 12(1), art 12(2) and art 8(3)(e).

Regional committees, and their parallel national committees that are provided for by the GLR Genocide Protocol.[138] The Kenyan National Committee for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination (National Committee) was launched in 2012 and is situated within the Ministry of foreign affairs as part of the function of the Office of the Great Lakes.[139] Potential for the committee playing a strong part in early warning or prevention lies in its composition of different players from civil society, academia, government ministries and local or religious leadership. These groups of people have access to, and engage with issues on the ground and within communities. They are well privileged to sensitize communities, analyze new and emerging threats and influence the process of prevention by feeding back into the national and GLR regional early warning framework on atrocity prevention. [140]

However most of these national committees are yet to be fully capacitated, in Kenya, the National Committee has not taken off properly since 2012. There is also limited information on who does what and when. Proper training on the UN Atrocity crimes framework needs to be constantly implemented and these committees need to be capacitated technically and financially to carry out their roles. Most importantly, it is not clear whether their expertise and context is properly tapped into when circumstances require it. For instance, there is no obvious link between the work that the GLR National Committee does and the work done by institutions set up by the KNDR agreement on addressing the post-election violence and preventing any future crisis that would result in displacement.[141] Given that most members of the National Committee are drawn from institutions and ministries set up under the KNDR agreement, the link should be automatically obvious.[142] Yet, besides the IDP Act and policy, it remains difficult to directly link the early warning and legal protection system emanating from the GLR process to efforts and mechanisms set up in Kenya for collectively resolving the crisis and consequent displacement.[143] The AU system was more visible in resolving the crisis, but its institutional system is not streamlined locally, for instance the CEWS has not influenced early warning in Kenya, equally, reconstruction through article 14 of PSC was not explored. This mix match in normative and institutional options, has left operationalization, applicability and implementation gaps in collectively protecting the internally displaced.

The Kenyan experience presents difficulties associated with attempt to reconcile R2P with IDPs protection. Kenya inadequately provided an illustration of what R2P can deliver in situations of internal displacement. Unfortunately, that intervention avoided linking the response structure to Guiding principles, the GLR framework, the AU framework or express R2P. This limited any future option for easily relying on it within these contexts. In fact, the Guiding principles and internal displacement only indirectly find a place within the CIPEV report and recommendations therein, with the KNDR settlement agreement skirting around, and lumping IDPs within other humanitarian issues. Because of this, linking IDPs issues to R2P principles underlying the peace agreement proves to be even more difficult, and this limits any attempts to collectively obligate Kenya to protect IDPs within this context. These factors make it difficult to replicate the Kenyan

[138] Clancy above at note 22 at 203.
[139] GLR Pact above at note 3 art 27; AIPR above at note 95 at 5-6.
[140] Kampala Convention above note 3 art 4 (2).
[141] National Steering Committee on Peace-Building and Conflict Management (NSC) and a Network of District Peace Committees (DPCs) cascading from Inter-Governmental Authority for Development (IGAD)'s CEWARN.
[142] Ministry of Provincial Administration and Internal Security; the Ministry of Justice, National Cohesion and Constitutional Affairs; the State Law Office; the Director of Public Prosecutions; the Kenya Police; the National Cohesion and Integration Commission; the Kenya National Commission on Human Rights; the Truth, Justice and Reconciliation Commission; the Law Society of Kenya; the International Commission of Jurists; the Federation of Women's Lawyers – Kenya; Peace Net Kenya, the Kenya Red Cross; and, the National Coordinator of the Great Lakes Region (the Committee's Coordinator).
[143] AIPR above at note 95 at 5-6.

approach in circumstances that are different from those in Kenya. It becomes very clear that 'the power of R2P is political, not legal.'[144] R2P has been instrumental in opening up the necessary political space to spell out procedures, and thereby also begin to open up new possibilities, for collective international action, which in exceptional circumstances, situations of internal displacement may demand. But as we saw in Kenya, avoiding a legal-oriented approach, becomes an easier less messy political option for obtaining international support, and limits the outcomes of R2P for IDPs to humanitarian assistance as opposed to legal protection, which would have been a state obligation, failure of which collective action is justified. This also means R2P within displacement situations will only work where and when it is politically viable.

CONCLUSION

The reality of internal displacement in Africa, and the human rights violations that accompany it and cause it, require response capabilities that find preserve in collective accountability underlined within R2P. The in-state nature of internal displacement, the fact that basic responsibility for protecting the internally displaced rests with states within which the IDPs find themselves, and the often times broken relationship, or incapacity to protect that leads to, or results from such displacement, has unlocked opportunities leading to the call for the reconceptualization of sovereignty itself.

International human rights and humanitarian law already reflects the criminalisation and prohibition of forced displacement. This includes, the protection of specific categories of the vulnerable from evictions that are prohibited under international law, recognition that all human beings are protected under human rights law, including IDPs, and finally, obligating states to take responsibility for consequences of internal displacement and enjoyment of other entitlements. By reflecting these provisions, as compiled within the Guiding principles, and being guided by them, both the AU and GLR framework were influencing, but also being influenced by norms already in existence. Perhaps what they offer, is a more concise, codified, collectively binding and elaborated version of these norms, specified to the African context.[145]

Yet, IDPs protection couched within R2P is still theoretical and rare in Africa.[146] This could be because of its limited and narrow application to atrocity crimes. The side-lining of the Guiding principles in R2P contexts and the exclusion of disaster IDPs is also problematic, but politically expedient because it limits situations within which R2P can be invoked.[147] The most contentious aspect here is the dichotomy between human rights and humanitarian oriented protection of IDPs. R2P re-emphasises the politics of demanding IDPs protection from the state and threats of collective intervention, as opposed to the easier and less political, humanitarian assistance. This is compounded by the fact that R2P is often reduced to military intervention. The obvious limited confidence in, and tensions brought on by military action, and the fact that non-coercive elements of R2P remain ignored, has contributed to the norm having limited relevance in IDPs situations.[148]

[144] E Luck "The United Nations and the Responsibility to Protect" The Stanley Foundation Policy Analysis Brief p. 6-8 available at https://stanleycenter.org/publications/pab/LuckPAB808.pdf(accessed on 12-05-2020).
[145] Compilation and analysis of legal norms, E/CN.4/1996/52/Add2. (1995); and Compilation and analysis of Legal norms, Part II, E/CN.4/1998/63/Add.1 (1998).
[146] CCR above at note 46 at 21.
[147] Cohen above at note 1 at 22
[148] ibid

This disregards the fact that all R2P pillars and dimensions are essential, and can be implemented together or separately within the context of internal displacement.

The politicization of the approach, and the lack of clarity of the concept itself has opened it for criticism, but therein lies opportunity to elaborate it to work for the IDPs context. Besides, in Africa, the concept is not vague because it is clarified and reflected in legal framework, both at sub-regional and regional level, creating legal obligations. Most skepticism surround African peace-keeping and intervention forces and it is argued that collective military action by these efforts is limited both by resources and capacity.[149] Yet this should not be an issue if Africa prioritizes pillar one, two and non-coercive elements of pillar three, like it has so far. This could go hand in hand, with Africa building its intervention force. Perhaps, the biggest issue remains the residual sovereignty which can obstruct future attempts to promote collective action, limiting it to just lip service, but as we have seen in Kenya, where non-coercive aspects are operationalized, intervention works well.[150] Notably, operationalizing R2P regionally, might be more effective, and less politicized, due to familiarity with actors and frameworks. It also presents less suspicion and is more amenable to regional diplomatic realities.

Of note is the Kenyan scenario where despite obvious challenges, R2P was 'successfully' implemented because from the on-set Kenya accepted regional and international support in the form of mediation and did not raise the sovereignty cloak. More importantly, because the intervention set out in Kenya reflected dialogic (non-coercive) elements of R2P, this limited politicization of the issue and the UNSG easily bypassed UNSC authorization as required by article VII of UN Charter.[151] Additionally, the intervention happened within the context of the regionally championed AU security apparatus (the Panel), with only support from the United Nations. This regionalised form of intervention, perhaps lent credence to the mediators, who were mostly African current or former leaders and limited distrust usually levelled against international interventions.

R2P can only succeed in bolstering the implementation of IDPs protection frameworks if there is political will for states to subject themselves to collective accountability. Mere existence of legal, policy and institutional capabilities does not in itself guarantee adherence to such standards.[152] For instance, in Kenya, internal demand for peace, and political willingness to settle, worked better than an imposed external solution would have. Importantly, African initiatives to bolster IDPs protection must reconcile their approach to operationalizing R2P with the cleavages that exist within Africa's political, institutional and normative compliance mechanisms. Weak responses on the ground and the very theoretical reality of intervention to protect IDPs, requires more preventative than reactive solutions. This can be achieved by prioritizing prevention of conflict, building stronger early warning mechanisms, promotion of transparency, facilitation of democratic governance and building political and legal consensus on relevant intervention measures where national governments have failed or are unable to perform accordingly.[153] Such measures need not be only militaristic and coercive. Perhaps it is important to engage with non-coercive approaches as displayed in Kenya. Such measures must also go beyond the emergency phase, to address the build-up to a crisis, the aftermath and root causes.

[149] Ibid
[150] Weiss above at note 103 at 21.
[151] Cohen above at note 1 at 22.
[152] Ibid; Weiss above at note 103 at 28.
[153] Id at 24.