The African Union and Human Protection:

Towards a Regional Protection Regime

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Abstract

A global discourse of protection and responsibility suggests that human protection norms have gained traction. Empirically, this coincides with an observed global reduction in violence. How does this relate to regional protection practices in Africa; is there a regional protection regime? If so, how is this regime constituted, and what does it comprise? Does it shape regional protection practices, and if so, in what ways? This article describes the origins of human protection norms in Africa and outlines the institutions they have given rise to, and then assesses the role of the protection regime in shaping regional practices. An analytical framework based on regime theory, that assumes that the emergence of institutions and consistent practice indicates the emergence of a regime, is employed. An empirical survey of institutions and practices suggests the development of a regional protection regime. However, the regional structures differ from, and compete with, pre-existing international structures. While the structural prerequisites for a regional protection regime are now in place, several factors interfere with the development of the regional protection regime. The article concludes with several observations. First, the incoherence of global and regional structures results in contradictions and duplication among institutions. Second, a lack of agency of local actors, owing to limited resources and understaffing, inhibits consistent protective responses. Third, resistance by some regional agents to the norms underpinning the protection regime. However, incoherence, inconsistency, and hypocrisy are common features of regimes. Consequently, the fact that the African human protection regime is characterized by incoherence, inconsistency, and hypocrisy undermines neither its significance, nor its ability to shape practice and promote human protection.

Keywords: human protection, conflict management, mediation, peacekeeping, international criminal justice, norms, consistency, subsidiarity, African Union

Introduction

There now exists a comprehensive international framework for preventing and managing conflict, preventing atrocities, mediating disputes, and prosecuting war crimes and crimes against humanity: an international regime, underpinned by interrelated clusters of protection norms that together constitute an "international human protection regime".[1] How, if at all, do these developments inform and shape conflict management and civilian protection in Africa? What, in turn, has been the influence of the regional protection regime internationally, where states of the Global North have been principal – if certainly not exclusive – norm propagators?[2] These questions are important because institutions, principles, and practices protecting populations from direct violence in armed conflict, as well as from the humanitarian consequences of conflict, can make a real difference to vulnerable populations. When these institutions function effectively, they help save lives, alleviate suffering, and contribute to resolving conflict. The emergence of a regional protection regime implies the institutionalization of human protection norms and practices. The formation of a regional protection regime – if this could be ascertained empirically – would signal a trajectory towards better provision of protection to vulnerable populations, and consequently, towards improved humanitarian outcomes.

There is now a rich body of literature assessing the success of the African Union and other regional organizations in contributing to conflict management and human protection objectives. Existing approaches have compared the success of the African Union (AU) with that of its predecessor organization, the Organization for African Unity (OAU);[3] surveyed the degree to which protection norms permeate legal and institutional structures of the AU;[4] compared the work of the AU with that of civilian protection approaches by other organizations (the United Nations);[5] and assessed the AU's work in the domain of peacekeeping,[6] sanctions and diplomacy,[7] and peacebuilding.[8] None of them have, as yet, employed regime theory as an analytical framework, or have systematically surveyed practices to ascertain the extent to which protection principles have begun to take root.[9]

Habitual, consistent practice is associated with norm consolidation.[10] Consequently, the emergence of institutions and practices clustered around several issue areas would suggest that human protection principles have gained traction. The rich constructivist literature in this area demonstrates how norms are "localized" at the regional level[11] and are given "meaning in use" locally through practice.[12] At the regional level, the number of institutions tasked with protection mandates has grown significantly over the past two decades, and the mandates of existing institutions have expanded and changed, suggesting that international human protection norms are beginning to shape expectations about appropriate responses to complex humanitarian emergencies. At the same time, regional and sub-regional organizations "have been criticized widely, and rightly so, for their inconsistencies … and uneven application of these norms".[13] Do regional practices, therefore, suggest that a regional protection regime is indeed emerging, and if so, how does it shape regional practices?

The article proceeds in three parts. The first part describes the origins of human protection norms in Africa. The regional protection regime was influenced by – and in turn has been an important driver of the development of – international human protection norms. The second part outlines the analytical framework, which draws on sociological accounts of organizational behaviour, and employs a governance perspective to outline the contours of the regime that comprises not just state actors, but a range of civil society actors that anchor and underpin the protection regime at the regional level. Part three then turns to the roles and responsibilities of these actors and outlines practices in three clusters of regional security governance: mediation and diplomacy, peacekeeping and humanitarian relief, and criminal justice – each of which constitute central pillars (preventive, responsive, and retributive/restorative, respectively) of the human protection regime.

The empirical data for these sections were collected through a combination of a review of the secondary literature and interviews. Interviews were conducted in Addis Ababa in July 2019. Snowball sampling was used to identify interviewees from a pool of experts from among practitioners and policymakers, including AU officials, national delegates, academics, and civil society representatives. The interviews were loosely structured but otherwise tailored to each interviewee. Informal participant observation, for example attendance at a meeting of the AU Peace and Security

Council, and conversations with individuals working at AU headquarters, in association with the AU, or otherwise informed of procedures and practices of the AU complemented the interviews. The formal interviews, in conjunction with informal meetings and participant observation, provided insight into the day to day practices of the bodies of the AU and the perceptions of a range of actors representing the institutions of the protection regime.

The article argues that regional human protection norms are indeed institutionalized to an advanced degree, and that regional practices are sufficiently consistent to condition collective expectations about appropriate responses in a range of crisis situations. However, several factors, as the discussion will show, undercut the agency of regional actors, and impede the ability of the regional protection regime to function effectively. Nevertheless, claims of the absence of regional agency are mistaken and on the whole, the empirical survey suggests that the trajectory is one towards a growing influence of the regional protection regime in coordinating human protection.

The origins of human protection in Africa

The origins of the AU are to be found in pan-Africanism and the formation of the Organization of African Unity (OAU) in 1963. Much as the motive for the formation of the European Union was to build an institution that would make war among European states impossible[14] – regional integration was to make war among European states "not merely unthinkable, but materially impossible"[15] – political independence was the defining ideational motive for the formation of the OAU: "We must unite in order to achieve the full liberation of our continent," Kwame Nkrumah, Ghana's first president, stated at the founding of the AU in Addis Ababa in 1963.[16] Protection was the raison d'être for the organization out of which the AU would later emerge – protection of individuals and groups not from state repression or internal conflict but the protection of individuals and states from the political violence and atrocities they had been subjected in the colonial era.

In 2002 the AU replaced the OAU. The motives for creating a new institution included an expectation that regional trade liberalization would benefit economic growth, and the EU and ASEAN served as regional models.[17] However, human rights concerns played an important role in the organizational transformation, particularly the influence of the responsibility to protect principle.[18] The central structures and the physical location of the organization remained the same,[19] but the change signalled a decisive shift in regional perceptions of the central role of the organization, and its political mandate. The new organization heralded a departure from the role of the organization as primarily concerned with promoting independence – which by now had been completed – to a role of safeguarding regional peace and security. The shift also explains the increasing power given to its central organ, the Peace and Security Council (PSC), the regional equivalent of the UN's Security Council. The AU's Constitutive Act is the world's most interventionist – article 4h bestows on the Union the right to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".[20] The new organizational structure and nomenclature reflected the regional consensus that the organization needed to be able to respond decisively to situations that could put at risk the stability of a state, and with it the security of its populations – potential crisis situations included volatility around elections, unconstitutional changes of government, and ethnic conflict.

The AU differs from the OAU in important ways: regional volatility and insecurity, rather than colonial subjugation, are now dominant concerns. International actors are regarded as potential partners in providing security, and building peace. Nevertheless, the origins of the formation of the AU continue to play an important role in constituting regional identities, shaping motives, and influencing state practice. Regional positions vis-à-vis the international campaigning for human protection norms such as the responsibility to protect reflect this continued ambiguity. While some states advocated for human protection principles, other states were more cautious, and yet others directly opposed to what was perceived as an attempt at institutionalizing neo-colonial practices. Some states took active roles in deliberations on the human protection norms, serving as norm entrepreneurs, or, in the case of sceptical states, norm "antipreneurs".[21] Other states took more passive

roles and implicitly endorsed or opposed human protection principles through voting decisions at the UN Security Council or the UN General Assembly Fifth Committee, responsible for administrative and budgetary matters, or, at the regional level, voting on Peace and Security Council communiqués.

Debate on the role of the ICC and on the principle of the 'responsibility to protect' reflects continued scepticism about a nascent protection regime. The 'responsibility to protect' (R2P) had emerged out of the deliberations of an independent commission, the International Commission for Intervention and State Sovereignty (ICISS), that had been co-funded by Canada and several American foundations. It envisioned a greater role for states with the means, as well as the will, to act in the face of grave human rights violations. "Sovereignty as responsibility" was the Commission's key formula for reconciling consistent human rights protection with a respect for state sovereignty. In the years that followed the publication of the "Responsibility to Protect report" in 2001,[22] supportive states, also including developing states, continued to promote the principle.[23] However, some states were more sceptical, and in some cases, post-colonial arguments served to justify sceptical positions.[24] Some states opposed the principle on the grounds that it invited selectivity and double standards, and threatened to undermine sovereignty, or that it encouraged the use of force.[25] In recent years, use of language associated with the responsibility to protect has become more commonplace among Security Council members, leading some analysts to conclude that there is now greater support for the principle among UN member states.[26] In any case, opposed positions were not representative for Africa – as a whole, the region strongly supported human protection principles. Indeed, many ideas associated with the principle originate from the African context – particularly Francis Deng and Roberta Cohen's work on internal displacement and the idea of "sovereignty as responsibility".[27] Among a minority of states adamantly opposed to the principle during the 2000s and early 2010s – the most intensive period of campaigning for a new approach to human rights protection – only a small number of states were African.[28] Questions around agency continue to characterize the region's stance towards the international protection regime – most states do not object to the principles associated with the international protection regime as such, but to the lack of agency that is afforded to developing states.

Actors, agency, and the regional protection regime

Institutions and agreements comprising regimes cluster functionally or territorially to produce regimes, or regime complexes.[29] A security regime is a set of "principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue area".[30] Regimes provide governance, sometimes (but not always) in the absence of government. They are social institutions that provide rules and norms that shape the behaviour of states and other actors.[31] In many cases, these become manifest within existing institutional architectures, or they are formalised through the creation of new institutions. Regimes are useful analytical devises for theorising collective protective practice. They are similar to some English School approaches describing practices associated with international society, and the role of regions.[32] A regime theory approach complements such approaches, offering further insights into rules, practices, and norms associated with a range of different actors, also including non-state actors and civil society.[33]

At the international level, structures mirroring those at the domestic level – legislative, executive, and judicial – are absent, but that is not to say that structures – actors, principles, and habitual practices – are not in place to structure relations, set expectations, and manage interactions. Within a range of security regimes governing the realms of human rights, environmental security, trade, arms proliferation, and so on, structures similar to those constituting legislative, executive, and judicial institutions can be identified. Consequently, each regime will have institutions associated with the making and reform of rules and principles, as well as deliberation – legislative and executive structures in the broadest sense. At the international level these include the Security Council, the General Assembly, the UN's Department for Peacekeeping Operations (in spite of limitations in terms of autonomy, and chronic underfunding), as well as judicial structures (*not* fully fledged judiciaries) including the International Criminal Court and the International Court of Justice.

Similar structures can be identified at the regional level and these shape security governance in the domain of human protection (for a summary of key institutions within each pillar at both levels, see fig. 1, the international protection regime, and fig. 2, the African protection regime, below). Legislative and executive structures govern responses in the domain of mediation and diplomacy, as well as conflict prevention. These are tasked with peacekeeping and humanitarian relief. Judicial structures govern the prosecution and punishment of human rights violations and crimes against humanity. As outlined above, the AU formalized human protection norms in its Constitutive Act of 2001, which established its right to intervene in response to war crimes, genocide, and crimes against humanity. The African Peace and Security Architecture (APSA) replaced the OAU's Mechanism for Conflict Prevention, Management and Resolution and is the key institutional framework through which human protection norms are implemented at the regional level. It receives a large proportion of its funds from the EU, the US, and bilateral donors.[34] The central organ of APSA is the Peace and Security Council (PSC), which, among a number of other responsibilities, is explicitly tasked with preventing conflict and mass atrocities,[35] and the Commission – here particularly the Department of Political Affairs, the Department for Peace and Security, and the Department for Humanitarian Affairs. APSA also incorporates the African Standby Force (ASF), established in September 2014. It has been operational since 2016, and is deployed by the PSC or when authorized by the AU Assembly under article 4(h) and 4(j) of the Constitutive Act. Other relevant actors include local humanitarian and human rights organizations and, within the legal domain, the African Commission on Human and Peoples' Rights (ACHPR). The regional protection regime also comprises several sub-regional organizations.[36] With the exception of the International Conference on the Great Lakes Region (ICGLR) all sub-regional organizations with security mandates also have an early warning mechanism for conflict, and they have all adopted conflict prevention mechanisms and legal frameworks for conflict prevention.

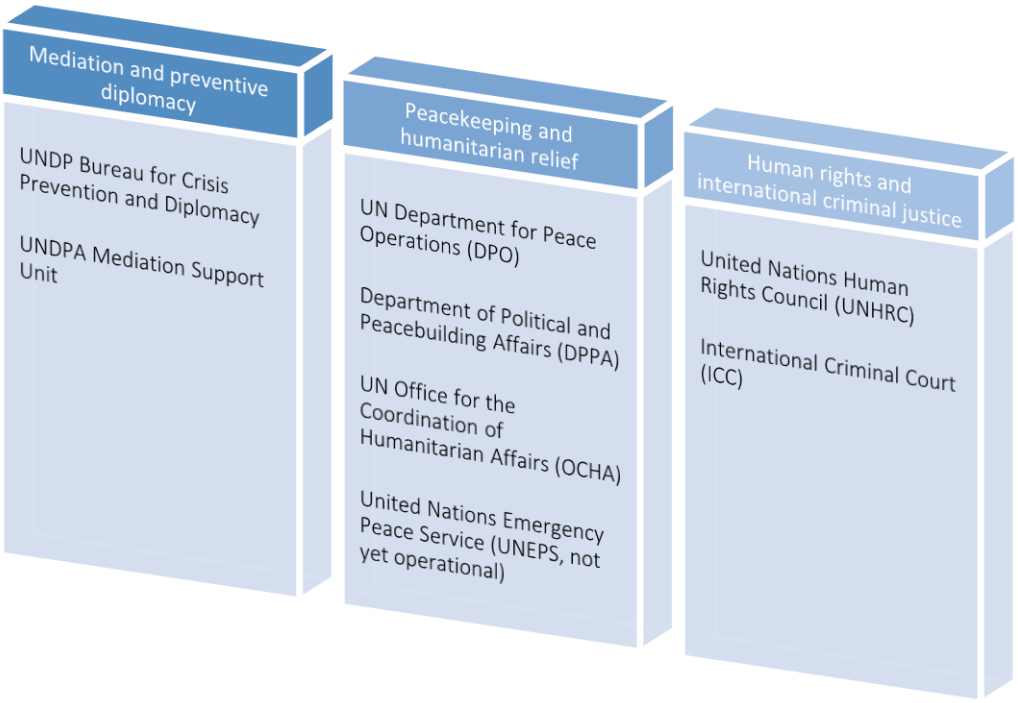

Figure 1: the institutions of the international human protection regime

The responsibilities of humanitarian actors in the international protection regime include conflict prevention, atrocity prevention, and conflict resolution as well as post-conflict rebuilding. To meet these responsibilities, protective agents engage in mediation, diplomacy, peacekeeping, humanitarian relief, and, after hostilities have ended, the rebuilding of state structures and criminal justice. These tasks continue to be pursued in an ad-hoc manner – on the whole, the international regime remains incoherent, in that tasks and responsibilities are not definitively assigned, and compliance with principles cannot be enforced. Similarly, the failure to meet protection responsibilities is punished inconsistently, although a failure to uphold protection responsibilities is consequential in that it weakens the legitimacy of an actor whose role also encompasses protection. Despite these weaknesses, international practice does suggest that collective expectations about appropriate responses to crisis situations are beginning to converge and that an international protection regime is beginning to take root.[37] But what does this mean for collective responses at the regional level? How

do the international, regional, and sub-regional levels relate to each other; are there conflicts and inherent contradictions? How are norms "localised" – reconstructed to align with local practices – at the regional level?[38]

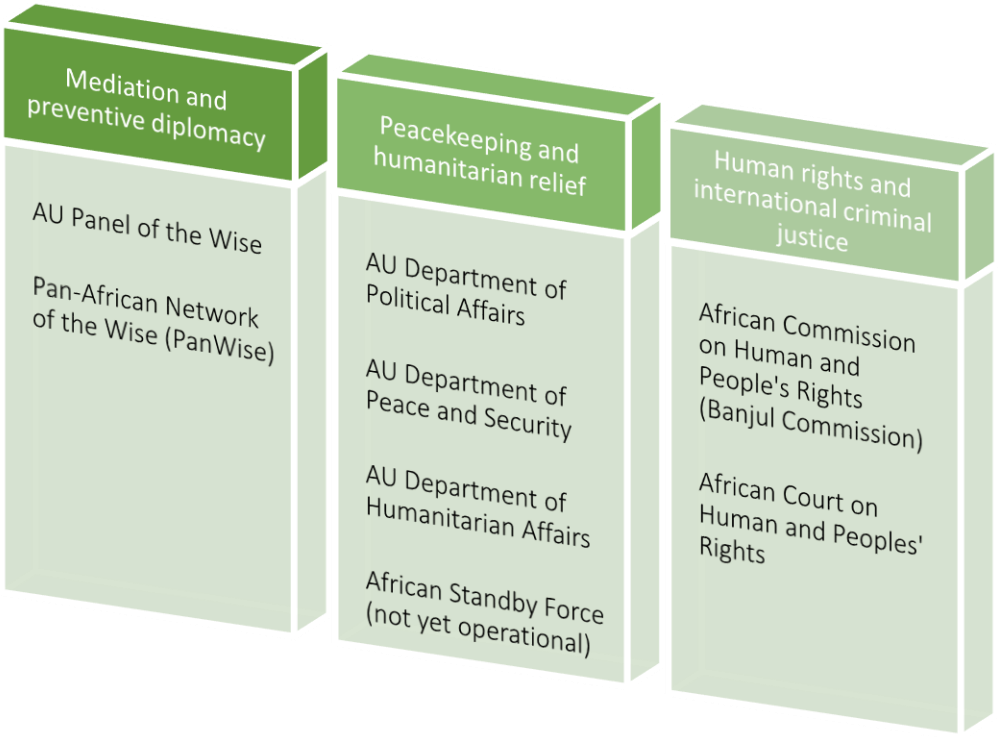

Figure 2: the institutions of the African human protection regime

A survey of responsibilities and practices of a range of actors, as will be outlined in the next section, suggests that the international and regional regimes interact and are co-constitutive, but that they also overlap, compete, and contradict each other. In this context, the origin of protection norms is salient, as is the process and direction of diffusion of norms between the international and regional levels.[39] The AU's constitutive act was undoubtedly influenced by the intervention debates of the 1990s; and vice versa, regional deliberations and the articulation of the AU's charter influenced the policy

debates on humanitarian intervention in the run-up to the publication of the ICISS report. However, the practice of human protection throughout the 2000s demonstrated that parallel structures at the international and regional levels often do not complement each other but compete with each other over influence and resources.[40] Furthermore, they are based on alternative conceptions about how best to realize human protection. This can lead to a form of norm contestation whereby local actors create their own rules and normative architectures, which may or may not complement other systems, in an effort to shield there autonomy from external interference from more powerful actors.[41] Incoherence also produces more scope for hypocrisy – a situation where behaviour digresses from rhetorical commitment. International society is characterised by incongruence of principles with observed practice – a situation Stephen Krasner refers to as 'organised hypocrisy'.[42]

The pillars of the regime as identified here – both for the international and regional levels – are not prescriptive. Rather, the model outlines the central pillars of the regime that can be discerned from recent state practice. At both the international and the regional levels, the regime comprises functionally differentiated domains (preventive, responsive, and punitive). The structure of the individual pillars, and the pillars as such, are underpinned by prevailing conceptions about peace and security architectures, derived from an analysis of practices at both levels.[43] This is not to say that a human protection regime could not be conceptualised differently. Indeed, existing practices are subject to numerous critiques from a range of theoretical perspectives and normative standpoints.[44]

The following sections will outline the status quo of the regional protection regime in each of the three pillars: mediation and diplomacy, peacekeeping and humanitarian relief; and international criminal justice. Each section outlines emerging practices, and what they suggest about the strength of the regional protection regime. Each section describes the way regional practices differ from, or contradict, international protection practices, and outlines the key factors limiting the strength of the regional regime in the given domain. The three main inhibitors across all domains are incoherence, inconsistency, and hypocrisy. The incoherence of the international regime means that there is lack of agreement on regulative norms assigning responsibility (see figure 3 below). Local actors promote the rule of subsidiarity – the devolution of power and authority as well as the distribution of the burdens

of governance[45] – for attributing responsibility. Subsidiarity can be understood as a model of global governance where "lower levels of governance are not denied of their competencies as long as they are capable of carrying out specific tasks assigned to them."[46] The idea of subsidiarity is relatively new – traditionally, state capacity has been the primary, or even sole, criterion for locating authority and assigning protection responsibilities.

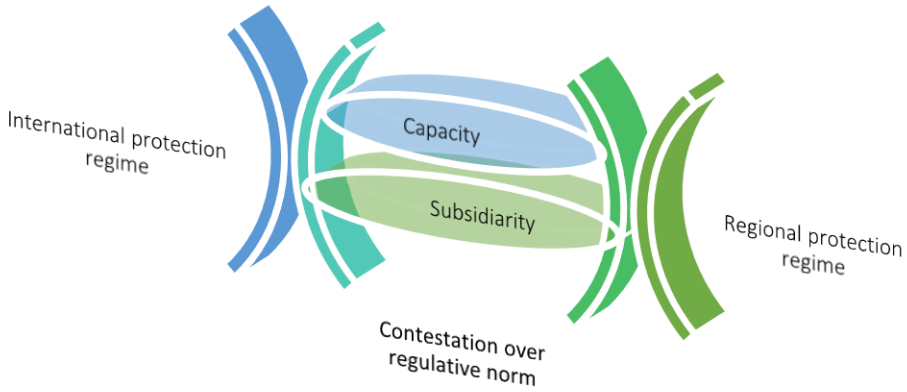

Figure 3: Regulative norms

Mediation and preventive diplomacy

Prevention diplomacy and mediation are central pillars in what can be referred to as infrastructures of peace or peace architectures, spanning networks of formal and informal institutions, and involving not just state actors, but also community-based organizations, academic institutions, faith-based entities

and political groups.[47] At the international level, the central organs responsible for preventive diplomacy are the Bureau for Crisis Prevention and Diplomacy, a sub-unit of the UN Development Programme (UNDP); and the Mediation Support Unit in the UN Department for Political Affairs (DPA). Numerous regional organizations now have equivalent or similar offices. For example, ASEAN's Regional Forum monitors crisis situations; the Organization of American States (OAS), as well as the Organisation for Security and Cooperation in Europe have actively pursued preventive diplomacy, as have the Arab League and the Gulf Cooperation Council in the context of the Arab Spring, particularly in crises in Syria and Yemen. These institutions conducted mediation, fact-finding missions, preventive diplomacy, including threat of coercion involving the use of force or sanctions, as well as leverage of diplomatic pressure and, in conjunction with civil society, practices of naming and shaming. While international responses typically vary in terms of their effectiveness, they share in common that they represent a global shift towards the institutionalization of practices that are associated with an emerging protection regime. Chapter VIII of the UN Charter requires international responses to conflict be led – or, at the very least, significantly shaped by – regional actors and institutions. Not only are regional mechanisms deemed more legitimate, there is also evidence to suggest that mediation that is regionally led, or involves regional actors, is more effective.[48]

The principal actors responsible for coordinating preventive diplomacy, including mediation, at the AU are the PSC and a specialized body, the Panel of the Wise. Since the formation of the AU, formal mediation has been common practice.[49] The Panel of the Wise has a specific portfolio of activities, and works in unison with the Pan-African Network of the Wise (PanWise) and an informal regional network of special envoys, special representatives, and AU commissioners.[50] The development of the regional regime is characterized by the emergence of standard procedures and habitual practice. The Commission of the AU exerts independent influence on the decision-making procedure of the PSC. Although it has no control over substantive decisions, its officers and focal points work on cases and draft communiqués and as such, set the agenda.[51] For example, the Commission has devised protocols determining that unconstitutional change of government should lead to suspension from the PSC.[52]

One of the factors limiting the effectiveness of regional mediation initiatives is the absence of a mechanism for assigning responsibilities among actors horizontally and vertically. Interorganizational disputes are common, and "have an extremely negative impact on peacemaking".[53] The absence of a clear coordinating mechanism means that mandates overlap, and structures are duplicated. Not only does this require expenditure of resources on coordinating collective responses, but it also results in ambiguous authority over decision-making procedures and has resulted in disputes over desired objectives and measures. On occasion actors at different levels work together effectively, creating synergies through well-coordinated responses, as was the case in collective responses to the post-election crisis in Kenya in 2007-2008.[54] However, interests do not always converge in ways that are conducive to well-coordinated collective action.

The principle of subsidiarity is preferred by African states,[55] but in practice collective responses are characterized by tensions and competition between units at different levels. The UN defined mediation in CAR, Cote D'Ivoire, Darfur, and Libya; sub regional organizations defined responses in the cases of Burkina Faso, Guinea-Bissau, Mali, Madagascar, and Zimbabwe. A lack of resources partially explains why international actors sometimes exert significant influence. The AU's budget is significantly smaller, consequently it is routinely forced 'to improvise mediation practices.'[56] However, the ability of regional actors to lead mediation is also determined by their relative unity and their ability to respond rapidly.[57] In many cases, sub-regional and regional organizations can respond more rapidly, determine objectives and set out a roadmap, thereby defining the international response. A lack of unity in the Security Council, the PSC, or sub-regional organizations weakens collective responses. For example, the AU's position in the case of Libya was weakened by the fact that its members were split over whether a negotiated settlement could include the regime's continuation in power. Throughout the crisis, the AU preferred a political solution, notwithstanding that three African states on the UN Security Council had voted in favour of the intervention. In March 2011, the AU's mediation efforts were brought to an abrupt end by NATO's military intervention. The PSC has since institutionalized regular meetings to ensure effective policy coordination.[58]

Competing authority for decision making at different levels is only one of the factors limiting the strength of the regime to deliver on protection objectives. Autocratic rulers' avoiding of precedents' that could threaten to undermine local authority may also explain hesitance to put principles into practice. However, the PSC has begun to hold member states to account with regard to their protection responsibilities. At its 669th meeting in 2017, the PSC issued a communiqué in which it expressed "concern over the continued cases of denials to … credible early warning signals of looming crises".[59] For example, the AU made the unprecedented move of threatening to use force to protect civilians in the context of the crisis in Burundi, with the PSC invoking Article 4(h) of the Constitutive Act. The AU subsequently failed to implement these measures,[60] but the invocation of article 4(h) in the context of a human protection indicates that human protection norms have begun to shape the way regional actors think about roles and responsibilities in the context of protection crises.

With the rise of the human security agenda after the end of the Cold War, structural prevention and the role of civil society have become increasingly salient.[61] Civil society actors play a key role in structural conflict prevention. In recognition of the role of civil society actors, the APSA provides civil society organizations with a framework to partake in deliberations and influence policy-making. The AU's Constitutive Act explicitly states building of a "partnership between governments and all segments of civil society" as a key objective.[62] The Office of the Chairperson of the AU Commission comprises the African Citizens directorate, a dedicated civil society unit, tasked with outreach and engagement with civil society organizations.[63] Still, the influence of civil society to date has been limited. Two factors interfere with the ability of regional civil society actors to exert independent influence: limitations in funding, and dependence on Western donors; and, second, operational limitations in context of incomplete civil and political freedoms at the domestic level. The AU has a stated commitment to civil society outreach, but its record has been mixed. While some civil society organizations have established office at African Union headquarters in Addis Ababa, others have found it more difficult get a foothold, and the AU's own civil society unit, the African Citizen directorate has been constrained by limited resources and a lack of personnel.[64]

Peacekeeping and humanitarian relief

Peacekeeping and humanitarian relief spans roles traditionally associated with tasks comparable to those of bureaucracies and agencies that report to executive actors of government, in other words those institutions tasked with implementing policy and the law. At the international level, the UN's bureaucracies are accountable to the Security Council and General Assembly, which can also mandate, or authorize, actions of states and coalitions of states. The UN's Department for Peace Operations (DPO), as well as the Department of Political and Peacebuilding Affairs (DPPA), and the UN Office for the Coordination of Humanitarian Affairs (OCHA) are central organs. The United Nations Emergency Peace Service – standing forces, designed to rapidly respond to human protection crises – could become a principal peacekeeping actor if it received sufficient support from member states and were to be realized in future,[65] similar to the proposal for an African Standby Force.

The formation of institutions with specialized roles and responsibilities, as well as associated norms and practices mirroring those at the international level lends further credence to the idea that a regional protection regime is indeed emerging. At the regional level, the principal executive organs involved in peacekeeping and humanitarian relief are the Commission, specifically the Department of Peace and Security, the Department of Political Affairs, and the Department of Humanitarian Affairs. The African Standby Force forms a central pillar of the APSA, but it is not yet operational. Its tasks, once realized, would include preventive deployment in conflict; the separation of parties to a conflict following a political agreement; the use of force in an ongoing conflict to protect civilians; involvement in post-conflict peacebuilding tasks, for example disarmament; as well as the creation of safe corridors for the provision of humanitarian relief. However, the prospects of the realization of the ASF as currently proposed are mixed, owing to the reluctance of sub-regional organizations to share control over, and responsibility for, these tasks with the African Union.[66]

The AU has deployed 8 AU operations to date, in Burundi (AMIB), CAR (MISCA), Comoros (AMISEC, and MAES), Mali (AFISMA), Somalia (AMISOM), and Sudan (AMIS I and II), and it has conducted a joint mission in Darfur (UNAMID).[67] The AU's largest peacekeeping operation to date has been its operation in Somalia, tasked with combating Al-Shabaab. The operation has been described as a successful model for peacekeeping collaboration between the global and the regional levels,[68] although it was costly in both financial, as well as in human terms, being the UN's deadliest mission to date, and costing, at its peak, approximately US$ 1 billion per year.[69]

Coordination issues at the global, regional, and sub-regional levels again interfere with the ability of regional actors to effectively provide protection. As in the field of mediation and preventive diplomacy, the principle of subsidiarity could provide a blueprint for successful coordination among regional and sub-regional actors. In practice, however, mandates follow strategic interests, and influence over operational affairs also depends crucially on operational capacity. AMISOM serves as an example illustrating both of these issues. Prior to AMISOM's formation, the African Union had not been the only organization that had considered a military operation in Somalia – the UN, as well as IGAD, had both considered an operation. The principle of subsidiarity, in both cases, did not play a role in compelling or constraining responses, or serving as justification for the inaction or action of the UN, the AU, or, in this case, IGAD. Had the principle of subsidiarity been followed, IGAD would have been the primary actor responsible for managing the conflict, with, where necessary, assistance from the AU or the UN. IGAD, with support from the AU, had indeed suggested a proposal for the deployment of a peacekeeping operation – "IGASOM" – to protect the Transitional Federal Government (TFG) in 2005, but neighbouring states were not permitted to contribute troops, and the operation failed to attract troop contributors.[70] AMISOM, in contrast, attracted sufficient troop contributors, although troop contributing states' motives for joining AMISOM varied.[71] Political and economic, as well as normative considerations, all played a role. While the IGAD proposal was unsuccessful, its endorsement by the AU does suggest that the principle of subsidiarity, local ownership, and regional involvement guided expectations about identifying appropriate actors: "…the IGASOM proposal … was initially meant to provide regional ownership of the crisis', although 'it did

not gain sufficient political traction."[72] If subsidiarity had been a guiding principle for the allocation of authority, the UN's direct involvement would have been considered last. However, the UN justified its lack of direct action not on the grounds that the primary responsibility lay with regional actors; but on the basis that the situation on the ground was too volatile so as to make a UN operation feasible.[73] Nevertheless, the UN began to provide budgetary and technical support in 2010, which also coincided with a troop increase to 12,000 troops; and the UN Support Office for AMISOM received $ 1.5 billion in direct funding between 2009-14.[74] Without the UN's support, AMISOM would not have been able to support itself.[75]

While UN and bilateral donors' funding equipped AMISOM with the necessary resources it also resulted in a 'hollowing out' of the mission's force headquarters, with the AU no longer the principal actor with regard to operational command.[76] Again, this goes to show the importance of funding for the ability of the bodies associated with the protection regime to perform their respective roles. The creation of a Peace Fund forming part of APSA and which funds peace support operations through member state contributions has improved operational peacekeeping capacities, but the AU still lacks a full suite of multidimensional peacekeeping capacities, and a pattern has emerged whereby the UN turns to the AU as a first responder, responsible for peace enforcement, and then takes over operations in the post-conflict phase for tasks associated with stabilization and post-conflict peacebuilding.[77]

Better funding could help address these issues and provide the regional capacity required for rapid response, multidimensional peacekeeping, and post-conflict stabilization and peacebuilding. Better funding would also permit the AU to act as a strategic level headquarters, developing guidance for training, setting down standards, and developing pre-deployment training schemes.[78] Multiple proposals, both at the UN and at the regional level, have considered reforms that could, if implemented, address funding gaps and provide financing for UN-mandated AU-led peace operations.[79] At present, most direct funding through donors takes the form of bilateral aid and is not coordinated through the AU.[80] As a consequence, the AU is under-resourced – the AU has 1,700 staff; the European Union, for example, has 33,000 staff. Key proposals center on replicating global funding structures: the UN's peacekeeping operations are funded through a regular budget through

which member states contribute contingent upon level of national income, debt burden, and per capita income. A report by the High Level Independent Panel on Peace Operations (HIPPO), "Uniting Our Strengths for Peace", advocated for direct financial, rather than in-kind, support from UN to UN-mandated regional operations, but the proposal was resisted on the grounds that the UN would cede operational control, yet retain overall responsibility, and that use of the funds by the recipient organization would be difficult to monitor.[81] In September 2015 the AU submitted its own proposal, whereby 75% of the funding for UN-mandated AU missions would come from UN-assessed contributions, with the remainder to be covered by the AU.[82] However, the proposal, similarly, failed to garner sufficient support.

Human rights and international criminal justice

Within the domain of human rights and international criminal justice, the human protection regime is comprised, institutionally, of courts and human rights commissions. At the international level, the United Nations Human Rights Council (UNHRC) and the International Criminal Court (ICC) are the principal permanent bodies. The ICC, created though the Rome Statue, is the only permanent court with jurisdiction for prosecuting the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. At the regional level, two institutions underpin criminal justice and accountability: the African Commission on Human and People's Rights (the Banjul Commission) and the African Court on Human and People's Rights (the African Human Rights Court). In 2008, states signed a treaty merging the African Court on Human and People's Rights with the African Court of Justice, creating, once all necessary ratifications have been obtained, the African Court of Justice and Human Rights (ACJHR). An important addition to the jurisdiction of the African Court on Justice and Human and People's Rights came in the form of the Malabo Protocol, signed at the African Unit Summit of 2014, in Malabo, granting the proposed ACJHR jurisdiction over international crimes –

effectively creating an "African Criminal Court".[83] Upon ratification by 15 signatories, the Court will thus be the world's first permanent regional court with the jurisdiction to prosecute suspected perpetrators of mass crimes.[84]

Three potential explanations exist for the emergence of a regional court with the mandate to investigate mass atrocity crimes and other crimes threatening international peace and security. First, the idea that it is the institutional embodiment of international norm diffusion. According to this perspective relevant institutions, including regional criminal courts,[85] are likely to become more common in future. Second, the idea that court is the result of a process of regional integration – a functionalist logic at work, in which integration in some policy areas spills over into other policy areas.[86] From this perspective the creation of the Court can be compared to the formation of the European Court of Human Rights. The third explanation is that the political impetus for broadening the jurisdiction of the Court can be explained, at least in part, with regional disapproval of the ICC, specifically its perceived selectivity and bias with regards to the cases it has decided to prosecute,[87] which have, since it became active in 2002, focused almost exclusively on situations in Africa (at present, only one out of eleven situations is non-African; however, among situations under preliminary examination, only two out of ten are African),[88] leading to regular threats of mass withdrawal from the body.[89] It is likely that all of these factors have played a role. The Malabo Protocol is modelled on the Rome Statute,[90] suggesting that a 'justice cascade' may explain the push for a regional court to investigate atrocity crimes.[91] At the same time, the ideational driver of judicial integration was undoubtedly the desire to establish an alternative judicial body to the ICC.

At present, the statute of the ACJHR has received the necessary number of signatures, but has yet to enter into force pending further ratifications.[92] The Malabo Protocol, at the time of writing, has received no ratifications.[93] Upon ratification of the Malabo Protocol, the ACJHR's statute will resemble the Rome Statue, investing it with the jurisdiction of investigation of suspected mass atrocity crimes. However, it also differs in one crucial way: as opposed to the Rome Statute, it includes a provision for official immunity.[94] The absence of official immunity is at the heart of the anti-impunity principle, championed by ICC advocates, but it has not remained uncontested among regional actors.[95]

The inclusion of official immunity in the ACJHR's statute will limit the ability of the Court to fully investigate all cases – which also impedes the ability of the Court to deter human rights violations. While these immunities mean that the barriers to accession to the body are lower, and that governments may be less likely to obstruct investigations and prosecutions, these provisions may also, perversely, incentivize governments implicated in atrocity crimes to remain in office beyond their term of office, for example by delaying, or suspending, elections.

Another likely impediment to the ability of the Court to function is the existence of overlapping jurisdiction with the ICC, and the lack of a procedural mechanism to establish responsibility. The statutes of the ICC and of the African Court of Justice and Human Rights make no mention of each other – there is no hierarchical structure, and no policy of subsidiarity or other means of establishing judicial authority. Likely consequences of an incoherent legal structure are turf battles on the one hand, and "forum shopping" on the other.[96] In order to avoid ICC prosecution, a state could refer a case to the African Court on Justice and Human Rights.[97] Furthermore, the threshold for referral to the Court is higher than that for referral to the ICC; the Rome Statute states a state must be "unwilling or unable *genuinely* to carry out the investigation or prosecution",[98] whereas the Malabo Protocol omits this qualification. However, at present, international criminal justice, at both the global and regional levels, lack an objective standard for interpreting the complementarity clauses. These could range from determining whether all legal means available have been exhausted; whether all suspects have been identified; whether trials are conducted in a timely manner; and convicted individuals have been punished.[99] A first step towards preventing turf battles and forum shopping could be to create a coherent system for international criminal justice that is based on a clear division of labour between the ICC and the future ACJHR. This could be on the basis of subsidiarity; on the basis of the gravity of the case (which is also an admission criterion for cases at the ICC); or the nature of the crime (the ACJHR will be mandated to investigate a broader range of crimes, such as human trafficking, or the exploitation of natural resources, which are not within the remit of the ICC).[100] At present, however, the global trend is in the opposite direction, given increased fragmentation of international criminal law, both substantively and institutionally.[101]

Conclusions

A web of governance structures at the international, regional, and sub-regional levels now exists, and expectations of actors at all levels are beginning to converge around human protection norms. International and regional institutions together form a global protection regime, with actors at different levels, and across a range of generalist and specialist bodies underpinning the regime. Specific protection practices – institutionalized channels for early warning and response, specific ways of coordinating mediation and preventive diplomacy, the development of permanent structures for peacekeeping, peacebuilding, and transitional justice – characterize the nascent global protection regime. This regime most closely resembles a 'tacit regime' according to Levy et al's classification,[102] where largely informal norms and practices influence the behaviour of a range of actors. It may be that these norms, practices, and institutions will become more formalised in the future.

At the regional level, a protection regime is beginning to emerge, reflected in an increasing number of specialized institutions that are becoming increasingly complex. The AU has become a major regional actor within the global protection regime. However, several factors inhibit the strength of the regional regime, and limit the agency of regional actors. Three problems in particular, as the preceding discussion has illustrated, interfere with the development of the regional regime and limit the agency of regional actors. These revolve around incoherence, inconsistency, and hypocrisy.

First, the incoherence of the protection regime and the inconsistencies produced by this incoherence. "Capacity" has been a traditional principle for locating responsibility. However, "capacity" and "subsidiarity" now offer two alternative regulative norms for structuring protection practice. On a case-by-case basis, an incoherent division of labour may result in competition among actors at the international, regional, and sub-regional levels. The case of Libya demonstrated this problem. International, regional, and local agents can make use of regulative norms to justify both inaction as

well as action. Similarly, parallel structures mean that collective responses lack coordination, with the result that responses vary in terms of robustness and tenacity of response as well as measures utilised and procedures for authorisation and implementation. This inconsistency of practice inhibits the consolidation of the regime by casting doubt on its ability to regulate protection responses. The regulative principle of subsidiarity has not yet taken root to the extent that sub-regional and regional organizations are given preference as a matter of routine.

Second, hypocrisy and contestation of protection principles. A range of actors at all levels, including states and international organisations, and particularly autocratic leaders for whom the stakes are typically much higher, may be reluctant to put principles into practice if these principles threaten their authority in times of political volatility. This form of resistance is likely to continue to obstruct advocacy for international human protection norms and the development of protection practices, although to what extent remains to be seen. It may be that the hypocrisy that characterises the protection regime at present will diminish as norms of protection continue to consolidate and protection practices shape the incentives and behaviour of relevant actors.

Finally, a central problem is a lack of budgetary resources and under-staffing of relevant bodies. Insufficient funding is a key issue pervading all of the policy domains. Capacity and authority are co-constitutive – only a protective agent with the means to protect will be regarded as a legitimate protective agent.[103] Given the realities of uneven distribution of resources, this means that in practice it remains difficult for regional protective agents to meet protection responsibilities and to assume authority over protection issues. Capacity ought to be congruent with authority based on predetermined principles of identifying responsible protective agents – but it is not, and rather than bring capacities into line with principles of right authority, all too often international actors choose a pragmatic course of action where legitimacy, and hence the authority to act, is derived from capacity. The international protection regime is premised on the idea that regional actors have an important role to play in implementing protection norms, but devolution of protection authority has been lacking, with states with greater capacities less willing to cede authority.

In terms of policy, the implications are therefore clear: clearer mandates, clear international statutes, and better coordination among international actors can help to improve coherence and facilitate more effective collective action. Further research could outline ways in which international law can be harmonized, and international institutions reformed to consider the increasingly important role of regional actors and to coordinate international responsibilities across actors, both horizontally, and vertically. Improving the consistency of collective practice would improve trust in the regime. Finally, an acknowledgment, by relevant actors, that effective agency also requires access to adequate resources, the meeting of budgetary requirements, and sufficient staffing of relevant bodies. Equipping the AU and other regional bodies with better resources is therefore a principal route for strengthening the regional regime, realizing local agency, and reinforcing global protection norms.

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