

# Could a United Nations Code of Conduct Help Curb Atrocities? A Response to Bolarinwa Adediran

*Edward C. Luck*

Let's be frank: no one has ready answers for how to prevent atrocity crimes and protect populations. After all, it has been less than two decades since the international community, through the articulation of the Responsibility to Protect (RtoP), began to view atrocity prevention and human protection as a prime subject of public policy.<sup>1</sup> For more than a half-century before that, genocide prevention was treated as little more than an after-the-fact legal matter. Furthermore, efforts to protect populations regularly encounter claims of territorial and, more consequently, decision-making sovereignty. In theory, all states favor protecting populations, but whether they are willing and able to take the requisite actions in individual situations is often another matter entirely. There has also been little effort to integrate prevention and protection agendas with more traditional approaches to conflict resolution, human rights, and humanitarian affairs. Preventing conflict and preventing atrocity crimes are distinct but related endeavors, yet the former almost always takes precedence in shaping and implementing policy. There is no doctrine or institutional home for advancing a common conception of how to achieve both ends. Finally, there is nothing easy about protecting populations from governments or nonstate armed groups intent on committing mass killings, sexual violence, or forced displacement. When prevention fails, and it too often does, there is little left but high-risk, high-cost options.

So it is understandable that many advocates of atrocity prevention and human protection have turned to a possible “code of conduct” for members of the United Nations Security Council as an attractive way forward. It is against this backdrop

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that Bolarinwa Adediran recently argued in this journal that the effort to establish such a code is energy misspent. In his article he lays out a thoughtful, if incomplete, argument against the practicability and effectiveness of a code of conduct. Though I am sympathetic to many of Adediran's arguments, in my view he undervalues the normative and political utility of such a code, while—ironically—also underestimating some of the implementation problems such a code would face.

For most of those states endorsing such declarations—now close to two-thirds of the UN's membership—this is a cost-free step, as few will be members of the Security Council anytime soon. The practice of blaming the Council for the sorry state of world affairs is well established, both because it is convenient and because of the Council's primary responsibility under the UN Charter for the maintenance of international peace and security. Most members of the Council, in any case, have limited capacity for carrying out its decisions. These considerations have no doubt contributed to the manifestations of cynicism among some delegations about these efforts to advance a code of conduct, which Adediran aptly documents.<sup>2</sup> Normative undertakings often have more than their share of feel-good public diplomacy about them. They tend to be reflected more fully in words than deeds, and they are espoused most readily by those who think these problems happen in other places, preferably far away. That is why, as the UN's first Special Adviser on the Responsibility to Protect, I repeatedly reminded the member states that these crimes have occurred, at one point or another, in every part of the world. The greatest danger is thinking that they could "never happen here."

Cynicism and selectivity aside, how should we assess the utility of the two proposed codes of conduct: (1) the France/Mexico initiative, which is focused on restraint in the employment of the veto by the five permanent members of the Security Council; and the initiative of the Accountability, Coherence, and Transparency (ACT) coalition, which would apply to all members of the Council. Three levels of analysis are relevant here. On one level would be the contributions of these initiatives to the political and normative movement toward giving increased attention to human security considerations in the making and implementation of policy in the Security Council, regional arrangements, and national capitals. RtoP is both a product and an expression of this larger movement.<sup>3</sup> On a second level would be the effects of such initiatives, should they be realized, on choices made by the Council and, derivatively, by other actors. Less understood, but more critical, would be the effects on a third level—the prevention

of atrocity crimes and the protection of populations on the ground in dangerous situations. These latter effects have been assumed more than they have been assessed. On each of the three levels, there would undoubtedly be downside risks as well as upside potential.

It is on this first level, the political and normative, that my assessment most sharply diverges from that of Adediran. While he ends up dismissing them largely on grounds of political infeasibility, I would contend that the France/Mexico and ACT initiatives have real value as the latest manifestations of the human protection project to which RtoP importantly contributes. To convince almost two-thirds of the UN membership to declare that members of the Security Council should not block actions aimed at protecting populations from atrocity crimes is no small diplomatic feat. The codes represent a significant step forward in the ongoing struggle to raise the visibility and political salience of efforts to curb atrocity crimes. If member states link the willingness to undertake the ACT pledge to suitability for election as a nonpermanent member of the Security Council, which requires a two-thirds vote in the General Assembly, then the ACT code could take on real political power. If it shapes the composition of the Council, then the code would also directly influence deliberations within the Council on human protection matters, both thematically and in specific situations where vulnerable populations are at risk. It would be that much harder for Council members to treat atrocity crimes as a tertiary priority.

The ten elected members, much more than the five permanently unaccountable ones, can be held accountable for upholding the ACT code. When acting together they have substantial influence given that any seven members can prevent a Council action, as all actions require an affirmative vote of at least nine members.<sup>4</sup> This gives the elected members a voice not only on *how* the Council votes but in deliberations about *what* the Council votes on. Further, all fifteen members serve as the monthly President of the Council on a rotating basis (alphabetically), and thus the elected members hold that seat two-thirds of the time. As such, they can act as authors or co-authors of relevant draft resolutions, such as they have on humanitarian matters in Syria. They also chair almost all of the Council's subsidiary bodies, and often take or share the lead on situations within their regions. For the past two decades they have been in the vanguard of human rights and human protection concerns in Council agendas, meetings, and outcomes. The ten non-permanent members have encouraged the body to be much more attentive to developments often associated with atrocity crimes by championing the inclusion

of questions of forced displacement; sexual and gender-based violence; children and armed conflict; women, peace, and security; the protection of civilians; and RtoP in the work of the Council.<sup>5</sup> The France/Mexico initiative usefully draws attention to the negative power of the permanent five to block timely and decisive action as called for by RtoP, but the ACT code embodies the larger principle of collective responsibility borne by all member states and by all members of the Council. It is too easy to always blame the five.

Yes, as Adediran details, there would be serious problems in application of the codes to actual decision-making within the Council. But, importantly, the widespread endorsement of the codes promises to contribute to the growing sense that the protection of populations from atrocity crimes should be an integral component of the Council's primary responsibility for the maintenance of international peace and security. When members of the Council feel otherwise, they should be compelled to explain their actions to the larger membership. Protection should be the expected practice, consistent with the Council's obligation under Article 24(2) of the Charter to "act in accordance with the Purposes and Principles of the United Nations."

Like most normative endeavors, the codes of conduct have an aspirational quality. Implementation of any such code would inevitably be uneven, especially in the early years. That has been true of human rights, international humanitarian law, and RtoP itself. If instant or consistent implementation were the standard, the world would have given up on all of these values decades ago. The codes should be understood as part of an ongoing political and agenda-setting struggle. They are about the attitudes and policy preferences of member states, not about reforming the Council itself. To Adediran's credit, he dismisses the reform argument rather quickly, which underscores that raising that issue in the first place was at best a distraction and at worse a detour from the consideration of the core human protection questions at stake in the debate over the codes of conduct.

As noted above, it is on the second level, in terms of the actual application of the codes to Security Council practice, that a number of problems would likely arise. Neither code of conduct could be easily applied within Council deliberations, where their application to specific situations would likely generate sharp debate about what constitutes "vital national interest" or a "credible" draft resolution. This additional layer of debate would not speed decision-making when urgent action is needed. Both the France/Mexico and ACT proposals envision some role for the secretary-general (and hence his special advisers on the

prevention of genocide and on RtoP) in making an assessment of the situation on the ground and of the likelihood of atrocity crimes being committed. When I served as Special Adviser for RtoP, I suggested to the Council that the reporting of situations in which RtoP crimes appeared to be imminent should be considered a normal component of the secretary-general's authority under Article 99 of the Charter to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."<sup>6</sup> That has now been accepted as standard practice. Nevertheless, these matters are often quite contentious, particularly in situations in which the Council is divided and/or a veto is likely. So the political stakes may be highest when and where such objective reporting is most needed. In such cases, the role of the secretary-general and his advisers will be both essential and controversial.

With the carnage in Syria in view, one cannot dispute the damage that is sometimes done by the casting of repeated vetoes when populations are at risk. It is right and understandable that both codes of conduct seek voluntary restraint in the use of the veto when atrocity crimes are or are at high risk of being committed. But a more thorough historical review is needed to clarify how often, where, and in what circumstances the veto has been employed to block effective action to prevent atrocity crimes and to protect populations. Even in Syria, one could ask how far would countries have been willing to go to protect the Syrian population absent the Russian and, less often, Chinese vetoes. In Kosovo, NATO acted forcefully without Security Council authorization, but no such action was contemplated in Syria. A more general lack of political will, not vetoes, prevented timely and decisive action in Cambodia, Rwanda, Srebrenica, Sri Lanka, South Sudan, and Burma. In recent decades, the veto has been infrequently applied to situations outside the Middle East, though there have been plenty of atrocity crimes committed elsewhere. It may be, then, that the real test for such a code would be less whether fewer public vetoes are cast and more whether the private threat to cast them becomes less credible and frequent in the process of negotiating relevant resolution texts within the Council.

In passing, Adediran suggests "the use of regional institutions as legitimate authorizing mechanisms in place of the Security Council."<sup>7</sup> Though he characterizes this as a "bolder" and "possibly more effective" solution, RtoP doctrine has long stressed the need for regional and subregional action, and the historical track record in this regard has been decidedly uneven.<sup>8</sup> In most parts of the world, strong and capable regional political institutions are lacking, including

most pointedly in the Middle East and Asia. It has been the Economic Community of West African States (ECOWAS), a subregional arrangement, that has acted most boldly in such situations. In Côte d'Ivoire, it was ECOWAS that advocated the forceful path that the Security Council followed, while the African Union favored more time for diplomacy when lives were at risk, just as it did in Libya in 2011 and South Sudan in 2018.

For reasons of capacity as much as of legal authority, it has proven most productive to think of partnerships and collaboration among global, regional, and subregional arrangements rather than to pose this as a choice between the Council and its regional and subregional counterparts. This is not a new idea, as it formed the basis for the articulation of Chapter VIII of the Charter, which has held up reasonably well over the years as a framework for such partnerships. Chapter VI on the pacific settlement of disputes likewise puts a premium on preventive efforts by parties and local and regional actors. Within the Security Council itself, there have been many years of building working relationships with regional groups, particularly the Peace and Security Council of the African Union. Most Council members, most of the time, would like nothing better than effective burden-sharing.

It is on the third level, that of protection, that the most important questions about the utility of the proposed codes lie. Perhaps because of their New York focus, neither advocates for the codes nor Adediran have had much to say about this—the human dimension of the challenge. Three points are critical.

One, passing resolutions is a means to an end, not, in itself, the primary purpose of the Security Council. The maintenance of international peace and security may be enhanced by the passage of Council resolutions, but historically there does not appear to be a strong correlation between the number of resolutions passed and the results obtained on the ground. This is an area calling out for more research, but offhand one can recall a number of chronic and destructive conflicts, such as those in Bosnia-Herzegovina, the Democratic Republic of the Congo, Somalia, the Sudan and South Sudan, and Syria, in which the parties paid relatively little attention to multiple resolutions and Presidential Statements (the latter requiring unanimity) from the Council. The authority and credibility of the Council are not necessarily enhanced by the quantity of its decisions in a particular matter. Sometimes the opposite is the case.

Two, efforts to prevent atrocity crimes and protect populations neither begin nor end with the Council. As Dana Zaret Luck and I have argued, the initial

conception of RtoP was too state- (and Council-) centric, offering too little room for agency on the part of vulnerable populations and other local and national actors.<sup>9</sup> In practice, the implementation of RtoP has required that the top-down approach reflected in an emphasis on Council action be complemented by an understanding of the critical importance of the bottom-up dynamics in actual situations of atrocity commission. In looking at a number of situations in which efforts to prevent atrocity crimes and protect populations either succeeded or failed, Alex Bellamy and I concluded that the involvement of the Security Council was more often associated with failure than success.<sup>10</sup> In practice, as Special Adviser, I found that preventive diplomacy was easier in some situations, such as Guinea, Kenya, and Kyrgyzstan, of which the Council was not seized. Again, more wide-ranging and rigorous research is needed, but clearly Council engagement is not a sufficient condition to ensure either prevention or protection.

Three, passing resolutions that contain operational commitments that members of the Council and other member states have no intention of carrying out can be counterproductive, even dangerously misleading. A divided vote, if nothing else, serves as a reminder that the international community is divided on how to proceed. Action may produce unintended consequences, as was the case in Libya, and may lead local groups and populations to expect forceful international action when it is unlikely to be forthcoming, as with the Council's declaration of safe areas in Bosnia-Herzegovina.<sup>11</sup> The Council lacks reliable means of monitoring the way its decisions are or are not implemented.<sup>12</sup> When faced with possible atrocity crimes, indifference and inaction are usually the greatest dangers, not flawed action. Nevertheless, codes of conduct should not be interpreted as endorsing any and all Council action, but rather only reasoned action by the Council that is likely to have the desired preventive and protective effects. Appeals to "do something" do not necessarily lead to the kind of reflective policymaking that would lead to sustained and effective, as well as timely, action. For instance, a code that includes no criteria about what makes one resolution more reasonable or compelling than another provides little guidance to Council diplomats when they have to choose among competing drafts and approaches, each claiming to offer the surest way to protect populations.

In short, like all fresh approaches to weighty policy challenges, the proposed codes of conduct do not offer any shortcuts or magic answers to the dilemmas surrounding efforts to prevent atrocity crimes and protect populations. This is an extremely tough task that will require multiple approaches and multiple actors

over decades, not just years. I disagree, primarily for the normative and political reasons noted above, with Adediran's assessment that these initiatives will ultimately prove to be "unhelpful."<sup>13</sup> They have generated renewed interest in prevention, protection, and RtoP; have forced members of the Council to reflect (at least a bit) on their Charter responsibilities; and have gained the support of close to two-thirds of the UN's membership. In my book, that is an impressive start. These initiatives, however flawed and incomplete, have already proven their worth in political and normative terms.

#### NOTES

- <sup>1</sup> The pioneering work was performed by the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
- <sup>2</sup> See Bolarinwa Adediran, "Reforming the Security Council through a Code of Conduct: A Sisyphean Task?" *Ethics & International Affairs* 32, no. 4 (2018), pp. 463–82.
- <sup>3</sup> For a discussion of the evolution of policy and doctrine on human security and RtoP, see Alex J. Bellamy and Edward C. Luck, *The Responsibility to Protect: From Promise to Practice* (Cambridge, U.K.: Polity Press, 2018), pp. 6–36.
- <sup>4</sup> A recent example, when atrocity crimes were very much on the agenda, was the July 2018 Council vote on sanctions for South Sudan. There were no negative votes or vetoes, but Côte d'Ivoire was the swing vote in a 9–0–6 decision allowing an arms embargo and targeted sanctions to proceed. See Resolution S/2428 (2018) of July 13, 2018 and the explanation of votes in UN document S/PV.8310.
- <sup>5</sup> According to the Global Centre on the Responsibility to Protect, the Council has referred to RtoP in seventy-seven resolutions as of November 15, 2018.
- <sup>6</sup> Simon Chesterman, "Relations with the UN Secretary-General," in Sebastian von Einsiedel, David M. Malone, and Bruno Stagno Ugarte, eds., *The UN Security Council in the Twenty-First Century* (Boulder, Colo.: Lynne Rienner, 2016), p. 453. Also see United Nations Security Council, "Letter Dated 30 December 2008 from the Permanent Representative of South Africa to the United Nations Addressed to the President of the Security Council," UN document S/2008/836, p. 13.
- <sup>7</sup> Adediran, "Reforming the Security Council through a Code of Conduct," p. 480.
- <sup>8</sup> Adediran cites his article, "Implementing R2P: Towards a Regional Solution," *Global Responsibility to Protect* 9, no. 4 (2017), pp. 459–87. Two of UN Secretary-General Ban Ki-moon's early reports on RtoP, which I prepared, stressed the value of exploring regional and subregional options whenever possible. See United Nations, Reports of the Secretary-General, *Implementing the Responsibility to Protect*, UN document A/63/677, January 12, 2009, and *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, UN document A/65/877-S/2011/393, June 28, 2011.
- <sup>9</sup> Edward C. Luck and Dana Zaret Luck, "The Individual Responsibility to Protect," in Sheri P. Rosenberg, Tibi Galis, and Alex Zucker, eds., *Reconstructing Atrocity Prevention* (New York: Cambridge University Press, 2016), pp. 207–48.
- <sup>10</sup> Bellamy and Luck, *The Responsibility to Protect*, pp. 164–80.
- <sup>11</sup> Alan J. Kuperman, "The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans," *International Studies Quarterly* 52, no. 1 (2008), pp. 49–80.
- <sup>12</sup> In Libya, the Council's timely decision to authorize the use of air power to protect populations was undermined in practice when those carrying out the mission decided to reinterpret the mandate to include regime change.
- <sup>13</sup> Adediran, "Reforming the Security Council through a Code of Conduct," p. 480.

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Abstract: In an article titled "Reforming the Security Council through a Code of Conduct: A Sisyphean Task?" (*Ethics & International Affairs* 32, no. 4, pp. 463–82), Bolarinwa Adediran argues that efforts to establish a code of conduct at the UN Security Council amount to energy misspent—for reasons both of practicability and effectiveness. While it is true that the proposed codes of conduct do not offer any shortcuts or magic answers to the dilemmas surrounding efforts to prevent atrocity crimes and protect populations, I disagree with the assessment that these initiatives will



ultimately prove to be “unhelpful.” I examine the initiatives on three levels of analysis: (1) their effect on political and normative movement toward giving increased attention to human security considerations, (2) their effect on Security Council decision-making, and (3) their effect on atrocity prevention and protection on the ground. The proposed codes have both downside risks and upside potential on all three levels, but it is on the first level that my assessment most sharply diverges from that of Adediran.

Keywords: United Nations, Security Council, code of conduct, atrocity crimes, atrocity prevention, Responsibility to Protect