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THE RESPONSIBILITY TO PROTECT:

CONCEPTUAL MISUNDERSTANDINGS AND CHALLENGES OF APPLICATION

Abstract: *The world's attention was recently focused on the International Criminal Court's arrest warrant for Sudanese president Omar al-Bashir on charges of war crimes and crimes against humanity. His indictment comes at a time when the United Nations is refining the issues inherent in the doctrine of the Responsibility to Protect (R2P), as well as legal issues regarding various states' responsibilities and culpability for inaction or indifference towards mass atrocity crimes. This Alert is the first of two issues focused on the R2P. This issue seeks to 1) provide a basic understanding of the R2P by looking at its development and principles, 2) clarify the myths and debates surrounding the doctrine, and 3) identify existing challenges in the application of R2P. Finally, with an eye towards the application of R2P in ASEAN, we look at the attempts of the African Union to incorporate the R2P within its regional framework.*

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The Responsibility to Protect: Basic Understandings

After the International Criminal Court (ICC) issued the unprecedented arrest warrant for Sudan's sitting head of state Omar al-Bashir for war crimes and crimes against humanity in March this year, issues have been raised about the efficacy of using the ICC to prosecute those accused of mass atrocity crimes. Bashir has remained defiant, with regional organisations in Africa pressing the United Nations (UN) Security Council to defer his indictment. This case has been linked to the Responsibility to Protect as the overall framework to prevent, react, and rebuild in the aftermath of mass atrocity crimes.

Beginnings of R2P

The doctrine known as the Responsibility to Protect, or R2P, had its beginnings in 2001. Incidentally, this was introduced into mainstream academic and policy discourse shortly after the 11 September attacks on the United States (US).

Development of the R2P was debated through the controversy of the Iraq invasion in 2003, and emerged in 2005 to be officially enshrined in the Outcome Document of the United Nations (UN) World Summit, signed by more than 150 heads of state and government of the UN General Assembly. It comes from the re-conceptualisation of state sovereignty as 'responsibility', rather than the absolute right of states to exercise the monopoly of force within their sovereign territories.

The consensus which led to the World Summit Outcome Document emerged after intensive, prolonged and contentious debates and discussions. It is clear in its emphasis on each individual state's responsibility to protect its populations from four mass atrocity crimes. It is also insistent on the preventive, non-coercive and non-military aspects of the doctrine. This is listed in paragraphs 138 and 139 of the Document, which also contains deference to the UN Charter and the Security Council (see info box on page 2).

From the 'Right to Intervene' to the 'Responsibility to Protect'

Gareth Evans, president of the International Crisis Group (ICG), a former Australian Foreign Minister and one of the principal architects of the R2P, explained



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UN WORLD SUMMIT OUTCOME DOCUMENT PARAGRAPHS 138&139. SEPTEMBER 2005:

The heads of state and governments attending the 60th Session of the UN General Assembly agreed as follows:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. [...] The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...]

(Source: International Crisis Group, 'The Responsibility to Protect')

that the doctrine transforms the controversial 'right to intervene' - espoused by some such as French foreign minister Bernard Kouchner - to the responsibility of individual states and the international community to protect civilians.

This includes responding to mass atrocity crimes as and when they occur. It is essentially a peace-building concept that incorporates prevention, reaction and rebuilding into its framework, and attempts to reconcile the debates around 'humanitarian interventions' and build a broad consensus in dealing with specific types of mass atrocities. It should be stressed that the R2P is not a euphemism for 'humanitarian intervention', which is coercive military intervention for humanitarian purposes. This is controversial to former colonial states which view such interventions with suspicions of perceived neo-colonialist designs, and developed states, which are concerned about state sovereignty.

The Three Pillars of the R2P

The R2P is built upon three pillars that frame its strategy and advances its agenda, and applies to four mass atrocity crimes – genocide, war crimes, ethnic cleansing and crimes against humanity. The principles found within the three pillars, particularly the first and third, are largely based on

and congruent with the UN Charter. The following elaboration of the pillars is summarised from the January 2009 report of the UN Secretary-General on implementing the Responsibility to Protect.

The Responsibility to Protect: Core Principles

(1) Basic Principles

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(Source: Report of the International Commission on Intervention and State Sovereignty, 2001)

Pillar One calls on states to protect their own populations - citizens and non-citizens, from genocide, war crimes, ethnic cleansing and crimes against humanity, including their incitement. It is predicated on the notion that state sovereignty

emphasises the duty and obligation of each state to protect civilians in its territory from grievous harm, and that sovereignty is not a licence to harm its own populations.

Pillar Two is about international assistance and capacity-building. It refers to the commitment of the international community to assist states in meeting those obligations. This draws upon the cooperation of United Nations member states, regional organisations, civil society and private sector actors, as well as the UN as an international institution. This pillar sets the framework for policies, procedures and practices that can be applied consistently, and is also where the prevention layer of the R2P is built upon.

Pillar Three looks at timely and decisive response, in which UN member states are to 'respond collectively in a timely and decisive manner' when a state is 'manifestly failing to provide such protection.' This is usually understood and interpreted too narrowly by many observers; it does not simply give a choice between 'doing nothing or using force', but comprises a broad range of tools available to the UN and its partners. These include various pacifist measures in accordance with Chapter VI of the UN Charter, coercive measures under Chapter VII, and/or collaborative measures with regional and other organisations under Chapter VIII of the Charter.

Although the doctrine of the R2P is meant to be a comprehensive framework to protect civilians in internal conflict situations, there are several myths and debates surrounding it, arising particularly from the intervention measures contained in the third pillar.

Myths and Debates about the R2P

Mistaking R2P for humanitarian intervention

Some academics perceive the R2P as a form or mechanism for humanitarian intervention. This is not only inaccurate, but is misunderstood further when compounded by emphasis on the use of force as a last resort (see the chapters by Banerjee and Askandar in Caballero-Anthony & Acharya, 2005; article by de Waal, 2007 quoted in Arbour, 2009), with little or no reference to non-

military responses such as the political or economic strategies contained in the doctrine. This incomplete picture of the R2P is exacerbated by media coverage of commentators who conflate the R2P with humanitarian intervention regarding, for instance, the situation in Darfur, Sudan (see de Waal, 2008).

The North-South Debates – Westphalian Sovereignty and 'Trojan Horses'

The main axis of debate over the R2P is particularly relevant, but not limited to, intervention. In this, there are two groups of states: those in the global North and the global South regarding the Westphalian model of sovereignty and the R2P as a 'Trojan horse', respectively.

The global North is concerned with fundamental questions over the weakening of the principle of sovereignty and the structure of the world order. They are also 'decidedly unenthusiastic' about allowing multilateral organisations to decide

on the terms of engagement over deploying military forces. The US under the George W. Bush administration led the way in resisting intervention in R2P-type situations and refused, along with some other states, to concede their so-called decision-making sovereignty.

In contrast, the global South fear that the R2P might be abused by 'imperial' or 'neo-colonial' powers for their own interests. Countries such as Egypt, Iran, Cuba, Pakistan, Venezuela and China have raised concerns over potential abuse of the R2P to legitimise interventions.

Due to having experienced firsthand the colonialist interventions - many of which have often appealed to moral and humane principles to justify these invasions or intrusions - these states have become wary of potential violations to their territorial sovereignty. Hence, while many countries in Asia tend to agree with the basic tenets of the R2P, governments hesitate to apply the doctrine due to disagreement with the reaction pillar of the R2P. In light of these current debates, there are three significant challenges that face the R2P today: conceptual, institutional and political.

“The conceptual challenge is to refine and define the concept in such a way that there are no longer basic misunderstandings, real or contrived, about the R2P which could obstruct a genuine universal acceptance. The two basic misunderstandings are viewing the R2P too narrowly and too widely..that it is essentially humanitarian intervention and not much else...”

INTERNATIONAL CRISIS GROUP

THE RESPONSIBILITY TO PROTECT (R2P): A PRIMER

- *What is R2P?*

The responsibility of states, and where they fail the international community, to protect civilians from mass atrocity crimes.

- *Why does R2P matter?*

Because it's the right thing to do: our common humanity demands that the world never again sees another Holocaust, Cambodia, Rwanda or Bosnia.

Because it's in every country's interest: states that can't or won't stop internal mass atrocity crimes are states that can't or won't stop terrorism, weapons proliferation, the spread of health pandemics and other global risks.

- *What kind of action does R2P require?*

Overwhelmingly, prevention: through measures aimed in particular at building state capacity, remedying grievances, and ensuring the rule of law.

But if prevention fails, R2P requires whatever measures – economic, political, diplomatic, legal, security or in the last resort military – become necessary to stop mass atrocity crimes occurring.

- *Whose responsibility is R2P?*

For individual states, R2P means the responsibility to protect their own citizens, and to help other states build their capacity to do so.

For international organisations, including the UN, R2P means the responsibility to warn, to generate effective prevention strategies, and when necessary to mobilise effective reaction.

For civil society groups and individuals, R2P means the responsibility to force the attention of policy-makers on what needs to be done, by whom and when.

- *How and why did the idea of R2P originate?*

Throughout the 1990s controversy raged — particularly over Rwanda, Bosnia and Kosovo — between supporters of a “right of humanitarian intervention” and those who argued that state sovereignty, as recognised in the UN Charter, precluded any intervention in internal matters.

The R2P concept was aimed at bridging that gap. It originated with the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, in 2001, and became a central theme in the recommendations of the UN High-Level Panel, *A More Secure World*, in 2004 and of the UN Secretary-General, *In Larger Freedom*, in 2005.

- *What is current status of the R2P idea?*

The world's heads of state and government unanimously accepted the concept of R2P at the UN World Summit in September 2005. The Security Council has also accepted the general principle.

But the task remains, as each new danger of mass atrocity crimes threatens, to translate that principled acceptance into effective action — at the international, national and community level.

Source: International Crisis Group (ICG)

(click here for the ICG's website on RTP)

Three major challenges

Conceptual, institutional and political challenges

The *conceptual challenge* is to refine and define the concept in such a way that there are no longer basic misunderstandings, real or contrived, about the R2P which could obstruct a genuine universal acceptance. The two basic misunderstandings are viewing the R2P too narrowly and too widely. The former refers to the misconception that it is essentially humanitarian intervention and not much else, but in fact, it is about using the full spectrum of preventive, reactive and rebuilding responses. The latter misunderstanding is that the R2P extends to almost any kind of threat against human beings, where in reality it is only

about generating an effective and consensual response to mass atrocity crimes.

The *institutional challenge* is to establish the various early warning and response mechanisms, diplomatic, civilian response, and - in extreme cases - military capabilities. This would involve many different actors, including the UN, regional organisations, individual governments, and international, regional and local non-governmental organisations (NGOs). In addition, many different structures and strategies would have to be put in place to help ensure that the international community can offer appropriate responses whenever situations of mass atrocity crimes occur.

One such structure is the regime of international law. Edward Luck, Special Advisor to the UN Secretary-General, reminds us that the first pillar of the R2P - that of state responsibility - is 'firmly based in existing international law.' By this he means that treaty-based and customary international legal obligations require states to prevent and punish mass atrocity crimes such as genocide, war crimes and crimes against humanity.

As a corollary, the legal understanding of these international crimes is largely reflected in the provisions of the Rome Statute of the ICC, which also strengthens the existing obligations on states to punish perpetrators of these crimes. The ICC and other courts at the international and regional levels serve to further R2P principles, although these then bring up political challenges.

The political challenge is to generate the political will to meet the challenges of mass atrocity crimes. Political will can be built up with mechanisms of mobilisation and interaction. One of this involves energising of the highest levels of government and inter-governmental decision-making, which is top-down or peer-group pressure. Another aspect involves bottom-up mobilisation from grassroots groups - comprising various types of NGOs and institutions - to 'kick' the decision-makers into action if they show hesitation in addressing or responding to potential or actual mass atrocity crimes.

Regionalism and the R2P: AU Lessons for ASEAN?

Against the background of the international community's failure to act decisively to prevent the 1994 genocide in Rwanda and other major conflicts, the African Union (AU) incorporated a 'right to intervene' in its 2000 Constitutive Act under Article 4(h).

The AU is seen as adopting a 'security culture of non-indifference' among its member states, with the norm of 'responsibility to protect' embedded in the peace and security architecture of the AU, according to The Nordic Africa Institute. This can be compared with the Association of Southeast

Asian Nations (ASEAN), in which their principle of non-interference has evolved towards 'constructive engagement', and potentially lead to fostering a culture of non-indifference.

Second, is the issue of institutional preparedness. The AU has early warning and early response mechanisms, but has inadequate preventive mechanisms such as coordination between human rights institutions and the mainstream AU organs, for example, to monitor human rights violations. This may resonate with the proposed ASEAN Security Community (ASC), which aims to foster regional integration by 2020 and has three 'strategic priorities' that are congruent with the R2P doctrine - conflict prevention, conflict resolution, and post-conflict peace building.

Hence the R2P could provide structure for the ASC to develop the ASEAN human rights body, as well as a framework to collaborate with regional and local civil society organisations to develop an early-warning capacity and 'preventive toolbox'.

Third, the political will to mobilise and generate effective responses is an apparent challenge for regional organisations. In the AU, members seem to prioritise the protection of ruling elites rather than the people, thus indicating that political will, not sovereignty considerations, determine whether states intervene. Despite this, political will could be driven by institutional mechanisms that impose legal responsibility on states to address and end mass atrocities. In order for such

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mechanisms to develop, member states would need to realise that the security of one's neighbours would impact on one's own security, and that the national interests of individual states are intertwined with regional forces.

Conclusion: Remaining faithful to the conceptual underpinnings

The core idea of the R2P, according to Evans, is simple: It is to turn the notion of the 'right to intervene' upside down, and emphasise instead on the responsibility of all states to protect their own people from mass atrocity crimes, as well as to help others to do so. The focus is thus on protection and not intervention, and we should look at the whole issue from the perspective of the victims.

Further, the 'responsibility' in question is that of preventing mass atrocities, with the question of reaction through various means arising only if prevention failed. The reflexive response towards mass atrocity crimes should not be one of whether states and the international community should act - but rather how and when to prevent or respond, using what means, and by whom.

In our next issue, we will continue with the theme of R2P and examine the applicability of the doctrine in Asia, where response has been more cautious, in part due to the ongoing intra-state conflicts in the region. In doing so, we will take a look at government responses to R2P so far, and attempt to identify potential cases of R2P in the region.

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