POLICY BRIEF

No. 1/2009

IMPLEMENTING THE 'RESPONSIBILITY TO PROTECT'

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INTRODUCTION

In a long-anticipated report to Member States of the United Nations, Secretary-General Ban Ki-Moon has described the 'responsibility to protect' (known in short-hand as R2P) as an "idea whose time has come" and presented a comprehensive plan for operationalizing the principle within the UN system. The Secretary-General's report responds to States' endorsement of R2P in the Outcome Document of the 2005 World Summit by providing both conceptual clarity on the principle, and a set of processes and tools for translating it from words into deeds. States are scheduled to address the document and its recommendations in a debate on R2P in the General Assembly in the spring of 2009.[1]

Paragraphs 138 and 139 of the 2005 Outcome Document recognize the responsibility of individual sovereign states to protect their own populations from genocide, crimes against humanity, war crimes, and ethnic cleansing. Unanimously, Member States also affirmed that the international community should assist states in fulfilling these responsibilities and, in the event that a state was "manifestly failing" to protect its population from the four crimes, should take collective action in a "timely and decisive manner" in accordance with the UN Charter.[2] Thus, as currently understood by Member States, R2P has three components or 'pillars': the protection responsibilities of individual States; the international community's role in assisting States to fulfill their responsibilities (capacity-building); and the international community's residual responsibility for timely and decisive response.

Despite its unanimous endorsement, R2P has been the source of contestation among States before, during, and after the World Summit negotiations, and claims about its status as a new 'norm' of international conduct have been strongly resisted. At the same time, R2P has been enthusiastically embraced by key sectors of civil society, and is part of the public consciousness in many Western countries. Over the past two years, the principle has been invoked to encourage international action in crises such as the attacks on civilians in Darfur, the pre-election violence in Zimbabwe, and the cyclone-related humanitarian catastrophe in Burma. More controversially, R2P was also appealed to by Russia in its recent military action in Georgia. In commissioning a Special Adviser to prepare this report, Ban Ki-Moon hopes to cement a firmer consensus on what R2P means, when it should be invoked, and how it can be implemented to prevent and respond to mass atrocities against civilians.

BACKGROUND

Debates about the legitimacy of military action by outside actors to address developments within the jurisdiction of a sovereign state have been an integral part of the evolution of the international system. In the nineteenth century, the political practice of 'humanitarian intervention' developed, whereby states (predominantly in Europe) intervened in the internal affairs of others either to rescue their own citizens from harm or to protect religious and national minorities who were subject to persecution. Enshrining this practice as a right in international law, however, was strongly opposed. By the time of the signing of the UN Charter, the overwhelming objective of statesmen and lawyers was to limit the legitimate pretexts for engaging in war to cases of self-defence or collective security. Therefore, the Charter itself remains silent on the question of whether states can use military force to address a humanitarian crisis occurring within the sovereign jurisdiction of another.

Nevertheless, a series of developments during the latter part of the 20th century contributed to a more permissive context for intervention by outside actors when humanitarian crises shocked the international conscience. These include, inter alia: the rise of international human rights instruments; the increased vulnerability of civilians in the context of civil conflict; the global and instantaneous access to information which can serve to heighten popular awareness of human suffering; and the greater willingness of the UN Secu-

rity Council to define instances where such atrocities are occurring as 'threats to international peace and security'.

Two cases in particular from the 1990s served as the impetus for a new debate on the legitimacy of intervention for humanitarian purposes. The late and half-hearted action by the international community during the genocide in Rwanda in 1994 led to much soul-searching on the part of international organizations and individual states about how to protect civilians in the future. Yet, the 1999 NATO bombing of Serbia, designed to prevent ethnic cleansing in Kosovo, occurred without Security Council authorization and created damaging divisions within the international community about the conditions under which force should be used.

The objective of former UN Secretary General Kofi Annan was to avoid the twin failures of Rwanda and Kosovo, and to find a new consensus within the international community over the legitimacy of action to protect civilians from mass atrocities. The Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS), took up Annan's challenge in 2001 and set out to determine when coercive action against another state for humanitarian purposes could be legitimate. ICISS's main contribution to the debate was primarily conceptual: in changing the language from a "right of intervention" (which focused on the coercive prerogatives of interveners) to a "responsibility to protect" (which focused more on the individuals subject to harm).

The core of the Commission's argument was twofold. First, it posited that contemporary sovereignty is no longer merely about undisputed control over territory, but rather a conditional right dependent upon a state's respect for a minimum standard of human rights. For the Commission, it logically followed that intervention is permissible – and an integral part of sovereignty - if it is aimed at protecting civilians from mass violations of their human rights. Second, the Commissioners insisted that the R2P required a framework broader than crisis response. The international community also had a responsibility to prevent such crimes from occurring, and to rebuild societies emerging from conflict.[3]

RESISTANCE TO R2P

Although the Commission's recommendations were warmly received by UN bodies and many Western states, a gap remained between the enunciation of a principle and its effective operationalization. The implementation strategy for the ICISS report originally envisaged a series of initiatives within the UN: a General Assembly Resolution embodying the basic framework of R2P; Security Council guidelines for responding to military interventions with a humanitarian purpose and agreement to suspend use of the veto in such situations (provided no vital national interest was at stake); and leadership by the Secretary General to advance ICISS's findings – most notably in his efforts to reform the institutions of the UN in 2005.

These efforts were confounded by three obstacles: resistance by the Permanent Five members of the Security Council to agree to any principles, in advance, that would commit them to action or curtail their use of the veto; objections from a vocal segment within the developing world to any action that smacked of a return to Western-style imperialism; and the war in Iraq in 2003, whose proponents twisted the language of R2P to provide a *post facto* justification for the U.S-led campaign to topple Saddam Hussein. More generally, the "Bush Doctrine" – with its focus on pre-emption and intervention - made many Non-western States suspicious about moves to broaden the list of legitimate exceptions to the prohibition on the use of force contained in the UN Charter.

As with all Declarations emanating from the UN, the paragraphs supporting R2P in the 2005 Outcome Document have ambiguous status in international law. In addition, in light of the objections to the principle

noted above, the text which was ultimately agreed upon by States narrows the original notion of the 'responsibility to protect' in two ways.

First, while ICISS and Kofi Annan had spoken of a broad international responsibility to protect, Paragraph 139 of the Outcome Document locates the new responsibility firmly within the United Nations, and more specifically the Security Council. By tying R2P explicitly to the Council (and its powers under Chapters VI and VII of the Charter), the statement does not provide any new legal obligations on the part of States to prevent or respond to atrocities. The existing mechanisms of collective security - which often involve un-wieldy intergovernmental bargaining in the Council - will be used to designate human rights violations as threats to international peace and security and to recommend action. It is also silent on the question of what should happen if there is failure by Council members to place a country situation on its agenda (as hap-pened, for example, in the case of Cyclone Nargis in Burma) or agree on appropriate action (as occurred in the case of Zimbabwe). Finally, it is important to note that the Council's role in *authorizing* actions designed to fulfill international responsibilities is not equivalent to the task of actually *fulfilling* such responsibilities. The latter requires some kind of accepted procedure for distributing responsibilities from the UN down to particular states and agencies, as well as a formula for sharing the costs of any policies or missions author-ized to address a humanitarian catastrophe.

Second, while ICISS had set as its threshold for action "large scale loss of life" or "ethnic cleansing" (actual or apprehended), the Outcome Document restricts the application of R2P to four specific crimes that al-ready form part of existing international legal instruments.[4] It also demands that states "manifestly fail" to protect their populations before the international community can intervene (whereas earlier enunciations of the principle had spoken merely of states being "unable or unwilling"). Emphasis on a hierarchy of respon-dents, which begins with the state where a human rights crisis is occurring, has enabled those who oppose R2P to argue about *when* addressing a crisis should transfer from the national to the international level, and to prevent more timely responses from the Security Council. Thus, for example, even after then-U.S. Secre-tary of State Colin Powell stated in September 2004 that his government believed genocide had been com-mitted in the Darfur region of Sudan, the response of the Council remained limited to monitoring the peace agreement, implementing an arms embargo against parties to the civil conflict, and establishing a commis-sion to investigate reports of violations of international humanitarian law.[5] The Council did eventually refer the Darfur case to the International Criminal Court, but it took almost two years before Member States were ready to contemplate a UN force to support the under-resourced African Union (AU) in its efforts to prevent more civilian suffering. Today, while there is a hybrid UN/AU force deployed in Darfur, the Security Council has proved unable to persuade states to contribute the necessary troops and equipment to sustain the mis-sion.

Notwithstanding these limitations, the Outcome Document provides a significant statement of *political* com-mitment by states to act in ways not explicitly provided for in the UN Charter: first, by committing to protect their own populations from the four crimes; and second, to participate in international efforts (where war-ranted) to encourage and assist other states in meeting these obligations. Moreover, the negotiation proc-ess over Article 139 saw changes to the traditional coalitions at the UN – particularly the tendency of "northern" developed countries to encounter resistance from "southern" developing countries, suspicious about interference in their sovereign jurisdiction. Though certain developing countries, such as Pakistan, Algeria and Egypt, have continued to oppose R2P, a series of African states, most notably Rwanda, Bot-swana, and South Africa, have spoken in favour of it in the General Assembly. This disagreement has made it difficult for developing countries to paint R2P as a principle designed to facilitate the return to West-ern imperialism.

THE SECRETARY GENERAL'S PLAN FOR IMPLEMENTATION

Since 2005, there has been continuing disagreement over what R2P precisely entails and who bears the responsibility to act. Some states endorsed the final text of the Outcome Document because they recognized it would be left open to conflicting interpretation and further discussion by the General Assembly. Representatives of China and Russia have perpetuated this ambiguity in the Security Council by creating a distinction between the "simple" or "general" principle of R2P, about which they contend many countries continue to have concern, and the specific commitments set out in the Outcome Document. Furthermore, both of these P5 states emphasize that the primary responsibility to protect is still borne by the individual state concerned, and that the international community's role is limited to providing assistance in ways that do not undermine sovereignty.[6]

In his January 2009 report, the Secretary General makes clear that renegotiation of R2P is not on offer, and that the provisions of the Outcome Document define the "authoritative framework within which the United Nations system and its partners can seek to give … institutional life" to the principle. This decision to narrow the scope of the principle makes consensus more likely within the United Nations, and will persuade reluctant Member States to consider the package of measures Ban Ki-Moon has developed for each of R2P's three 'pillars'. He also insists that the structure of R2P "relies on the equal size, strength and viability" of each of these pillars, and that one form of response cannot be allowed to outstrip the others. The implementation package has four programmatic components:

1) *Capacity building.* Consistent with the responsibilities elaborated under 'Pillar 2', Ban Ki-Moon's report calls on the international community to help States meet their inherent responsibilities to protect their populations. The tools for doing so include confidential or public suasion, education and training, and other forms of material assistance. The institutions and agents identified as key to this assistance include:

- the Office of the High Commissioner for Human Rights (which can assist in the creation of national constitutions and legislation that provides for and protects human rights);
- international and national development agencies (which can promote 'good governance' and human rights protection through their aid programmes);
- the newly established Peacebuilding Commission (which can help restore stability and economic development post-conflict, so as to prevent future atrocities);
- Special Representatives of the Secretary-General (who can offer training and education on issues such as child protection and the prevention of genocide); and
- a series of regional organizations such as the Organization for Security and Co-operation in Europe (OSCE) or the Economic Community of West African States (ECOWAS) (which can share best practices from other geographies on how to build institutions that can help to prevent or diminish the threat of the four crimes).

There is also discussion in the report of the potential for developing a *civilian* rapid deployment force that could help in the prevention of R2P crimes, with the hope that earlier deployment of 'blue suits' might preclude the need for the later dispatch of 'blue helmets'.

2) *Early warning and assessment.* The Secretary General's report is heavily focused on prevention, which reflects his belief that the international community needs more options for its involvement beyond the use of military force.[7] A central piece of the prevention 'puzzle' is improving how the United Nations responds to reports of a brewing crisis that could lead to the four crimes identified in the Outcome Document. Developing this capacity for early warning within the UN is viewed as having three main requirements: the

timely flow of accurate and relevant information about the preparation or commission of mass atrocities within a country; a strong capacity within the UN to assess that information and understand its implications; and easy access to the Secretary General and the Security Council so that the analysis and recommendations can be acted upon. Ban Ki-Moon's report suggests that one way to strengthen this institutional capacity is to consolidate the analysis and sharing of information in a single office for the Prevention of Genocide and the Responsibility to Protect.

3) ***Timely and decisive response.*** Where Pillars 1 and 2 prove insufficient to protect populations, and States are 'manifestly failing' in their responsibilities, the international community must respond in a timely and effective way. Ban Ki-Moon's report indicates that this response should occur through the institutions of the UN (primarily the Security Council and General Assembly) and not through unilateral action outside of them. He also insists that the international community's options are not limited to the use of violent means. Thus, the recommendations include improvements to the Secretary-General's mediation capacity (his 'good offices' function), more systematic application of diplomatic and financial sanctions, and the use of UN missions to deliver strong messages to political leaders about their legal obligations and the possibility of prosecution under international criminal justice. With respect to the Security Council, the report calls for greater activism on the part of the Secretary-General in bringing matters to the Council's attention, improving the transparency of the Council's decisions, securing sufficient resources for military missions, and developing clearer mandates for the protection of civilians.

4) ***Collaboration with regional and sub-regional organisations.*** Finally, the operationalization of R2P relies heavily on better collaboration between the United Nations and organizations at the regional and sub-regional level. Ban Ki-Moon's report focuses on ways in which the UN could help to build regional capacity, but also to learn from different regions' experiences with measures to build state capacity and prevent conflict.

THE CHALLENGES AHEAD

While the implementation plan for R2P is both comprehensive and politically sensitive, it leaves some important questions unanswered and opens up the possibility for institutional overlap. Indeed, there is a risk that by placing so much emphasis on Pillars 1 and 2, the Secretary-General's report will enmesh R2P in the already well-established agendas of capacity-building and conflict prevention, and obscure what is truly novel about the concept – namely, generating and exercising the *international* responsibility to respond to mass atrocities when state authorities fail to protect their populations. More significantly, in some areas the report calls for greater UN activism in areas traditionally seen as being within the domestic jurisdiction of states. Thus, while Ban Ki-Moon insists that R2P is designed to be an ally of sovereignty, rather than its adversary, some States will view with suspicion the measures he has outlined.

In particular, there are four main issues that will challenge those tasked with the implementation of R2P over the coming months.

Continued uncertainty over meaning. Recent events in global politics show how the language of R2P can be used in ways not necessarily intended by the original authors. In the case of the cyclone in Burma, for example, many called for the application of R2P– some even going so far as to characterize the actions of the military junta as a crime against humanity. But this broad rendering of the principle did not necessarily help the cause of R2P, raising concern within the developing world about the extent of interventionism implied by the concept. There is also some evidence that references to R2P persuaded the regime in Rangoon that it was facing potential attack from the outside, and hampered the efforts of neighbouring states to

negotiate humanitarian access. To take another example, in August 2008 the Russian government used the provisions of the Outcome Document to argue that it was merely exercising its responsibility to protect its fellow citizens – who it alleged were facing threat of genocide - through its military operations in Georgia. While most proponents of the principle countered that this was a misapplication of R2P, the incident showed how quickly it can be politicized to suit the interests of powerful players.

Examples such as these pose two challenges. First, despite the desire of the Secretary-General to narrow the scope of R2P, there are those who may not accept the largely legalistic conception of 'mass atrocity' contained in his report. If segments of international civil society invoke R2P in conscience-shocking situations (such as Burma or Zimbabwe) and exert pressure for action, only to be told "it doesn't apply in this case", they may begin to wonder whether the principle has any value. This possibility needs to be carefully managed, as the successful implementation of R2P relies on actions by national governments - who in turn often respond to advocacy from civil society. Second, the case of Russia's appeal to R2P raises the question of whether the interpretation and application of the principle can in fact be 'controlled'. It is more likely to go the way of other concepts in international society (such as 'self-defence' or 'sustainable development'), whose meanings are now the subject of contestation between opposing sides in a conflict. This possibility for argumentation needs to be considered in all facets of implementation, since it could affect States' willingness to accept offers of capacity-building, early warning assessments, or requests by the Security Council to participate in diplomatic or military initiatives.

Inadequate cooperation between the UN and regional organizations. As noted above, the Secretary-General's implementation plan calls for a substantial up-grading in the relationship between the UN in New York, and a series of regional bodies. Yet, the track record of collaboration and resource-sharing between the centre and regions should raise questions about the likelihood of fulfilling these aspirations. The joint work of the UN and African Union in places such as Burundi and Sudan, for example, reveal a lack of capacity at the centre of the UN to analyze the regional implications of crises, insufficient communication with and inclusion of regional actors, and inadequate support for regional action. Furthermore, in some areas of the world, regional capacity is embryonic or non-existent, meaning that the United Nations does not have an eager and willing partner with whom it can cooperate in fulfilling the responsibility to protect.

Lack of attention to 'hard power'. As suggested above, while the Secretary-General's focus on assistance and capacity-building has been a prudent strategy for gaining buy-in from reluctant members of international society, he may have paid too much deference to the opponents of R2P. This can be seen in the lack of specificity over *how* the UN will mobilize resources (both financial and military) to respond to crises when more peaceful means have failed. As Ban Ki-Moon notes in his report, proposals for creating a rapid response military capacity for humanitarian crises have been discussed and debated at length – but with no tangible results. Yet, if the international community is serious about exercising its responsibility to protect civilians, then more concrete solutions are required in terms of how collective military missions should be funded, how its personnel should be trained and what tasks they should perform, and how command and control structures might be organized.

Resistance to preventive measures. Ban Ki-Moon has chosen to focus the UN's efforts on preventing humanitarian catastrophes from occurring – both by building better institutions in fragile societies and by monitoring developments so as to forestall any escalation of violence. The assumption appears to be that these actions represent a less controversial and potentially more effective way of advancing R2P than discussing military intervention. But effective preventive measures can also be highly intrusive, and therefore do not avoid the problem of States' sensitivities about sovereignty. Developing countries have already expressed concern that any monitoring process for R2P-related crimes might place a category of States under permanent surveillance. They also contend that the process of choosing the States to which preventive

measures would apply is likely to be a subjective exercise, and could be influenced by the strategic interests of major powers.

These kinds of objections have already limited the capacity of existing UN bodies – such as the Peacebuilding Commission – to pursue an agenda of prevention. It is therefore crucial that proponents of R2P learn from these experiences. In addition, it must be recognized that while most diplomats agree that it is better (and less costly) to prevent a crisis than to respond to one that has occurred, there has historically been great difficulty mobilizing support and resources for preventive measures. In contemporary international society, the political will to act (which is linked to the costs actors are asked to bear) is often fashioned out of extreme and real-time necessity rather than longer-term strategies. It is almost two decades since the publication of Boutros Boutros-Ghali's *Agenda for Peace,* which called on States to develop systematic efforts in preventive diplomacy, yet neither the creation of new UN bodies to coordinate actions related to prevention (such as the Department of Political Affairs), nor the rise of non-governmental organizations dedicated to the cause of conflict prevention, have produced a significant body of successful cases.

CONCLUSION

The Secretary-General's report on R2P represents an important attempt to build consensus around one of the thorniest issues of our time. He offers a convincing diagnosis of the contemporary problem of protecting civilians and how the responsibilities of individual States and the broader international community might be exercised. Ultimately, successful implementation will depend on three factors: States' willingness to take prevention seriously; the capacity of the UN and its agencies to absorb the requirements of R2P within an already crowded agenda; and the ability and authority of the Security Council to both mandate specific actions to developing/acute humanitarian crises, and ensure that States comply with its instructions.

ENDNOTES

[1] 'Implementing the responsibility to protect'. Report of the Secretary-General. UN doc. A/63/677, 12 Jan. 2009. The Report was prepared with the assistance of the Secretary-General's Special Adviser on issues related to the responsibility to protect, Edward Luck. Luck was appointed in February 2008 to consult with Member States on the best approach for implementing R2P.

[2] The Outcome Document was later adopted as a General Assembly Resolution. See UN Doc. A/RES/60/1, 16 Sep. 2005. In April 2006, in a debate on the Protection of Civilians in Armed Conflict, the Security Council reaffirmed the principles outlined in Paragraphs 138 and 139. See UN Doc. S/RES/1674, 28 Apr. 2006.

[3] See The Responsibility to Protect, Report of the Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, 2001).

[4] Under both treaty-based and customary international law, States already have obligations to prevent and punish genocide, war crimes, and crimes against humanity. While ethnic cleansing is not a crime identified specifically in law, acts of ethnic cleansing can be viewed as constituting one of the other three established crimes.

[5] See the Report of the International Commission of Inquiry on Darfur to the UN Secretary-General (Geneva: 25 January 2005). While the Commission found evidence of attacks that were deliberately and indiscriminately directed against civilians, it concluded that the Government of Sudan was not pursuing a policy of genocide – due to the absence of clear genocidal intent on the part of the government.

[6] See, for example, the debate within the Council on the 'Protection of Civilians in Armed Conflict'. UN doc. S/PV.5577, 4 December 2006.

[7] Address by UN Secretary-General Ban Ki-moon to the conference on 'Responsible Sovereignty: International Cooperation for a Changed World'. UN doc. SG/SM/11701 of 15 July 2008.