

Implementing the Responsibility to Protect: Understanding the Principle and the Role of Regional Arrangements

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This paper has three principal purposes. First, to outline the nature and scope of the Responsibility to Protect (hereafter RtoP) in order to identify what it is and, just as importantly, what it is not. Second, to outline what needs to be done in order to translate the principle from words to deeds. Third, to identify the role of regional arrangements in implementing RtoP.

Responsibility to Protect

The international community's response to the failure to protect populations from such widespread brutality as the killing fields of Cambodia and the genocide in Rwanda has been multifaceted, spanning conceptual issues and practical matters. An important part of that response was the unanimous agreement to affirm the Responsibility to Protect concept at the largest ever gathering of heads of state and government, the 2005 World Summit.

As agreed by UN Member States, the RtoP concept rests on three equally important and non-sequential pillars which were set out by the UN Secretary-General (UNSG) in his 2009 report on *Implementing the Responsibility to Protect*:

- First, the responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement (para. 138).
- Second, the international community's responsibility to assist the state to fulfill its responsibility to protect (para. 139).
- Third, in situations where a state has manifestly failed to protect its population from the four crimes, the international community's responsibility to take timely and decisive action through peaceful diplomatic and humanitarian means and, if that fails, other more forceful means in a manner consistent with Chapters VI (peaceful measures), VII (enforcement measures) and VIII (regional arrangements) of the UN Charter (para. 139).¹

No single pillar is more important than the others and the RtoP is equally dependant on each pillar. The UNSG's report was subsequently discussed by the UN General Assembly in an Interactive Informal Dialogue held in July 2009. Fifteen of the region's governments participated in the dialogue by making statements to the plenary session of the General Assembly (Australia, China, Democratic Republic of Korea, Indonesia, Japan, Malaysia, New Zealand, Myanmar, Philippines, Papua New Guinea, Republic of Korea, Singapore, Solomon Islands, Timor-Leste, Vietnam). With the exception of only one government (Democratic Republic of Korea), the region welcomed the UNSG's report, reaffirmed their commitment to the 2005 agreement and endorsed the three pillars of RtoP. Subsequently, the General Assembly adopted a unanimous resolution noting the UNSG's report and indicating the Assembly's willingness to continue its consideration of the RtoP.²

The 2005 World Summit Outcome Document (WSOD) and the agreement reached by the General Assembly in 2009 signify the extent of international agreement about the RtoP. It is

¹ A/60/L.1, 20 September 2005, paras. 138-140. See *Report of the Secretary-General on Implementing the Responsibility to Protect A/63/677*, 12 January 2009 (hereafter *Implementing the Responsibility to Protect*)

² A/63/L.80, 14 September 2009.

important to distinguish between the RtoP that governments have agreed to adopt and the ideas that helped shape it. More specifically, as agreed by states, RtoP applies only to the four crimes enumerated in the 2005 Declaration and their prevention: genocide, war crimes, ethnic cleansing and crimes against humanity. It is clear, therefore, that RtoP applies only to a relatively narrow field of human security. As such, it did not apply in the case of Cyclone Nargis in 2008 despite the fleeting arguments made by the government of France and some Western commentators. As the UNSG's Special Advisor, Edward Luck explained, the French position represented a 'misapplication of the responsibility to protect principle', a view echoed by many in the Asia-Pacific region including the Asia-Pacific Centre for the Responsibility to Protect.³ Luck advised that to count as a crime against humanity and therefore a matter of concern for RtoP, crimes such as murder, extermination and forced expulsion would have had to have been committed as part of a widespread and systematic attack on the civilian population. This was patently not the case in the aftermath of Cyclone Nargis. Other problems to which RtoP does not apply include: generalized human rights questions, use of force that falls short of the aforementioned crimes, and human security problems stemming from HIV/AIDS, climate change, generalised economic deprivation or energy shortages.

It is also important to emphasise that RtoP is based on well established principles within existing international law and is consistent with the principle of non-interference enumerated in the UN Charter (Article 2(7)) and the ASEAN Treaty of Amity of Cooperation. RtoP is embedded in existing international law in three senses. First, the crimes to which the concept relates are crimes that have already been agreed by states and enumerated in law. Second, under customary international law, states already have obligations to prevent and punish genocide, war crimes and crimes against humanity; assist states to fulfill their obligations under International Humanitarian Law; and promote compliance with the law. Third, the mechanisms through which the RtoP can be implemented are consistent with existing international law. Paragraphs 138 and 139 of the WSOD identify four principal ways in which RtoP can be implemented, each of which is consistent with existing international law: (a) the primary responsibility rests with the State itself. This is the cornerstone of sovereignty; (b) the international community may provide assistance, such as capacity-building, mediation and diplomacy. Such assistance may only be provided at the request and with the express consent of the state concerned and is consistent with the state's sovereign right to make bilateral and multilateral agreements; (c) the UN Security Council might take measures in a manner consistent with Chapters VI, VII and VIII of the UN Charter, the General Assembly might make recommendations on the basis of Article 11 of the Charter, and other Organs of the UN might act in accordance with the Charter; (d) paragraph 139 of the WSOD explicitly envisages a role for regional arrangements. Such roles must, of course, be consistent with the charters, constitutions or guiding principles of the regional arrangement concerned and with the UN Charter. Any other mechanisms that may be called upon in relation to the implementation of the RtoP (such as, for instance, the International Criminal Court) are guided by their own constitutions and statutes which are voluntarily accepted by participating states and their scope and jurisdiction are limited by these agreements and general principles of international law.

Finally, it should be stressed that the RtoP emphasises the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity. Member States explicitly agreed that '[t]his responsibility [to protect] entails the prevention of such crimes' (para. 138) and identified four specific elements of prevention: (a) preventing the incitement of the four crimes (para. 138); (b) supporting the UN in establishing an early warning capability (para. 138); (c) assisting states under stress before crises and conflicts break out (para. 139); (d) supporting the mission of the

³ Edward Luck, Statement to the US Senate Foreign Relations Committee, 17 June 2008 and Asia-Pacific Centre for the Responsibility to Protect, 'Cyclone Nargis and the Responsibility to Protect', report, 16 May 2008.

Special Adviser of the Secretary-General on the Prevention of Genocide (para. 140). Prevention is the single most important element of the RtoP.

Implementation

As noted, RtoP rests on three non-sequential pillars. This section outlines the pillars in more detail and reviews the UN Secretary-General's proposals for implementing each of the pillars.

Pillar One: The State's Primary Responsibility

Pillar one of the RtoP refers to the state's primary responsibility to protect its own population from the four crimes. The primary responsibility to protect rests with the state, applies to all populations under a state's care, and not just citizens (para. 138) and includes the responsibility to prevent the commission of the four crimes and their incitement. The principle of the state's primary responsibility to protect was reaffirmed by the UN Security Council and has been widely endorsed in the Asia-Pacific region.⁴ Although the international community should assist the state in a manner consistent with the UN Charter when called upon to do so, the state's role in protecting its own population is the conceptual centre of the RtoP concept. States voluntarily accepted this obligation and should be expected to fulfill it. In his 2009 report on implementing the RtoP, the UNSG noted that 'no single part of the world has a monopoly on good ideas or successful practices' when it comes to implementing pillar one of the RtoP. However, he identified a range of measures that states might take to protect their populations from the four mass atrocity crimes and to prevent their commission, drawing on a range of experiences from around the world. He also called for more research to be undertaken on why some societies plunge into mass violence whilst their neighbours remain relatively stable and why some armed conflicts descend into genocide and mass atrocities whilst others do not. Important in this regard are processes of state-to-state and region-to-region learning through which states and societies learn from one another's experience. There is no single template that states can use to implement their primary responsibility to protect and the approach taken must be sensitive to the needs, interests and preferences of each community.

Pillar Two: International Assistance and Capacity-Building

The second pillar of the RtoP refers to the international community's duty to assist states in meeting their RtoP obligations through a combination of persuasion and partnership.⁵ It also shares with pillar one an emphasis on preventive measures.⁶ According to the 2005 WSOD, assistance under pillar two of the R2P could take one of four forms: (a) encouraging States to meet their responsibilities under pillar one (para. 138); (b) helping them to exercise this responsibility (para. 138); (c) helping them to build their capacity to protect (para 139); (d) assisting States 'under stress before crises and conflicts break out'.⁷

Measures designed to strengthen sovereignty by helping states to prevent state failure, strengthen national resilience and resolve internal conflicts significantly reduce the likelihood that the RtoP related crimes will be committed in the future.⁸ Even in cases where there is no immediate threat of the crimes being committed, international efforts to assist states make an

⁴ S/PV.5898, 27 May 2008.

⁵ *Implementing the Responsibility to Protect*, para. 28.

⁶ *Implementing the Responsibility to Protect*, p. 9.

⁷ *Implementing the Responsibility to Protect*, p. 15.

⁸ Daniel C. Esty, Jack A. Goldstone, Ted Robert Gurr, Barbara Harff, Marc Levy, Geoffrey D. Dabelko, Pamela T. Surko, and Alan N. Unger, *State Failure Task Force Report: Phase II Findings* (McLean, VA: Science Applications International Corporation, 1998), p. 5.

important contribution to reducing the threat of mass atrocities in the long-term. The primary role of pillar two is to galvanise the international community into assisting states to build and maintain the capacity necessary to address potential problems well before they manifest in the commission of mass atrocities. Measures undertaken under pillar two are done so with the express consent of the state involved, usually in the form of a specific invitation. Among a range of relevant measures, the UNSG's recommendations for implementing pillar two included the use of the UN and regional arrangements to support states where requested. This may involve the provision of technical and financial support to states that are enacting preventive measures; the use of education on human rights to prevent future crimes; assistance with combating sexual violence; a special emphasis on women and children in conflict; a focus on building learning processes between regional organisations and the UN; building civilian capacities to prevent the four crimes; the provision of military assistance to states as necessary; assistance with establishing impartial and effective security and judicial systems within states; targeted development assistance; support for the establishment of safe and secure dialogue within states; and post conflict peace-building measures to prevent future crimes.⁹ Regional arrangements can play a particularly important role in marshalling the resources, technical capacity and political will necessary to provide appropriate and effective assistance to states. It should be emphasised that the precise composition of relevant regional arrangements and activities will be different in each region, taking account of regional circumstances and norms.

Whilst many of these measures may be conducted on an ad hoc and state-to-state basis, states under stress might exercise their RtoP by requesting assistance and others might fulfill their responsibilities by responding to that call. This might involve the consensual deployment of civilians, police officers and even military personnel. Most contemporary UN peace operations, for example, are deployed with the consent of the host state and are tasked with assisting that state. As such, these operations have a strong connection to pillar two.

Pillar Three: Timely and Decisive Response

Pillar three, which is set out in detail in paragraph 139 of the World Summit Outcome Document, is an integral part of the RtoP and is as important as pillars one and two.¹⁰ Responding to the failure to protect Rwandans from the 1994 genocide, pillar three establishes a political commitment that the international community will on occasion assume the RtoP. There are two stages to this responsibility. First, as paragraph 139 makes clear, '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' (para. 139). There are a range of peaceful activities that the UN may undertake which may not be specifically enumerated in Chapters VI and VIII of the Charter, but as these two Chapters are identified it is worth mentioning their content. Chapter VI relates to the 'Pacific Settlement of Disputes' and its provisions include the use of negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. Chapter VIII of the UN Charter relates to the role of regional arrangements and permits Member States to enter into such arrangements.¹¹

The second stage of pillar three refers to the use of a wider range of collective measures, both peaceful and non-peaceful, that may be used by the international community if two conditions are satisfied: (a) peaceful means prove inadequate (para. 139) and (b) national authorities are

⁹ *Implementing the Responsibility to Protect*, paras 28-48.

¹⁰ *Implementing the Responsibility to Protect*, para. 49.

¹¹ *Implementing the Responsibility to Protect*, para. 49.

'manifestly failing' to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In these situations, paragraph 139 affirms that the UN Security Council, acting in accordance with the authority bestowed upon it by the UN Charter, including Chapter VII, is prepared to take collective action 'on a case-by-case basis and in cooperation with relevant regional organisations as appropriate' (para. 139). It is for the members of the UN Security Council to determine whether the two conditions have been met and to decide upon appropriate measures. As such, and it is important to underline this point, RtoP's capacity to legitimise coercive interference in the domestic affairs of states is circumscribed by the UN Charter and does not imply any alteration to the Charter's provisions in this field. In his 2009 report on implementing RtoP, the UNSG outlined a number of ways in which the international community's capacity to exercise its pillar three responsibilities might be strengthened. These include strengthening the UN's capacity to deploy peace operations which have the mandate and capability to protect civilians under threat. Such proposals deserve close scrutiny.

Role of Regional Arrangements

It is widely recognized that regional and sub-regional arrangements have an important role to play in implementing the RtoP but more work is needed to enumerate this role more precisely and establish the most appropriate mechanisms. The World Summit Outcome Document specifies at least seven distinct roles for regional arrangements. They should: (a) encourage and help states to fulfill their primary responsibility to protect (para. 138); (b) support the UN in establishing an early warning capability (para. 138); (c) help states build the capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (para. 139); (d) assist states under stress before a crisis breaks out (para. 139); (e) support the mission of the Special Adviser of the UN Secretary-General on the Prevention of Genocide (para. 140); (f) utilise peaceful measures under Chapter VIII of the UN Charter to respond to crises involving the four crimes (para. 139); (g) cooperate with the Security Council in the application of measures, including Chapter VII measures, when peaceful means are inadequate and national authorities are manifestly failing to protect their populations (para. 139).

Of course, it is for regional arrangements themselves to determine precisely how they will fulfill these roles, taking into consideration relevant regional needs, capacities, and norms of behaviour. When thinking about the role that regional arrangements might fulfill, it is worth thinking about three modes of behaviour in which they can operate:

1. *As actors within their region:* regional arrangements assist their Member States and can adopt appropriate peaceful measures.
2. *Through horizontal cooperation:* regional arrangements can work together to learn lessons and build capacity.
3. *Through vertical cooperation:* regional arrangements can 'add value' to efforts spearheaded and authorised by the UN.

Whilst there is broad consensus on the centrality of regional arrangements in implementing the RtoP, more study is needed to specify the ways in which such arrangements might fulfill these responsibilities. In the Asia-Pacific region, further study and dialogue is required around three questions in particular: first, is the list of roles for regional arrangements appropriate and legitimate? Second, assuming a positive answer to the first question or the emergence of a revised list of roles, what institutions and arrangements should take carriage of implementing the RtoP? Third, on the basis of the answers to the first and second questions, what specific measures might be realistically taken in the Asia-Pacific region? Meaningful answers to these questions require careful analysis, consultation and dialogue. This paper has attempted to

contribute the questions and some of the parameters in terms of defining the scope of RtoP, the Consortium for Non-Traditional Security in Asia provides the ideal setting for the further consideration and analysis of these questions.