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Vienna: Honouring the Responsibility to Protect

I think everybody who read the newspaper over the last few months is acknowledges the importance of preventing mass atrocities and of implementation the responsibility to protect. In 2011 alone there were several situations that put R2P on the agenda. In context of the Arab Spring we have seen atrocities in Egypt and Yemen; in Libya we have seen the first intervention that the UN mandated with reference to R2P; and also the situation in Syria raises R2P related questions. Moreover we have had the situation in Cote d'Ivoire after the presidential elections, which also included episodes of mass atrocities and a robust UN response. I think this is not only evidence that mass atrocities are much more frequent that we sometimes like to think, but also the best argument for why the R2P is important. Over the last decade or so, the R2P became the dominant framework for looking at mass atrocity crimes and it gathered enormous support in a rather short period of time.

The first point that I would like to make concerns the importance of non-Western ideas within the R2P discourse. The R2P is sometimes accused of being a Western concept or even a form neo-colonialism, which facilitates hegemonic interventions in the global south. I think, however, that this does not accurately reflect the important contribution of non-Western figures and states to the development of the R2P. The idea of 'sovereignty as responsibility', which provides the key philosophical foundation of the R2P, was developed by Francis Deng, a former Sudanese diplomat and now Special Adviser on the Prevention of Genocide. The Constitutive Act of the African Union from 2000 includes an intervention clause in article 4(h) that goes even beyond the R2P. The International Commission on Intervention and State

Sovereignty, which first developed the R2P concept, was co-chaired by Mohammed Sahnoun, a well-respected Algerian diplomat, and included several other non-Western commissioners. Jean Ping of Guinea, now chairperson of the AU, played a crucial role in securing inclusion of the R2P in the 2005 World Summit Outcome Document. Moreover, it needs to be recognized that the greatest opposition against R2P in the discussions leading up to the 2005 World Summit came from India and the United States. John Bolton, then US Ambassador to the UN, did more than anybody else to water down the R2P principle, demanding a comprehensive redrafting of the R2P paragraphs. I also shouldn't be forgotten that Kofi Annan of Ghana was a key norm entrepreneur throughout the entire R2P process and that Ban Ki-moon of South Korea is firmly committed to the R2P as well. I do not want to downplay Western ideas in the R2P, but simply point out that non-Western ideas play an important role as well.

This is a point, I think, that merits wider distribution. A key area that requires more work is the stimulation of cross-cultural debate on the R2P to see how different cultures relate to the R2P and how governments in different regions think about the principle. I think this element of deliberation is important, so that it does not look like 'the West' is imposing a norm here. There is quite a strong civil society element to the R2P that is very important in building such a global constituency for the R2P.

My second point relates to prevention as the key priority of the R2P. There are two important changes within the R2P agenda, concerning priority and scope of the R2P. While the R2P was initially about reaction, the R2P's key focus shifted to prevention. Moreover, the scope of the R2P has been restricted to genocide, war crimes, ethnic cleansing, and crimes against humanity. The R2P does not deal with armed conflict, natural disaster, or human rights violations per se. I think it is very important to reflect those two changes in advocacy and research on the issue. Both, I would argue, also

address fears of some states that the R2P could be used to justify hegemonic interventions.

These two developments also suggest that the R2P is best approached as international crimes prevention. The element of *crime* is crucial here and it needs to be spelled out what follows from approaching the R2P with a 'crime lens'. There is still a lot of conceptual work to do here. The R2P still requires clarification on many points. How can we prevent international crimes? What are the distinct elements of international crime prevention? How is the prevention of international crimes different from conflict prevention or the protection of civilians in armed conflict? I think that it is particularly important to distinguish R2P from other agendas in the field of peace and security, like conflict prevention or protection of civilians.

Vienna: UNEPS, Protection of Civilians, and Responsibility to Protect

I'll offer some thoughts on how the idea of a UN Emergency Peace Service relates to the concepts of R2P, protection of civilians in armed conflict, and peacekeeping. I'll end by reflecting on what UNEPS might potentially add to the implementation of the responsibility to protect.

Let me start by saying a few words about the idea of UNEPS and how it relates to the concepts of R2P, PoC, and peacekeeping. Since the formation of the United Nations the creation of a standing UN military force has been proposed repeatedly. And it has been proposed in many slightly different forms. The UNEPS proposal of Global Action to Prevent War envisions a permanent standing capacity based at UN-designated sites, including regional bases, which would have the ability to respond to

situations of emergency within days. According to Global Action, UNEPS should include around 15.000 personnel (which I think is quite ambitious but probably necessary given that UNEPS might need to be deployed at different places at the same time), recruited from different countries and trained in human rights and gender aspects. And it would be financed through the regular UN budget. The Security Council has generally been envisaged to play a key role in creating and directing such a standing UN military force. That the Security Council has the legal power to mandate military intervention into a sovereign state in order to stop mass atrocities is widely shared. Since the early 1990 the UN Security Council has gradually widened the scope of 'threats to international peace and security' so as to cover humanitarian emergencies within state borders. An alternative could be the General Assembly. Overall, we are talking about a UN based rapid reaction capability, which is supposed to complement and not replace other UN efforts in the field of peace and security. I think the general rationale of UNEPS is to close the time gap between a Security Council decision - to deploy peacekeeping forces or to intervene in mass atrocity situations - and the implementation of this decision. So the time dimension is crucial.

Over the years, it has been argued that such a standing UN military force could have several different purposes: a) it could speed up the deployment of peacekeeping forces to maintain and observe ceasefires (peacekeeping purpose), b) it could be used to provide access and protection for humanitarian agencies, c) it could be used as a tool for preventive deployments to deal with imminent dangers for civilians (protection of civilians purpose), d) it could improve the organisation's capacity to prevent and halt mass atrocity crimes (a more distinct R2P purpose). While I agree that UNEPS would make a positive contribution to peacekeeping, PoC, and R2P, I think that analytically one shouldn't mix those purposes. The R2P, that is

the prevention and reaction to mass atrocity crimes, is not the same as the protection of civilians, and it certainly is not the same as peacekeeping. When one discusses UNEPS, I think one needs to be aware which purpose it is supposed to serve, as that has implications for how UNEPS needs to be designed. I would assume that questions of impartiality, host-state consent, and use of force would be three areas that play out differently in the context of peacekeeping, PoC, and R2P. Thus, UNEPS need to be thought of in different ways and can come in different guises.

Let me say a few words about the potential contribution of UNEPS to R2P. I think the mass atrocity prevention purpose of UNEPS is the most compelling. This is probably also why crises like the 1994 Rwandan genocide and the Darfur crisis since 2003 did more than anything else to generate support for proposals for a standing UN force. For this reason, I'm also not sure if one should call UNEPS a standing peacekeeping capacity, as I think that peacekeeping implies certain principles and mind-sets. I think to clarify the potential importance of UNEPS for mass atrocity prevention it is instructive to compare the cases of Libya and Rwanda.

Between 6 April and 19 July 1994 (within three months) in between 800.000 and one million Rwandans (mostly Tutsis) were murdered. At the time, there was incitement and other early warning signs (not least the warnings of Romeo Dallaire). So there was a general sense that mass atrocities were imminent. The shortcomings of the Security Council's response to the unfolding genocide in Rwanda are not due to the fact that Rwanda was sitting in the Council at the time. Three different missions have in fact been deployed to Rwanda. The first was the United Nations Observer Mission Uganda-Rwanda (UNOMUR), a rather small military observer mission that should make sure that no military assistance was reaching Rwanda from the Ugandan side. The strength of UNOMUR was 81. The second mission, the United Nations

Assistance Mission for Rwanda (UNAMIR) was set up in November 1993. It had 2.539 military personnel deployed by 31 March 1994. However, after the murder of 10 Belgian peacekeepers and the outbreak of mass atrocities against Tutsis, the Security Council decided to reduce UNAMIR's strength to 270 personnel. In mid-May, and in face of unfolding horrors in Rwanda, the Security Council finally decided to again increase UNAMIR's strength to 5.500 troops and to mandate it to contribute to the security and protection of refugees and civilians at risk. However, not one state, also none of those nineteen states that had agreed to have troops on standby for UN peacekeeping, was willing to contribute. Without new troop contributions and rather ill-equipped, UNAMIR couldn't do anything to stop the unfolding atrocities. The third mission to Rwanda, the French-led Operation Turquoise, was deployed in late June 1994, shortly before the mass atrocities gradually ceased. In short, the international community failed to get their act together, which contributed to the shocking scale of the genocide.

It is important to keep in mind that those that carried out the mass atrocities in Rwanda, mainly the Interahamwe militia, weren't well equipped military forces and many victims could probably have been saved by a modest-sized external military force. To reiterate this point, there is relatively widespread agreement that a quite modest-sized international military force could have stopped the slaughter. Moreover, the weakness of UN standby arrangements was clearly revealed by the UN's failure to secure national contributions when UNAMIR's size and mandate was strengthened in May 1994. The UN simply couldn't secure troops within a reasonable timeframe. Governments weren't prepared to put their soldiers at risk. I think that it is a general weakness of standby arrangements that they have difficulty dealing the more complex and difficult and dangerous mass atrocity situations, like Rwanda.

Let's contrast this with Libya. Libya is often compared to Rwanda because of the rhetoric and incitement used by the Gaddafi regime. Gaddafi made his intention to commit mass atrocities pretty clear when he said that he will "liberate and purify the Benghazi area", that he "will not give up and chase the cockroaches until the end", and that he will "go from door to door to cleanse Benghazi". There was a clear threat of mass atrocities, reminiscent of Rwanda. The clear sense that mass atrocity crimes are imminent, makes both cases a good comparison. What then happened in Libya, however, is that international diplomacy produced a decisive response in a short period of time. There was widespread condemnation of various actors, from the Human Rights Council, to the General Assembly, to the Arab League. The UN Security Council passed Resolution 1970, referring the situation to the ICC, imposing sanctions, and threatening further steps as a deterrent. Resolution 1973, then, provided the authorisation to use all means necessary to protect civilians and civilian populated areas. And whilst it is true that the conflict is still going on, we certainly haven't seen mass atrocities on the scale of Rwanda. This is largely due to the robust engagement of the international community.

I think the comparison clarifies some important points with regards to UNEPS. First, it makes very clear how important 'timely and decisive action' is. There was timely and decisive action in Libya but not in Rwanda, with very different results. UNEPS would certainly improve the UN's ability to respond to crises in a timely and decisive manner. However, the case of Libya also shows that 'timely and decisive action' is possible, even without UNEPS, if there is sufficient political will. UNEPS would therefore primarily be important in situations where there is general political will to prevent or halt mass atrocities, but member states are reluctant to commit their own troops (as was arguably the case in Rwanda). If there is widespread political will and

a coalition is willing to take the lead with UN authorization, then UNEPS aren't crucial but might still be helpful in facilitating the response. If there is no political will and Security Council authorization, then UNEPS wouldn't make a difference. Thus, it seems to me that UNEPS should only be thought of as a complementary tool to other mass atrocity prevention measures.

Finally, I'll just say a few sentences about the potential role of UNEPS within the R2P. I can see two potential roles for UNEPS: one in prevention and a slightly different one in reaction. In prevention: a) UNEPS could be deployed well before mass atrocities break out to provide a presence, to show face, and provide scrutiny, b) they could be used to make threats of intervention more credible and therefore improve deterrence, and c) they could be deployed in context of small-scale atrocities and help to physically protect victims and incapacitate potential perpetrators (late-stage prevention). Particularly in late state prevention, impartiality would have to be abandoned. In reaction: UNEPS could save lives by facilitating a rapid and effective response, when prevention failed. Overall, and I think that the Libya case shows this nicely, in the context of mass atrocity prevention UNEPS cannot operate along the traditional peacekeeping principles of impartiality, consent, and non-use of force, but must take sides.

Vienna – International Status of R2P norm and its three pillars of response

In my remarks I'm going to offer some thoughts on three areas. First, I will elaborate on what the content and legal status of the R2P norm is. Second, I will offer some observation on how the R2P is faring in international relations and diplomacy.

Finally, I will suggest some ways in which the R2P could be strengthened through conceptual clarification.

Let me start by saying a few words about the content and legal status of the R2P. It is universally accepted that the R2P rests on three pillars. This three pillar model stems from paragraphs 138 and 139 of the World Summit Outcome Document (which reflects the view of more than 170 heads of state and government on the issue), was subsequently embraced by SG Ban Ki-moon in his 2009 report *Implementing the Responsibility to Protect* and was also echoed by the General Assembly during its plenary debate in late 2009. Pillar one is 'state responsibility'. It is the primary responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. This could mean that states become party to relevant human rights treaties, sign up to the ICC, promote an independent press etc. The second pillar is 'international assistance and capacity-building', that is the international community's responsibility to assist states in protecting their population and to help them in building the necessary capacity. This could mean to assist in building a competent and independent judiciary, assisting in reforming the security sector, promoting better education, or increasing development assistance. The third pillar is 'timely and decisive response'. That is the international community's residual responsibility to step in and respond in a timely and decisive manner if states are manifestly failing or if they are unable or unwilling to protect their population. Those three pillars provide the general framework of the R2P.

It is important to highlight two crucial changes within the R2P framework since it was first developed by the International Commission on Intervention and State Sovereignty in 2001. These two changes concern the priorities and scope of R2P. With regards to priority: I would argue that the R2P is now a doctrine of prevention.

Pillars one and two clearly deal with prevention, and I would argue that the most important parts of pillar three essentially deal with prevention as well, albeit with late stage prevention. I'm thinking here of preventing incitement to genocide and mass atrocities - for instance through jamming radio stations or spreading alternative views through UN broadcasts and information services -, the use of sanctions, particularly targeted sanctions on travel, finances, and luxury goods, or the possibility to directly communicate threats of international criminal prosecution to potential perpetrators. Those are also the measures that played a crucial role in the international community's response to the situation on Libya. With regards to scope, it is important to stress that the R2P deals only with four international crimes, namely genocide, war crimes, ethnic cleansing, and crimes against humanity. What it does not deal with is armed conflict, natural disasters or human rights violations per se. The concept of *crimes* is central to R2P. I think Libya is also a good example for this, where the international community clearly reacted in anticipation of crimes (either crimes against humanity or violations of IHL). I think those two developments suggest that the R2P needs to be approached as international *crime* prevention.

If that is the content of the R2P, then what is its status in international law? I think most observers and commentators agree that the R2P itself is not a binding norm of international law. The WSOD has been adopted by the General Assembly as a resolution, but that does not make it binding international law. The GA is not a law-making body with powers under the Charter to pass legally-binding rules. However, as a GA resolution it might reveal *opinion juris* on a given issue. And if that is accompanied by substantial state practice it might become customary international law. I don't think, however, that we have either one. The drafting and negotiation history of the WSOD does not provide evidence that states intended to create a legal

norm of responsibility to protect. Moreover, there is no extensive and consistent state practice. I'll say more about state practice in a second. Thus, if you want to characterize R2P in legal terms, it is probably best described as 'soft-law'. As such it does not create precise legal rights and obligations, but it might very affect the interpretation of neighbouring norms or influence actor behaviour.

It is important to stress, however, that the R2P is not devoid of legal content. I have just mentioned that the R2P applies narrowly to genocide, war crimes, ethnic cleansing, and crimes against humanity. Each of these international crimes has a fairly precise legal meaning grounded in existing international law, particularly international criminal law. The term ethnic cleansing has no immediate legal significance, but the practices of deportation, forcible transfer, or the use of sexual violence to drive people out of a region probably constitute war crimes or crimes against humanity. In some parts, therefore, the R2P concept only makes explicit what international law already requires of states. Thus, R2P should be seen as a political commitment to strengthen the implementation of already existing humanitarian law. Let me briefly explain. The R2P contains two sets of responsibilities, with different legal implications. First, responsibilities of states towards their own population (pillar one). Second, responsibilities of the international community to assist or take decisive action (pillars two and three). I would argue that the first set of responsibilities is deeply embedded in existing international law, much of which is considered *jus cogens*. International law clearly prohibits states to commit genocide, war crimes, ethnic cleansing, and crimes against humanity. The legal roots of the second set of responsibilities are more controversial and less well defined. It is probably too optimistic to say that they are deeply rooted in international law. The most interesting and progressive development in this regard is probably the ICJ ruling in the *Bosnia vs. Serbia* case; the closest we

get to a legal duty to intervene to stop genocide. However, the responsibility invoked by the ICJ is essentially one of due diligence: Serbia has not taken all the measures that were reasonably available to it to prevent genocide. Thus, I think that the R2P's primary function today is to remind all states of the obligations they have to their own citizens and to contribute to the clarification of the responsibilities that they have to strangers.

I will now briefly turn to the question of how the R2P norm is faring in international relations and diplomacy. That the R2P paragraphs at the 2005 World Summit were accepted by more 170 heads of state and government could lead one to think that there is overwhelming agreement and support for R2P. I think one needs to be careful with such an assessment. There remains a fair deal of scepticism with regards to the R2P in some parts of the world. The notorious opponents are: Cuba, Nicaragua, Pakistan, Sudan, North Korea, and Venezuela. But there are many more states that have reservations and demand conceptual clarity and further deliberation. Conceptual clarity, I would stress, is particularly important in order to strengthen support for the R2P and to avoid abuse of the norm, as happened when Russia invoked R2P to intervene in Georgia and when some tried to justify the US invasion of Iraq with R2P. However, the GA debate in 2009 was quite promising and suggests that support for the R2P is growing. Throughout the debate, only very few states simply rejected the norm. Most states actually engaged in more or less serious efforts to revise and clarify the norm.

An interesting case is the Security Council. The WSOD rooted R2P in the responsibilities of the Security Council. The Security Council, however, proved reluctant to deal with the concept. It was mostly the General Assembly that discussed

the concept; and debate in the GA was also very limited. Within the Security Council member states made reference to the R2P almost exclusively in the context of debate on the protection of civilians in armed conflict. In 2006 the Security Council made reference to the R2P in Resolution 1674 on the protection of civilians in armed conflict. But it only re-stated the WSOD and did not add anything new. In Resolution 1706 later in 2006 on the situation in Sudan, the Security Council indirectly referred to R2P by referring to Resolution 1674. There is a general reluctance in the Security Council to refer to R2P. This might have changed with Libya. The Libya case is the first time that the R2P has been invoked in multilateral documents to justify recourse to force. Both Resolution 1970 and 1973 refer to the responsibility to protect, albeit only to the responsibility to protect of the Libyan state, not the one of the international community. The responsibilities of the international community are mentioned in context of the protection of civilians. However, some organizations also made direct reference to the responsibility to protect of the international community. NATO's Secretary General Anders Fogh Rasmussen said on April 14th, *"All of us agree: we have a responsibility to protect Libyan civilians against a brutal dictator. The United Nations gave a clear mandate to do it. The people of Libya desperately need it. And we are determined to do it"*. On 5th May, Catherine Ashton said: *"Under the leadership of the United Nations, the international community will continue to implement UNSC Resolution 1970 and 1973, and will intensify the pressure on the Gaddafi regime as part of our responsibility to protect the Libyan population"*. Thus, I think that Libya is a crucial case for the R2P that could give the R2P renewed impetus.

To end, let me suggest some ways in which the R2P norm could be strengthened. I think that providing conceptual clarification on what the R2P is and entails, and how

it can be distinguished from other concepts is a crucial way in strengthening the R2P norm and actually putting it into practice. How to distinguish R2P from related concepts, such as conflict prevention or the protection of civilians in armed conflict? Take the relationship between the protection of civilians agenda and R2P as an example. R2P draws on, but is not identical to, the rules of the protection of civilians agenda, which is both broader and narrower. The PoC agenda is narrower as it only applies in a context of armed conflict, while the mass atrocity crimes encompassed by the R2P can be committed outside such situations. The PoC agenda is broader in that it deals with a broader set of crimes than the four specific R2P crimes. It needs to be spelled out what follows from this.

Let me finish my remarks by raising a few questions that I think are worthwhile to discuss:

- What would be gained by making the R2P a hard norm of international law?
- How could the Security Council be held accountable for failures to implement the R2P?
- Are the four R2P crimes equally important to the R2P? What about single war crimes? Is proving genocide too demanding?
- What are the similarities and differences of the R2P and related concepts like conflict prevention and protection of civilians?
- What are the implications of the move to crimes within the R2P concept?
- What is the role of impartiality within the R2P?