

**55th Annual meeting of the
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“Current issues of modern international law”

**Roundtable discussion on the concept of
“Responsibility to Protect”**

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Opening remarks

Ladies and Gentlemen, it is a great pleasure to be here with you. I am delighted to participate in this discussion on the “Responsibility to Protect” (R2P).

Foundation

In 2005, more than 150 Heads of State and Government unanimously embraced the “Responsibility to Protect”. They declared that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the international community, through the United Nations, has a parallel responsibility to help protect populations from those crimes.

R2P is a relatively new concept. It is still evolving and developing. It represents the core challenge of the United Nations as set forth in the preamble of the UN Charter: “to save succeeding generations from the scourge of war”; to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”; and “to establish conditions under which justice and respect for international law can be maintained”. These are significant challenges, which speak directly to the role of the United Nations - not only to maintain peace

between nations, - but also to protect individuals from atrocities, and to promote their enjoyment of fundamental human rights.

How did we get to R2P?

How did we get to “R2P”? The General Assembly’s consensus on R2P at the 2005 World Summit follows a decade which witnessed, among others tragedies, those of: Rwanda, Srebrenica, Kosovo and Darfur. It stems from questions of how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”

The Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda concluded that the UN had failed the people of Rwanda, and cited “a lack of resources and political commitment”. The Report of the Secretary-General on the fall of Srebrenica questioned the “pervasive ambivalence within the United Nations regarding the use of force in the pursuit of peace” and “an institutional ideology of impartiality even when confronted with attempted genocide”.

The “three pillars” of R2P

In addressing the challenge of “operationalizing” R2P, the Secretary-General has identified “three pillars” of action. Pillar I is the enduring responsibility of States to protect their populations. Pillar II is the role of the international community to assist States to protect their populations before crises and conflicts escalate to the level of the commission of R2P crimes. And Pillar III involves a commitment that States “are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter... where national authorities are manifestly failing to protect their populations”. The commitment thus includes action under Chapters VI

and VIII, as well as under Chapter VII, and includes cooperation with relevant regional organizations, as appropriate.

The concept is thus premised on the legal framework provided under the Charter. Any decision of the Security Council to take action would require the concurring votes of each permanent member [Art.27.3]. This underscores that R2P does not create any additional exceptions to the prohibition on the use of force under the Charter [Art.2.4]– the only exceptions being acts in self-defence [Art.51], and acts authorized by the Security Council [Art. 42].

R2P gives expression to important international developments

R2P gives expression to what had become a global-wide conviction that it is immoral and unacceptable for States to allow gross violations of the human rights of their populations, and that the international community has a concomitant responsibility to prevent these crimes. In this light, R2P has grown out of a number of important developments. It reflects a recognition of the changing nature of conflict since the drafting of the Charter in 1945 – today most conflicts occur within States rather than between them. It signifies a broad acceptance of fundamental principles of human rights, and reinforces the normative content of the crimes of genocide, war crimes, [ethnic cleansing], and crimes against humanity. And it affirms States' obligations under international law to prevent, prosecute and punish genocide, crimes against humanity, acts constituting ethnic cleansing, and war crimes.

Sovereignty as responsibility

A conceptually distinct approach has evolved which centers on the notion of "sovereignty as responsibility". This underscores that sovereignty entails enduring obligations towards one's people as well as certain international privileges.

At the heart of R2P is the recognition that state sovereignty – the cornerstone of international relations – entails responsibility. States have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. And building upon this responsibility is the positive obligation which is placed upon the international community to assist States to meet their responsibilities, and to take action where these responsibilities are not met.

Importantly, rather than detracting from the principle of State sovereignty, R2P reinforces it. It drives home the role of the State as a protector of its nationals. As stated by the Secretary-General, R2P is "an ally of sovereignty, not an adversary". As one of the defining attributes of statehood and sovereignty is the protection of populations, prevention of atrocity crimes begins at home. R2P reinforces the collective security mechanism established by the Charter, with its emphasis on prevention, and that enforcement measures may only be taken in accordance with the Charter.

So some might ask, what is new? The "added-value" so to speak of R2P, is that it encapsulates the moral and legal imperatives of the international community in relation to the four "R2P crimes ". It is a potentially powerful vehicle for an important political process, where political pressure, as well as tangible technical and material assistance, may be brought to assist States to exercise their responsibilities. It places pressure not only on national Governments,

but also on actors in the international community. It provides for a marked shift in perspective. While some would argue that R2P has no normative effect, others hold that R2P is an “enabling new norm”, and, while it is not an obligatory new norm, and does not impose binding new duties, it does confer additional responsibility, and that additional responsibility includes taking action to prevent and address the R2P crimes and violations.

How is R2P applied?

How do States protect their populations, and how can the international community assist them? In his report on “operationalizing R2P”, the Secretary-General made some important observations about “responsible sovereignty”. He said that in essence, it boils down to politics of inclusion, not exclusion. It is about States having institutions, capacities and practices which can constructively manage tensions, and deliver fair and equal enjoyment of human rights to all members of their populations.

Rule of law

In my view, the rule of law is key to the implementation of R2P and hence, to the prevention of atrocities. As defined in the UN’s 2004 report on the rule of law and transitional justice¹, the rule of law ultimately comes down to a principle of governance in which all persons, institutions and entities, - including the State itself, - are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, - and which are consistent with international human rights norms and standards. It entails supremacy of law, equality before the law, accountability to the law, and fairness in the application of law. It speaks to separation of powers,

¹ (S/2004/616, para 6)

participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

The rule of law weaves its way through each of the three pillars of R2P. Under the first pillar on the “protection responsibilities of the State”, it speaks to the need for States to protect their own populations, and to institutionalize and internalize such protections in a purposeful and sustainable manner. It requires that States become parties to, and implement, relevant international instruments on human rights, international humanitarian law and refugee law, including the Rome Statute of the International Criminal Court. The first pillar requires that States manage diversity to promote equality, inclusivity, respect for fundamental rights and observance of democratic values and practices. In this way, States provide the architecture for the prevention of large scale atrocities within their territories.

With regard to Pillar II on “international assistance and capacity-building”, the international community, acting through individual States, regional organizations and the UN, can assist States to build specific rule of law capacities within their societies that will make them less susceptible to R2P situations. Assistance under Pillar II is designed both to help the State to meet its Pillar I responsibilities and to make the necessity of action under Pillar III avoidable or less frequent. The UN is well placed to assist States under Pillar II. It is actively engaged in promoting the rule of law on many fronts, including through technical assistance, development, engagement on human rights, peacekeeping and peacebuilding projects. My own Office, the Office of Legal Affairs, regularly engages with States in the codification of international law. An important part of our capacity building and assistance is carried out under the UN Programme of Assistance in the technology, study, dissemination and appreciation of

international law. We are continuously engaged, in training and capacity building in treaty law, and in our annual treaty event held at the opening of the General Assembly in which States are encouraged to sign up to core human rights and other important multilateral treaties.

Regarding Pillar III, the rule of law is crucial in the relations between States. Pillar III requires that any action by the Security Council must be in conformity with the UN Charter. The international rule of law promotes international peace and security. Under Pillar III, where necessary, the preference is to persuade national authorities to change their behaviour, employing the tools of Chapters VI, VII, and VIII as needed and authorized by the appropriate international authorities. There have been numerous cases in which national governments have sought and benefitted from international assistance in addressing serious strains within their societies – among these have been Sierra Leone, Liberia, Burundi, Timor-Leste, Guinea, Kyrgyzstan and South Sudan. Where national authorities are failing to protect their populations, the international community has committed to take collective action through the Security Council in accordance with the Charter.

Whether taken under Pillar II or Pillar III, in each case, the international assistance serves to reinforce and not to undermine, national sovereignty while helping governments to provide additional protection and security to their populations.

Invocation of R2P regarding Libya

I will now touch upon Libya. In resolution 1970 (2011), the Security Council recalled Libya's "responsibility to protect its population". This was the first time the Council had referred to the

R2P framework since a 2006 resolution on Darfur. The international community, both via the UN and other multilateral and bilateral efforts, took a series of measures under Pillars II and III to help protect the civilian population from, what were described by the Security Council, as “widespread and systematic attacks ... which may amount to crimes against humanity” – thus framing the attacks within the R2P crimes. These ranged from diplomatic measures, to the imposition of sanctions and referral of the situation to the ICC, to the Security Council’s authorization “to take all necessary measures to protect civilians and civilian populated areas under attack”. In Libya, action by the international community was swift, multifaceted and targeted. This was the most explicit and robust application of R2P to date.

R2P in Libya – success or otherwise?

While it is premature to pass judgment on the success or otherwise of actions under “R2P” in the context of Libya, the NATO intervention has been applauded for stemming the violence against the civilian population while it has also been criticized for going beyond the limits of the Security Council authorization. Some States have expressed concerns that the NATO action went beyond what was strictly necessary “to protect civilians and civilian populated areas under attack”. However, others maintain that the protection of civilians in Libya required the drastic action taken, and that many thousands of lives were saved by the intervention.

In this connection, the International Commission of Inquiry on Libya mandated by the Human Rights Council found that NATO had “conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties”. NATO has given a detailed account of its targeting decisions, and in particular the focus on

minimizing civilian casualties. However, the action serves to remind that sober judgment is needed before undertaking any operation which places civilians at risk

Looking forward, the Security Council has now mandated a civilian mission to assist Libya in establishing a democratic system of governance based on the rule of law. While many challenges remain, the international community, through the UN, is supporting Libya's post conflict economic and social recovery. This activity falls within the rubric of R2P and is evidence of its continuing relevance in Libya.

Responsibility While Protecting

In an interesting development, in order to address some of the concerns raised in connection with R2P in Libya, in November last year Brazil circulated a proposal to supplement the concept by a set of principles and procedures on the theme of "Responsibility while Protecting" (RWP). In essence, RWP can be refined into two criteria. First, the Security Council, before authorizing any military force, would be required to take into account considerations of last resort, proportionality and balance of consequences. Second, the Council would establish a "monitoring and review mechanism" with respect to the implementation of the use of force under these criteria. We are, of course, following this discussion with much interest.

Syria

Today, with thousands dead and many more injured, the grave situation in Syria is at the top of the international agenda. As far back as July last year, the Secretary-General's Advisors on the Prevention of Genocide and R2P warned that "the widespread and systematic attacks by Syrian security forces and associated militias on civilians could constitute crimes against humanity". The situation has now been

described as reaching the threshold of a non-international armed conflict, at least in certain areas, and thus the acts of violence against civilians would amount to the commission of war crimes.

While the concept is very much at the forefront of efforts by the international community to address the tragedy in Syria, the current humanitarian situation is of great concern. Syria is a true test of R2P.

Of course, States and the international community through the League of Arab States and the machinery of the United Nations, have sought to provide assistance and apply pressure via efforts under Pillars II and III.

The Secretary-General has repeatedly called upon the Syrian authorities to stop the violence, and he continues to remind Syria of its responsibilities. The League of Arab States, the UN Human Rights Council and the General Assembly have been intensely engaged. The Joint Special Envoy of the UN and League of Arab States, Kofi Annan, was appointed to focus international pressure to stop the violence and facilitate humanitarian access. The Security Council has condemned the violations against civilians, called for an end to the violence, and for accountability. After months of deadlock, in April this year the Security Council finally adopted two resolutions on Syria. In resolution 2042, the Council called for the “urgent, comprehensive and immediate implementation of all elements of the Envoy’s six-point proposal”. A week later in resolution 2043, the Council authorized a United Nations Supervision Mission to Syria – “UNSMIS” - for an initial period of 90 days, comprising up to 300 unarmed military observers, to monitor and support implementation of the Envoy’s six point proposal, as agreed to by the Government of Syria. As you know, the UN monitors have now had to suspend their work in light of the

increasing violence, and it is not clear when, or if, they will be able to resume. All of these efforts are very fragile, and the world is wondering what is the effect of these measures when the situation is escalating so significantly.

It is far too late for prevention as such. The challenge for the international community is to find ways to prevent further escalation of the conflict. R2P's contribution is to continue to underscore the responsibilities of States vis-à-vis their populations, and to pressure and motivate the international community to help States meet those obligations. This includes the taking of collective action where States fail to meet their obligations. To a very large extent, the Syrian authorities have disregarded their responsibilities. However, the international community is focussed and motivated, and, while much remains to be done, the doctrine of R2P is very much engaged.

In this connection, I note that as the discussions of Syria continue, many have observed that it is the 30 year anniversary of the so-called "1982 Hama Massacre" in which the Syrian Army under the orders of Hafez al-Assad, quelled an uprising in the town of Hama. The city of Hama was shelled for weeks and it is estimated that tens of thousands were killed. At that time, the bodies of the United Nations did not take action, or even debate taking action, in response to the killings. This signifies how things have changed in the international community since 1982.

On this note, I'd like to leave you with the thought that the doctrine of R2P continues to generate immense pressure not only on the Government of Syria, but also on the international community to take effective action to ensure that the Syrian authorities desist from the violence. It has increased the moral and political pressure on the

members of the Security Council. It continues to place moral and political pressure on States and the entire machinery of the United Nations to find a way to end the bloodshed of thousands of innocent people.

Conclusion

To conclude, R2P represents an important commitment by the international community to protect populations from egregious crimes. In essence, States have a responsibility to protect their populations as an inherent attribute of Statehood. The international community has a responsibility to help States meet those obligations, or to step in when States manifestly fail to do so, in accordance with the Charter. These obligations are anchored in international law, and reflect obligations of humanity. It is for all of us to support the responsibility to protect. And this is where civil society is so important. It is for lawyers, and groups like yours who can play a very important role *vis-à-vis* capitals and international institutions in support of the principles of R2P.

Thank you