Strengthening the rule of law through the United Nations Security Council

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Panel comments on ‘responsibility while protecting’

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PANEL COMMENTS ON ‘RESPONSIBILITY WHILE PROTECTING’


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There is no denying that the Security Council needs to strengthen its oversight of the use of force. We need to consider how the Security Council might improve its accountability for the measures undertaken in its name. When I first made these panel comments, I had not had the benefit of having read Australia’s Permanent Representative to the United Nations statement at the UN informal discussion of Responsibility while Protecting. I now have, and I commend it to you. His response was far more pithy than anything that I might say and it is worth commencing with his observation that:

The principle of R2P is now widely accepted. Nevertheless debates about appropriate implementation remain. This is as it should be. It is right that the international community should vigorously debate the most effective actions to prevent and respond to mass atrocity. The challenge is to do so in a manner which does not lead to paralysis and inaction. We cannot, as the Secretary-General said in his most recent speech, ‘make the best the enemy of the good’.1

The consequences of using excessive force, indiscriminate force, or inappropriate force are clear and can lead to: the alienation of the populations the international community intends to protect; loss of support and legitimacy in the international community; and the perception that the UN has become party to the conflict, or is at least partisan.

We need to avoid conflating the very real differences between ‘Responsibility to Protect’ and the requirement under international humanitarian law to provide protection to civilians in circumstances of armed conflict. Too often, when confronted with the messy realities that occur when we resort to force, there are those who attempt to rationalise them away by stating that they agreed to force – but not force that actually hurt someone. The use of force by states is never tidy and mistakes will be made, but we have not yet established an international political community that obviates the requirement for the resort to force in circumstances that Michael Walzer characterized as shocking ‘the conscience of mankind’.2 Coupled with that observation, there are regimes that would like to see Responsibility to Protect fail as a practical concept. As Australia’s Permanent Representative at the UN said:

The criteria of force as a last resort should not be a requirement to rigidly and physically test and exhaust all lesser options before resorting to physical force, but rather a matter of making a reasonable, objective judgement based on all the available evidence that no lesser measures could succeed in halting or averting the harm in question.³

Put simply, failure is not an option, there can be no going back to the killing fields of Cambodia, Rwanda and the former Yugoslavia. However we formulate the responsibility of the international community, we do need to recognise that responsibilities do, in fact, exist.

Paragraphs 10 and 11 of the letter from the Permanent Representative of Brazil to the Secretary-General are somewhat reminiscent in tone, if not content, of the Weinberger/Powell doctrine.⁴ You will remember that this doctrine sought to impose good and rational limitations on when the US would have resort to force. The problem is that these principles were too pure – interpreted narrowly and concurrently it would effectively have prevented the US from ever using force. By removing the possibility of deployment, one loses the deterrent effect, and in so doing, the ability to conduct preventative diplomacy is lost.

As Frederick the Great reportedly commented, ‘Diplomacy without arms, is like an orchestra without instruments’. The principles embodied in our evolving understanding of both ‘Responsibility to Protect’ (in case of mass atrocity crimes) and ‘Protection of Civilians’ (the application of International Humanitarian Law within an agreed Security Council mandate) are too important to ignore what the Secretary-General has identified as the need to take ‘proactive, decisive and early action to stop violence before it has begun’.⁵ Prevention and deterrence are at least as important as taking military action after atrocities have begun and as identified in paragraph 4 of the Brazilian note, collective military action is only one of the three pillars of the concept of the responsibility to protect. State responsibility and international cooperation and assistance are the two other pillars, but will only work if the final sanction of credible military action exists.

So it is impossible to disagree with the Brazilian concept that we should ‘first do no harm’ and second ensure that any military action authorized by the Security Council abide by the

³ Statement at the UN informal discussion on ‘Responsibility while Protecting’ by H.E. Mr Gary Quinlan, 21 February 2012.
letter and the spirit of the Security Council mandate and be carried out in strict conformity with international law, but we need to ask - so what? Is this statement really new?

The Secretary General’s ‘Report on the protection of civilians in armed conflict’ submitted to the Security Council on 22 May this year suggests that the Brazilian Statement reflects a position that has long been advocated in practical terms. At paragraph 20 he refers to the formulation of the concept of ‘responsibility while protecting’. He followed up by pointing out that

I recall the recommendation in my 2007 report on the protection of civilians that the Council systematically call for compliance with international humanitarian law by peacekeeping and other missions authorized to use force and that it request that such missions regularly provide information on missions to spare civilians from the effects of hostilities.

He goes on to chide those responsible for ‘the continuing and inaccurate conflation of the concepts of protection of civilians and the responsibility to protect’. He makes the clear distinctions that we are all aware of pointing out that Protection of Civilians is founded on long-established principles of International Humanitarian Law while responsibility to protect is, as yet, ‘a political concept, set out in the 2005 World Summit Outcome’. Protection of civilians relates to violations of International Humanitarian Law in situations of armed conflict, while Responsibility to Protect is limited to the mass atrocity crimes – which might occur in circumstances short of armed conflict.

The Secretary-General urges the Security Council to ensure compliance with international law by:

• Including language relating to the protection of civilians in most of its situation specific resolutions;
• Showing greater willingness in using targeted sanctions against violators of International Humanitarian Law;
• Using the informal Expert Group on the Protection of Civilians to brief Security Council Members before the establishment or renewal of mission mandates;
• Calling on the High Commissioner for Human Rights to brief the Council on these issues;
• Strengthening practices such as the Arria Formula briefings in order to ensure that it is informed more fully’; and

7 The ARRIA FORMULA enables a member of the UN Security Council to invite other Security Council members to an informal meeting, held outside of the Council chambers and chaired by the inviting member. The meeting is called for the purpose of a briefing given by one or more persons,
• Systematically requesting information on the protection of civilians from all relevant United Nations entities.

This last point is the critical one. If Security Council members do not insist on being informed, and display readiness to take appropriate action, then all the statements of intent in the world mean nothing. A critical concern is that the concept of responsibility while protecting relies on the cohesion of the Security Council. If a Rwanda scale genocide were to break on the world today, by the time the international community had exhausted the checklist of worrying about regime change, attempting preventative diplomacy, exhausting all peaceful means, limiting the scope of the use of force, and devising monitoring modalities – we would have seen the genocide run to its successful conclusion.

There are two issues that arise when we consider the circumstances where oversight of use of force mandates might apply. One is *Quis custodiet ipsos custodes?* Who guards the guardians? All of the procedural measures set out in the discussion paper might be trialed and applied. But if a permanent member wishes to disrupt monitoring or accountability measures, then there is a problem. The second issue is that mandates are often left intentionally broad to allow the Special Representative and the force commander to take whatever steps are necessary and appropriate to achieve the mission.

**Is it really new?**

Which brings us to the question is this really new and what does it add to our understanding of the resort to the use of force by the international community. The original 2001 document *Responsibility to Protect*, published by the International Commission for Intervention and State Sovereignty (ICISS), set six criteria that needed to be justified as an extraordinary measure of intervention:

1. Just Cause
2. Right Intention
3. Final Resort
4. Legitimate Authority
5. Proportional Means
6. Reasonable Prospect

Clearly, this is founded in well established and understood principles of Just War doctrine extended in to the more complex area of international intervention. But the document

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demonstrated something else too. Resort to force is the final resort, not only because military violence is so utterly horrible, but because it is by its nature an imperfect tool. There is a sense that some people see ‘protection’ as a passive activity. It often is not. Sometimes it calls for missions to attack, and to kill, belligerents targeting civilians.

Also, for all the talk of precision targeting, the belligerents get a vote, or as Clausewitz wrote, ‘War is the province of chance’. When you use violence for political ends it is because you have run out of alternatives and rationally conclude that though it might not turn out the way you want, taking the chance on coercing or destroying those causing the problem is your only option.

The ‘responsibility within protection concept’ seems to assume that it is possible to apply military force so discriminately that it will obviate the production of second and third order effects.

Whether taking measures to protect civilians within an armed conflict under a Security Council Mandate, or conducting an intervention to prevent what Secretary-General Kofi Annan called ‘gross and systematic violations of human rights that affect every precept of our common humanity’, the use of armed force will require measures that might seem unpalatable to observers who do not have to apply them.⁹

By this, I do not mean the obligation to apply force discriminately, to avoid harm to non-combatants and even to accord combatants their human rights. All that is understood, but to prosecute military operations, commanders often need to apply the principles of war which include offensive action and surprise. Military action is often about sowing shock and confusion.

The 2001 document Responsibility to Protect recognised this fact, stating

the fewer the national reservations on the employment of the national contingents in such an operation are, the greater is the capacity of the force commander to act decisively and flexibly. Tight political control of such operations is mandatory, but political control does not mean micro-management of military operations by political authorities. Political leaders need to set clear objectives for each phase, within defined operational parameters. Military commanders should carry out these objectives, seeking further guidance when the objectives have been completed, or significant new challenges arise.

Note that I am not conflating Protection of Civilians and Responsibility to Protect but wish to emphasize that whether military efforts occur within a mandated mission or are in

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themselves the response to atrocities that shock the conscience of mankind, commanders need some tactical and operational flexibility. My concern is that too narrow a reading of ‘Responsibility while Protecting’ might promote an overly timid approach to enforcement (remember Srebenica), and might ultimately operate to limit the credibility of force as the ultima ratio of the international community when its laws are flouted.

So while putting oversight, accountability and monitoring measures in place is probably a good thing within missions with a protection mandate, we need to be aware of the danger that some countries might seek to interfere with the implementation of the mandate for their own purposes. We also need to be certain that we are not binding the hands of military commanders who have to respond to a dynamic, changing and often threatening environment. New York is often not the best place to conduct assessments of conditions in theatre as General Romeo Dallaire found in Rwanda. Sound principles of mission command require us to give military professionals scope for success, but also to hold them accountable if they overstep their authority.

As a principle, force that is ‘judicious, proportionate and limited to the objectives established by the Security Council’ is a fine idea. Establishing what that actually means in a situation of escalating violence might keep the lawyers busy for many years after the conflict is concluded.

If we seek one objective, it is to establish the rule of law, not replace it with the rule of lawyers.