

# The Principle and Practice of R2P: Whose Responsibility, What Kind of Action?

Summary of Project



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# **The Principle and Practice of R2P: Whose Responsibility, What Kind of Action?**

**Summary of Project**

## No. 1

# Operationalising the preventive aspects of the responsibility to protect

**By Eli Stamnes**

The report is underpinned by two working hypotheses. The first is that prevention is better than cure. Prevention is cheaper in all respects, almost always easier, and morally more defensible. This argument is particularly strong when it comes to the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, which is the scope of the responsibility to protect (R2P). The second hypothesis is that in order for R2P to maintain its political clout, it is crucial that it is not invoked inappropriately. There is a tension between these two hypotheses, which is linked to the multifaceted character and time perspective of preventive action. The report suggests a solution that seeks to maintain the primacy of prevention while at the same time safeguarding the integrity and political utility of R2P.

There is a strong case for prioritising prevention in the context of R2P. The International Commission on Intervention and State Sovereignty (ICISS) defined the responsibility to prevent as one of R2P's three constitutive elements, arguing that it was 'the single most important dimension'. In this way it sought to alleviate fears that humanitarian action may be used with neo-imperialist or neo-colonialist motives. In today's international political climate, with the renewed support for absolute state sovereignty in the wake of the Afghanistan and Iraq invasions, the preventive component of R2P is even more important. It may also constitute a practical necessity due to the current overstretch of troops and resources and the assumed difficulty of achieving a Security Council mandate for more coercive action.

One problem with preventive action in the context of R2P is connected to the breadth of measures involved. These measures are typically divided into two categories – 'direct' and 'root cause' prevention

– which both consist of a broad range of political, economic, legal and military measures, the distinction being drawn by ‘the time available to make a difference’. The danger is that if one is to invoke R2P in connection to everything from ‘preventive diplomacy’ and ‘preventive deployment’, to the ‘promot[ion] of membership in international organisations’ and the ‘support for education for tolerance’, the R2P label could become meaningless and lose its political clout. Another problem relates to the timeframe involved in ‘root cause’ prevention. Such capacity building measures take so long to implement that it is simply too late to begin to initiate them when it can credibly be established that a society is at risk. It is therefore futile to invoke R2P in order to muster commitment and resources for such measures, even if they are assumed to be crucial for the prevention of mass atrocities.

On this basis, the report suggests a two-fold solution. First, direct references to R2P should be limited to situations in which mass atrocity crises are looming. In other words, R2P should only be invoked in connection to the use of ‘direct prevention’ measures. Secondly, and relatedly, work on the implementation of ‘root cause’ prevention should take place without direct appeals to the concept of R2P.

‘Direct’ R2P prevention could involve instruments such as economic inducements, fact-finding missions, arbitration, etc., or a more comprehensive response in the form of the deployment of a multifaceted preventive operation. Relevant lessons for the latter could be learnt from the United Nations Preventive Deployment in Macedonia (1992–1999) and various EU and OSCE initiatives, but it is emphasised that the preventive deployment should be tailored to the particular case at hand and focus specifically on the prevention of mass atrocities.

‘Root cause’ prevention would entail the promotion of a ‘culture of prevention’ of mass atrocities, or the mainstreaming of prevention into the day-to-day workings of international politics. Crucial here would be ‘a habit of preventive investment’.

The report also identifies areas in which further research is required. These are:

- the difference between conflict prevention and the prevention of mass atrocities, and the implications for ‘direct prevention’ as well as ‘root cause prevention’.
- the role of identity construction, gender and gender-based violence in the occurrence and prevention of mass atrocities.

- how a multifaceted preventive deployment might be tailored to address a looming mass atrocity crisis.
- the role that regional organisations might play in connection to such deployments.
- how the UN might best deal with the tension between maintaining the consent of the host government to the deployment and the need to adequately address minority and other identity-related issues.
- how coherent ‘root cause prevention’ policies might be devised, and who should be responsible for their execution. How is coordination and coherence best achieved between different actors and initiatives.
- the conceptual and practical links between ‘root cause prevention’ and peacebuilding.
- the normative implications of ‘root cause prevention’.

No. 2

## Regionalising the Responsibility to Protect

### Possibilities, capabilities and actualities

**Kristin M. Haugevik**

This report discusses what part regional organizations can and should play in ensuring implementation of the international Responsibility to Protect (R2P). What formal responsibility and which enabling capabilities do regional organizations have for assuming a role in protecting populations from mass atrocity crimes?

The report begins by discussing the formal role projected for regional organizations in the implementation of R2P, individually and vis-à-vis the UN, in the 2005 UN World Summit Outcome Document. The description of this role is then compared to the one depicted in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS). The second part of the report offers an overview of relevant capabilities held by key regional organizations in Europe, Africa, the Americas and Asia, capabilities that could enable them to take part in protection tasks prior to, during or in the aftermath of mass atrocities. In the third and final part of the report, the capability aspect is seen in relation to the constitutive and constraining impact that individual member states' interests may have on the ability of regional organizations to act within the context of R2P.

The following three observations emerge:

First, the Outcome Document explicitly refers to regional organizations as prospective partners for the UN in the implementation of R2P, both by term and by reference to Chapter VIII of the UN Charter.

While the Outcome Document considers regional organizations first and foremost as partners of or sub-contractors under UN in the context of R2P, the ICISS report opens up for the possibility that regional organizations might act without prior authorization from the Security Council in cases where the latter fails to take action.

The international community's failures to respond to atrocities in the past are in themselves evidence that the present UN system, including the role of the Security Council, is sub-optimal. However, opening the door for action by regional organizations without prior authorization from the Security Council would probably create more problems for R2P than it would resolve. Despite its deep-rooted institutional weaknesses, the UN is today the only proper international forum for extensive political dialogue and decision-making. Further consideration of alternative authorization structures *within* the UN system therefore seems a more promising path than allowing for indistinct practices outside the UN system.

Second, it is problematic to treat the wide spectrum of different regional organizations under the same collective term when operationalizing the principle of R2P. If R2P is defined broadly – as it is in the Outcome Document – then practically all regional organizations today possess capabilities that in some way or another could enable them to take part in the implementation of R2P. In fact, however, regional organizations vary significantly in their actual abilities. This aspect needs to be recognized when further identifying and concretizing the role of regional organizations in relation to R2P.

Third, capabilities alone are no guarantee for effective action. A key factor that both constitutes and constrains regional organizations' potential to play a role in implementing R2P is the willingness (collective or individual) of their member states to do so. In many cases, regional organizations are prevented from taking on protection tasks due to ineffective decision-making procedures or powerful member states that block action on grounds of national concerns. Conversely, some states might be tempted to use R2P as a pretext or cover for taking action in pursuit of their own national agendas. Such practices are difficult to prevent, but are highly unfortunate for the further operationalization of R2P.

No. 3

## Operationalising the Responsibility to Protect

The continuing debate over where authority should be located for the use of force

**By Nicholas J. Wheeler**

This report focuses on the question of where authority should be located for the use of force. This question has been a matter of considerable controversy since NATO unilaterally employed force to protect the Kosovars in March 1999. At the heart of this debate has been the question of whether the UN Security Council should be the only body that can authorise the use of force for humanitarian purposes. Or alternatively, are there substitutes for Security Council authority that can and should be invoked – both legally and morally – in cases where the Council is either unable (because of the power of the veto) or unwilling (because of the lack of majority support in the Council) to act to prevent or end mass atrocities.

Restricting itself to a focus on the military dimension of R2P, this report identifies seven models of authority which span the boundary from consent to non-consensual action. These are: (1) consent freely given; (2) coerced and induced consent; (3) Security Council authorisation; (4) the Security Council as a global jury; (5) General Assembly authorisation; (6) Regional arrangements; and (7) coalitions of the willing. The level of controversy regarding the legitimacy and legality of using force for protection purposes increases as intervention moves into the non-consensual realm. Even if governments disagree about the efficacy of using force, it is recognised that sovereign states have the right to request such assistance. Indeed, the UN Secretary-General

and his advisors have identified assisting (the military component is only one dimension here) states in fulfilling their responsibilities for protection as a key goal in operationalising the 2005 Outcome Document. However, as my report argues, the boundary between consent and non-consent is an imprecise one, and it is necessary to recognise that consent for military deployments is often secured through the threat of coercive pressures (as with the case of East Timor in September 1999) as well as inducements in the form of rewards.

From the seven models of authority identified, five are ones that might be employed by governments in cases where a target state is ‘manifestly failing’ to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity’ (as set out in paragraph 139 of the Outcome Document). The least controversial here is *Security Council authorisation*, but the proclivity of the Council to interpret Article 39 of Chapter VII as permitting such uses of force is a recent normative development, and one that should not be underestimated when set against the Security Council’s narrow statist interpretation of Article 2 (7) during the Cold War. Nevertheless, the report points out that whilst the new norm of Security Council authorised protection has enabled interventions that were previously unthinkable, this has not ensured that action has been taken when it was most desperately needed such as in Rwanda, and more controversially in Darfur. There is also the possibility that future cases might see the Council reversing this expansive interpretation of Chapter VII, and many governments in the Non-Aligned Movement remain sensitive about the Council expanding its competence into matters that were previously covered by Article 2 (7) of the Charter.

The report explores the potential of *General Assembly authorisation* when the Security Council is deadlocked (as could have happened if Western governments had sought a mandate for intervention in Darfur). However, this poses a host of problems that will caution governments, especially those with a vested interest in maintaining the authority of the veto from pressing their claims in this body. The legitimacy that would flow from an affirmative vote in the General Assembly is the strongest argument here, but critics of the Assembly who favour vesting authority in a ‘concert of democracies’ would reply that decisions on whether to save endangered peoples should not rest with an Assembly that is comprised of a large number of governments that do not have good human rights credentials in their own jurisdictions.

The above criticism opens up the much larger question of UN reform but advocates of R2P have not been afraid to enter this terrain. The International Commission on Intervention and State Sovereignty argued in 2001 that the five permanent members of the Security Council

(P5) should limit the exercise of the veto in cases where there was majority support for a resolution authorising intervention for human protection (unless vital interests were at stake). However, such a proposal would not resolve divisions between the P5 such as those that arose over Kosovo because what was at stake in the latter case was not a capricious Russian and Chinese threat to veto NATO's action but genuine differences of opinion over whether the use of force was warranted. Moreover, what made the Kosovo case such a difficult one for the Council was that NATO was seeking a mandate (though it never tabled a formal resolution) to use force to prevent what it argued was an impending humanitarian catastrophe. Justifying preventive or anticipatory intervention for protection purposes is extraordinary difficult because action will always lack the legitimacy that comes from media reports of mass atrocities. This seems an inescapable problem and certainly one that will not be resolved by any of the proposed reforms to the Security Council's working methods or practices.

Consequently, we are left with the prospect of future Kosovo-type situations where the permanent members (perhaps expanded beyond the P5) are divided on the merits of military action. Yet the Security Council's handling of the Kosovo case might also offer the best precedent for how the international community should cope with future cases of this kind. The lesson of Kosovo, and especially the abject defeat of the Russian draft resolution condemning the bombing, is that Council members are not ready to legally sanction armed intervention for humanitarian purposes that lacks express Council authorisation. But neither will they always condemn it. A majority of Council members were persuaded that NATO's breach of the strict procedural rules of the UN Charter should be excused and in this sense it operated an international equivalent to mitigation in domestic law.

By contrast with those liberal interventionists who wish to establish the principle that *coalitions of the willing* have the authority to consider using force in cases where the Security Council is paralysed from acting, the Kosovo model of the *Security Council as a global jury* has the virtue of not directly challenging the Council's authority whilst also preserving an emergency exit when it is 'manifestly failing' to protect populations from genocide and mass killing.

No. 4

# Protection of Civilians, the Responsibility to Protect and Peace Operations

**By Jon Harald Sande Lie**

Whether implementation of the R2P norm will succeed depends on its reception and acceptance among the actors involved. Although the norm was adopted at the 2005 World Summit, several challenges remain before it can be properly operationalized and implemented. Indeed, some conceptual proponents rank conceptual confusions about what R2P actually entails as being among the main challenges of implementing R2P.

This paper considers the conceptual challenges facing R2P operationalization empirically, based on the assumption that only by understanding the practical realities of implementing a new concept can we draw lessons to chart the way ahead. However, as the concept has not yet been applied by the Security Council, there is no empirical experience of R2P implementation. Consequently, this contribution takes a comparative approach, examining R2P together with its conceptual protection sibling of PoC – the Protection of Civilians. R2P and PoC share several features: both aim at securing civilians' well-being in conflict situations, and both involve civil and military actors from UN and non-UN agencies. The Security Council reaffirmed R2P in Resolution 1674. Thematically this resolution belongs to the realm of PoC, and thus attempts to inscribe R2P into PoC's existing protection realm. R2P and PoC differ in terms of scope: while PoC is all-inclusive in protecting civilians under imminent threat of physical violence, R2P is limited to what are defined as the four main atrocity crimes. R2P emerged to provide a more robust framework for protection in such situations than that offered by PoC.

PoC lacks a stringent definition, but can be said to aim at mainstreaming a culture of protection – that is, an awareness of protection measures and activities throughout the UN system and among other relevant actors. R2P, by contrast, is clearly defined. While a clear definition both inscribes and excludes various actors depending on their mandate, role, and core competencies, the culture of protection rooted in PoC is more open to contextual appropriation and interpretation. The empirical presentation shows how PoC is understood among actors from the humanitarian, development and military segments. The main differences relate to the civil–military divide: humanitarian actors, claiming ownership of the protection policy franchise, are reluctant to cooperate with political-military entities, for fear of jeopardizing the neutrality necessary for them to retain access to their humanitarian space of operations.

While there is agreement on the importance of protection and PoC, R2P remains contested – both at HQ and mission level. Overcoming the civil–military cultural divide is important for concerted protection efforts – although this challenge also points up the humanitarian and moral paradox that the best way to stop violence might be to use force. The strict definition of R2P and its connotations with politics and the use of military force might have the effect of alienating humanitarian actors, thereby undermining the comprehensiveness that is so crucial to successful R2P operationalization.

# No.5

## The Responsibility to Protect

### A Legal and Rights-based Perspective

**By Dorota Gierycz**

This report analyses the responsibility to protect from a legal and rights-based perspective. It shows that the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is rooted in existing International Human Rights Law (IHRL) and International Humanitarian Law (IHL). The clause on the responsibility to protect adopted by consensus by the 2005 World Summit constitutes an important commitment towards implementing these universal rights and obligations which are lacking enforcement and continue to be violated, especially in armed conflicts.

The many human rights treaties containing strong protection obligations include the two human rights covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as numerous human rights treaties with a more limited focus which have been ratified by most countries of the world. They contain provisions reflecting customary law and voluntarily undertaken binding treaty obligations. With the high number of ratifications of such instruments as the Covenants, the Convention on Genocide, CAT, CRC, CEDR, as well as the universal ratification of the 1949 Geneva Conventions, state parties have been put under concrete obligation to implement these. If taken seriously and conscientiously implemented at the national level, those instruments could have prevented most of the atrocities committed and helped to address others effectively, if necessary with the assistance of the international community.

Protection of the individual against atrocities, which is at the core of both IHRL and IHL, is a primary responsibility of states as the main bearers of obligations under international law. However, if a state is unable or unwilling to exercise its protection obligations, these shift to international organizations, including the United Nations or any other authority controlling the territory and its population. This report analyses the decision of the International Court of Justice (ICJ) in the Case Concerning Armed Activities on the Territory of Congo (2005), which affirms this principle, and demonstrates the resultant protection responsibilities of any power in control of a territory.

The crimes enumerated in the protection clause of the World Summit Outcome Document fall under the jurisdiction of the International Criminal Court (ICC), which was established to deal with the ‘most serious crimes of concern to the international community’, such as the crime of genocide (Article 6), crimes against humanity (Article 7), and war crimes (Article 8). Although the ICC has jurisdiction only over its state parties and those referred to its jurisdiction by the UN Security Council, these crimes evoke serious international legal consequences under all circumstances, also if tried by national courts. Genocide and crimes against humanity are considered crimes under all circumstances, whether in time of peace or war; neither immunities nor the statute of limitations apply; they fall under universal jurisdiction with an obligation of local trial or extradition; they involve increased international obligations for states to cooperate; and are not to be subject to amnesty.

The report further analyses various protection tools available within the UN human rights machinery, in particular the Human Rights Council with its new Universal Periodic Review (UPR) system and the special procedures, and the OHCHR, with its extensive field presence tasked with public reporting and support to national protection systems and public defenders. It concludes that those tools could play a much stronger role in preventing and addressing atrocities – through timely provision of information, early warning or thorough analysis of protection conditions in various countries.

The most important obstacle, however, to implementing the responsibility to protect clause within the UN is the prevailing institutional gap between human rights and security matters within the world organization. This problem was taken up by former Secretary General Kofi Annan in his 2005 report ‘In larger freedom’, in which he called for the integration of human rights into the work of the UN on an equal footing with security and development and by granting the human rights machinery conditions to operate in the mainstream of its activities, in close collaboration with the Security Council. If implemented,

those measures could create the conditions for a consolidated, systemic UN approach to enacting the principle of the responsibility to protect.

The present report concludes that the responsibility to protect clause should be perceived as an opportunity to give force to the implementation of the underlying human rights instruments that often remain on paper or are not supported by sufficient national legislation and enforcement. It also identifies research and policy recommendations that may facilitate the operationalization of this important clause.

## No. 6

# Protecting Civilians from Harm

## A Humanitarian Perspective

**By Turid Laegreid**

The core and spirit of R2P is generally welcomed in the humanitarian world, as R2P represents a commitment to important established principles laid down in international law. If the intentions of R2P are fully met, it has the potential to strengthen the global legal and political framework for protection of civilians.

However, most humanitarian actors have taken care not to engage directly in the ongoing debate on the implementation and future of R2P. The potential for coercive action can be controversial for humanitarian organisations for several reasons.

The protection of civilians as a concept can become too identified with R2P as a political process and the subsequent association with the use of coercive measures.

The fear is that framing a conflict in R2P terms can create problems for access for humanitarian agencies, leaving the civilians even more exposed to abuse and violations. The Darfur case, which was one of the first conflicts to be consistently framed as a protection crisis, shows that the R2P rhetoric can go both ways. At times the Government of Sudan (GoS) responded to R2P related rhetoric by restricting access, thereby leaving vast populations without humanitarian assistance. However, at other times the GoS has used increased access as a means to ease the international pressure on itself.

There is also a risk that the focus on R2P as a political commitment – without reference to the legal obligations underpinning it, can lead to a sidelining of treaty laws that cover a range of rights and obligations. Less reference to law in UN and NGO advocacy is partly a consequence of more actors embracing the notion of protection. Some omit

reference to law because of lack of legal training, or more likely, of pragmatic reasons. States will often be less sensitive to be held accountable to their political commitments than to legal obligations. However, while political commitments at times can facilitate action, they can also more easily be changed and even retracted.

The Secretary-General and other main promoters of R2P have stated that civil society organizations and individuals should play a key role in operationalizing the R2P concept. In that endeavor, a look at the lessons from the Guiding Principles for IDPs is recommended. A major achievement of Francis Deng and his colleagues was their ability to mobilize support and acceptance of these principles among governments, UN agencies, NGOs, civil society and IDP communities through a systematic and inclusive dialogue process over years. If the civil society organisations are to be mobilised to defend R2P principles and support the building of public opinion in favour of the basic elements of R2P, debates on scope and interpretations should be encouraged.

No. 7

## Power to Protect?

### The Evolution of Military Structures and Doctrine in Relation to the Responsibility to Prevent and Protect

**Ståle Ulriksen**

This report investigates military thinking and force structures in relation to the requirements of the Responsibility to Protect (R2P), tracing developments in these fields since the International Commission on Intervention and State Sovereignty (ICISS) presented its report in December 2001. The focus is on five factors seen as central to military development.

The first section discusses the growing divide between military doctrines and force structures designed to fight more or less symmetric interstate wars on the one hand, and those designed to do peacekeeping, stabilization and counterinsurgency on the other. Both 'schools' are relevant to R2P, but in very different ways. The former involves a capability to destroy military forces and the machinery of states. If credible, that may be effective as a threat to prevent rational actors from committing atrocities. However, implementation can create a chaos that this approach was not designed to handle. To manage that chaos and to protect the population in the long-term, forces capable of controlling population and territory – i.e. capabilities of the other school – are needed. The balance between these two military 'schools' is currently in favour of the latter, but that may change if great power rivalry continues to escalate. A return to forces designed solely to protect classic national interests would be very harmful to the military capabilities needed for R2P.

The second section discusses the availability and suitability of two kinds of forces. The level of forces in ongoing operations has risen dramatically since 2001. In a sense this is positive: it improves the staying power of the forces already in place. But this level is not likely to increase further unless now-marginal actors can become more involved in international operations. Moreover, the availability of deployable rapid reaction forces in readiness increased dramatically from 2001 to 2007, but the strength of these forces is now threatened by the demands of ongoing operations. The growth in Western reaction forces is likely to slow down if European policies do not change. This can be highly deleterious to the ability to intervene rapidly if genocide is unfolding. Even so, the ongoing institutionalization of the African Standby Force (ASF) clearly represents an improvement.

The third section compares the doctrinal requirements of the ICISS with recent doctrinal developments, especially in the USA but also in the UN and NATO. It concludes that these developments in doctrines for counterinsurgency and stabilization are positive and highly relevant for R2P. There is a new recognition of the need to protect the population in order to achieve success in all stability and counterinsurgency operations. This is a big shift that, if continued, may enhance the ability to protect quite dramatically.

The fourth section discusses military security sector reform (SSR) as a R2P measure. It holds that SSR may be perceived both as a tool in post-intervention settings and as a tool for the prevention of war crimes. It concludes that there is a gap between the thinking on civilian SSR and military SSR, and that new momentum is needed in military SSR.

Both the increase in rapid reaction forces from 2001 to 2007 and the ongoing paradigmatic shift in military doctrine represent improvements in the international community's military ability to address R2P emergencies. However, the rising demand for more troops to ongoing operations is a real threat to the credibility of the new reaction forces. If the international community is to be able to prevent or stop genocides or major atrocities in the future, greater attention should be given to the maintenance and preferably also the expansion of such forces.