



A COMMON STANDARD FOR APPLYING R2P

Promotes the full continuum of R2P actions:

While it is universally agreed that the best form of protection is prevention, the lack of common standards of assessment at early stages of potential developments is one factor for the continued focus and association of R2P with military intervention exclusively. Common standards that span the full range of beneficial protection endeavors will help to ensure prevention is promoted forcefully where it is really needed

Targets application of limited resources:

Given the constraints on time and resources that stakeholders can direct to address mass atrocities, a common standard of assessment concerning which situations will benefit most from international assistance will ensure the most effective allocation of those limited resources.

Enhances Legitimacy: A common standard of assessment, while inevitably open to interpretation by all parties, will at the very least begin to require parties to explain their reasoning from a common reference point. Actions that are taken will be seen as more legitimate if successfully applying the standards; decisions not to take a certain course of action will also be seen as more legitimate.

Reduces Uncertainty: A common standard, along with guiding principles, will increase the likelihood that all relevant stakeholders (including States, regional organizations, NGOs and international organizations) **focus on a discussion of appropriate action** in any situation of stress, and **reduces the depth and duration of debate** that is centered on whether a situation would benefit from the application of the R2P.

The Responsibility to Protect provides an opportunity to overcome international inaction in exceptional situations of genocide or other mass atrocities. During R2P's first decade, however, its unique potential to unite approaches in addressing mass atrocity situations has been hamstrung by uncertainty over whether a situation comes within the R2P remit - from early prevention to the use of force as a last resort. This uncertainty stems - in part - from the fact that as a preliminary matter, there is not a common standard against which to measure and analyze incoming information to determine whether R2P applies. Over the past decade, R2P has been invoked in situations of widely different origin and intensity including Darfur, Kyrgyzstan, Myanmar/Burma, Cote d'Ivoire, Sri Lanka, Libya and Syria, with international responses ranging from ineffective to highly effective.

Moreover, debates concerning R2P's application have been most prominent in situations where violent conflict and the loss of life have already commenced. The main issue on the table has been the legality, morality and prudence of intensely coercive forms of intervention, particularly military action. This late term engagement with R2P continues in spite of the fact that UN Secretary General Ban Ki-moon and UN member states have unambiguously stated that prevention is the single most important dimension of R2P.

Our research aims to advance the ability of states, regional organizations, international institutions and civil society to focus on the practical implementation of measures to prevent mass atrocities through R2P at a mid-term stage when such prevention has a reasonable prospect of success. The research seeks to achieve this aim by developing a standard and its guiding principles, against which relevant actors can assess incoming information in respect of R2P to determine when they should act pursuant to their R2P commitments.

Despite the use of the terminology of "standard" and "guiding principles," **they are not intended to be implemented as legally binding tests against which to gauge the appropriateness of action.** Instead, the standards aim at assisting relevant stakeholders in determining whether a situation benefits from falling within R2P.

Why a Common Standard for the Application of R2P?

The practical consequences of invoking R2P will vary from situation to situation. R2P supports stakeholders acting based upon existing legal obligations and through a continuum of measurable and agreed

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steps by national and international actors. It does not dictate, however, the precise means by which R2P should be implemented in a given situation. Nonetheless, relevant stakeholders have been working to strengthen the understanding and the appropriate application of the concept. A widely-accepted standard specifically developed for R2P will assist in the effort of preventing atrocities and protecting populations in four ways:

- **Promote the full continuum of R2P action:** While it is universally agreed that the best form of protection is prevention, the lack of common standards of assessment at early stages of potential developments is one factor for the continued focus and association of R2P with military intervention exclusively. Common standards that span the full range of beneficial protection endeavors will help to ensure prevention is promoted forcefully where it is really needed and has a greater likelihood of success.
- **Target application of limited resources:** Given the constraints on time and resources that stakeholders can direct to address mass atrocities, a common standard of assessment concerning which situations will benefit most from international assistance will ensure the most effective allocation of those limited resources.
- **Legitimizing effect:** A unified, common standard will add a level of **transparency, credibility and accountability** to the deliberations over the application of R2P to a given situation which will, ultimately, result in greater consistency in outcomes of State action and norm legitimacy. A common standard of assessment, while inevitably open to interpretation by all parties, will, at a minimum, begin to require parties to explain their reasoning from a common reference point. Actions that are taken will be seen as more legitimate if successfully applying the standards; decisions not to take a certain course of action will also be seen as more legitimate.
- **Reduce Uncertainty:** A common standard, along with guiding principles, will increase the likelihood that all relevant stakeholders (including States, regional organizations, NGOs and international organizations) **focus on a discussion of appropriate action** in any situation of stress, and **reduce the depth and duration of debate** that is centered on whether a situation would benefit from the application of the R2P.

CARDOZO LAW

This research project at Cardozo Law addresses the normative concerns embedded within R2P, systematically develops a common standard against which incoming information may be assessed in respect of the application of R2P, coherently develops guiding principles for the application of the standard, and rigorously assess the benefits of challenges to the adoption of a common standard for the implementation of the R2P framework; including norm legitimacy, efficient allocation of resources and strategic mid-term prevention. The research project is led by Professor Sheri P. Rosenberg, Director of Program in Holocaust & Human Rights Studies.

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Standard and Guiding Principles

The Standard aims to provide a systematic and coherent approach to incoming information that can be utilized on a case by case basis for assessment and analysis of potential R2P situations. The application of the standard aims to increase transparency and accountability to deliberations on the application of R2P to a given situation to promote consistent State action. The Standard can be used by States, regional and international organizations, civil society and other actors called upon to determine the applicability of R2P.

The Standard and the guiding principles take the salient features of, and build upon, well-established national and international practice in determining existing risk levels as a basis for assessing future developments with an acceptable level of certitude. Moreover, the Standard and principles are inspired and guided by other areas of the international and national law which share similar goals and normative designs as R2P.

Standard of Assessment

The situation will be considered in the context of R2P, if the examination of the situation establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing are occurring or could occur in the future.

Principle 1: Determination of Relevant Human Rights Violations

1. The objective of the determination of relevant human rights violations is not the identification of separated legal categories of mass atrocity crimes on, the one hand, and other human rights violations, on the other, but a common consciousness of the risks involved in any massive violation of human rights.
2. The following human rights violations have been of particular relevance in past cases of mass atrocities: killings, torture, mutilation, rape and sexual violence, abduction, forced population movement, expropriation, destruction of property, looting, lack of freedom of speech/press/assembly/religion, destruction of subsistence food supply, denial of water or medical attention, man-made famine, redirection of aid supplies, acute discrimination against a particular group(s), restricted movement.

Principle 2: Determination of the level of gravity or seriousness of potential violations

1. The persecution of large parts of the population based upon identities applied by the perpetrators is the main element of the **exceptional** situations relevant to the application of R2P.
2. The significance of human rights violations will be assessed in light of the number of potential victims of violence or level of irreparable harm that may be caused to potential victims taking into account the following risk factors:

STANDARD OF ASSESSMENT

The situation will be considered in the context of R2P, if its examination establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing are occurring or could occur in the future.

*Like all standards guiding international relations it will be open to interpretation by a wide array of actors with varying national interests, but its flexibility will be bound by the common values shared by States: to prevent mass atrocities against men, women and children.

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- Identification of the victims based upon **identity criteria** linked to race, color, descent, relation, ethnic, or national associations, citizenship status, gender, sexual orientation or other ground and their association with a specific political opinion or group;
 - public **hate speech**, incitement to violence;
 - exclusionary ideologies that purport to justify discrimination;
 - a past history of violence against perceived groups; and
 - a **climate of impunity** in which these events unfold.
3. The following circumstances can increase the risk-level for potential victims:
- Armed conflict, which may disproportionately affect a specific group or a large part of the population;
 - existence of and support to militias that could carry out attacks against potential victims; and
 - elections

Principle 3: Application of R2P

1. R2P requires States to **take concrete measures** to mitigate the real risk of mass atrocities, based upon existing legal obligations. The R2P encourages a concept of consecutive, measurable steps by national and international actors, based upon existing resources and strategies, but does not prescribe particular measures.
2. The nature and timeline of the steps depends on **the gravity and urgency** of the situation. Such measures could include:
 - public acknowledgement and condemnation of human rights violations;
 - clear and public order to military, police or security forces to **respect international human rights and humanitarian law**;
 - immediate enforcement of accountability for the most relevant violations;
 - ensuring humanitarian assistance and **protection for victims** of violence; and
 - in cooperation with relevant stakeholders, including potential victims and drawing an action plan with timelines for **mitigating the most urgent risk factors**.
3. Action of the international community is subsidiary to action by the national government, i.e. to **support and complement** rather than substitute.

Principle 4: Determination whether a State is “manifestly failing” to meet its responsibility to protect

1. When the national authorities are manifestly failing to meet their responsibility to protect, the responsibility moves to the international community.
2. The determination – whether a State is “manifestly failing” – should be based upon the information relevant to human rights violations, the state of implementation of measurable steps to mitigate risk factors, and its impact on the real risk that exceptional grave violations of human rights could occur in the future. Based upon the outline of consecutive measures to mitigate the real risk of exceptionally grave human rights violations, the compliance of national governments and the international community can be established. **Manifest failure occurs when relatively foreseeable consequences have not been addressed and the risk level prevails or increases.**

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Basis for the Development of Standard and Guiding Principles

Conceptualizing and Operationalizing the Preventive Dimension of the Responsibility to Protect

Most scholars and practitioners agree that **R2P, as a whole, is not a legal norm**. Rather, it has evolved into a defining principal in international relations. To date, **R2Ps greatest contribution is its harnessing of disparate areas of international law to provide a useful framework for each one's relevance and application to mass atrocities**. With a view to the multiple responsibilities undertaken within the scope of R2P it would be **a grave error to associate R2P mainly with military intervention for humanitarian purposes**. Rather, R2P contemplates a far wider range of policy tools to forestall the need for such intervention in recognition that **prevention is the best form of protection**. Any standard developed for the R2P context must take the prospective lens of prevention.

The Urge to Turn to Criminal Law

The use of international criminal law terminology within the 2005 United Nations World Summit Outcome Document has both comforted and confused all those dealing with R2P. The result of both compromise and principle, three of the R2P acts set out – genocide, war crimes and crimes against humanity find relatively detailed definition within international criminal law. Ethnic cleansing is one possible form of crimes against humanity, and may be a component of both genocide and war crimes. **The delimitation was intended to limit R2P to exceptionally grave situations where international law had already defined limits to the principle of sovereignty**. This compromise, however, has resulted in much confusion. Above all, it should be self-evident that R2P cannot apply only at the stage at which responsibility under international criminal law for an individual culprit could be established. Such a standard would ensure the immediate demise of the normative concerns embedded within R2P, most of all its ability to proactively attempt to prevent a real risk of or on-going forms of mass atrocities. Therefore, alternative standards amalgamated from national and international law animated the standard and surrounding guiding principles developed for R2P.

Suggested Readings

2009 Report of the UN Secretary-General on Implementing R2P: [Implementing the Responsibility to Protect, January 2009](#)

UN Special Advisor on the Prevention of Genocide, Analysis Framework, available at http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf (last checked May 7, 2012)

Barbara Harff, 'How to Use Risk Assessment and Early Warning in the Prevention and De-Escalation of Mass Atrocities', *Global Responsibility to Protect*, 1:4 (2009), pp. 506-531.

Sheri P. Rosenberg, 'Responsibility to Protect: a Framework for Prevention', *Global Responsibility to Protect* 1:4 (2009), pp.156-192.

Anne Orford, *International Authority and the Responsibility to Protect*, (Cambridge University Press 2011)

Ekkehard Strauss, *The Emperor's New clothes?: The United Nations and the Implementation of the Responsibility to Protect*, (Nomos, 2009)

Other Sources of Law and Practice

The assessment of the likelihood of future conduct is by its nature a very different enquiry than the assessment of evidence to determine whether a fact has been proven about a past event. The enquiry involving R2P will

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often, perhaps, always, have elements of both forward-looking and backward-looking investigations, assessing whether sufficient acts have occurred to fall within R2P and whether future atrocities are potentially to occur.

Analyzing various evidentiary standards from national and international law has shown that the determination of the risk of a violation of international (and national) legal obligations in the future based upon present facts and circumstances has been addressed successfully by international and national courts. In the context of R2P, the **level of harm that would occur must be, by definition, exceptionally grave**, as described by the crimes considered at the apex of international crimes. At the same time, engagement to prevent such crimes must be measured and reasonable in light of the precautionary principle as well as the prerogatives of sovereignty. As a result, the mid-level standard of “real risk” appears most suitable to the objectives and goals of R2P articulated by member states and further articulated by the Secretary General, since it requires individualizing risks and considering concrete scenarios

Conclusion

This briefing has outlined how a common standard of assessment against which to analyze incoming information, developed specifically to engage the normative concerns of R2P, will assist in the effort of preventing atrocities and protecting populations. It does so by promoting the full continuum of R2P actions, by enhancing the credibility of engagement taken within the R2P framework, by establishing the type and scope of evidence analyzed to reach a judgment, and finally by reducing the depth and duration of debate that is centered on whether R2P applies, to focus at an earlier stage on appropriate action to protect lives.

This policy brief is based upon the results of a multi-staged research project undertaken by the Program in Holocaust and Human Rights Studies (PHHRS) at Cardozo Law, Yeshiva University in New York, NY. The project is led by Professor Sheri Rosenberg, Director of PHHRS. Ekkehard Strauss, an independent researcher and consultant on mass atrocities and Adjunct Professor at Griffith University, Queensland, is an Expert Consultant on the project and co-author of the brief.

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