R2P IDEAS in brief

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The Responsibility to Protect and the International Criminal Court: Complementary or Conflicting?

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The first years of the new millennium witnessed two global normative and institutional developments in efforts to prevent and stop mass atrocities. These are the responsibility to protect (R2P) norm and the International Criminal Court. Both address mass atrocities in different ways. R2P provides a normative framework for preventing and stopping mass atrocity situations, such as genocide and crimes against humanity, in particular through the United Nations. The ICC goes beyond the normative to provide a global, if not universal, institution designed to punish perpetrators and, hopefully, deter future atrocities. They are both tied into the 20th century global human rights project, as well as the highest reaches of global geopolitics. Both have featured in recent conflicts, yet recent experience has demonstrated that there is an uneasy relationship between the two which can make conflict management more difficult. This policy brief will examine this relationship. It will begin by briefly outlining the development of R2P and the ICC. It will then discuss the potential positive and negative interactions between the two, using recent cases to illustrate key points. It concludes with some recommendations on how the international community should support the use of R2P and the ICC together, including considering the implications of referring an ongoing conflict to the ICC, making clear that all parties to a conflict are subject to potential ICC investigations, and providing normative and practical support for the ICC by, for example, facilitating the arrest of ICC suspects by UN peacekeeping forces.

Responsibility to Protect

The responsibility to protect has its roots in the global failures to adequately address a number of genocidal and other mass atrocity situations in the 1990s. After the end of the Cold War, there was significant hope that the United Nations would be better positioned to address conflict situations, including those where very significant human rights abuses were occurring, and indeed for a few years, UN peacekeeping efforts expanded significantly as the UN became involved in a variety of conflict situations. However, a series of failures on the part of the UN - including in Rwanda and the former Yugoslavia - raised significant questions about the ability of the UN to harness increased cooperation to stop genocide and other related situations. These failures led directly to a report in

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2001 by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS), entitled *The Responsibility to Protect*.[1]

It argued that claims to sovereignty entailed responsibility towards individuals in the state and that the international community had a responsibility to step in to address the most extreme situations of human rights abuses when a state failed stop them or, indeed, was responsible for the abuses. This responsibility is three-fold: a responsibility to *prevent* atrocities, a responsibility to *react* when mass atrocities occur, and a responsibility to *rebuild* after such situations have ended. The World Summit endorsed[2] a somewhat watered down version of the original R2P concept. This document made clear that R2P only applied to four international crimes - genocide, crimes against humanity, war crimes and ethnic cleansing - that are commonly referred to as mass atrocity crimes. It, and the subsequent report by the Secretary-General in 2009, identified three pillars of R2P: 1) states have the primary responsibility to protect their people from mass atrocities, 2) the international community has a responsibility to assist states in this regard, and 3) the international community has a responsibility to use a variety of means - diplomatic, humanitarian, and military - to protect people when the state fails to carry out its responsibilities. However, the most important element of the World Summit recognition of R2P - both normatively and practically - was the fact that the UN committed itself, on a case-by-case basis, and when all other efforts had failed, to use, or authorise the use of, force against the wishes of a state to stop mass atrocities. This use of force is what had previously been called humanitarian intervention. This terminology was avoided, at least partly because of its disfavour in many developing countries, in particular, who saw it as a cover for neo-imperialist intervention. Further, the World Summit Outcome Document made clear that such interventions could only be authorised by the UN Security Council. This briefing is concerned with the 'hard edge' of pillar 3 - the use of military force to protect people from mass atrocities.

It should be noted that the World Summit did not create new international law in this area. There is no legal obligation arising from the outcome document and subsequent resolutions from the UN to engage in such intervention, and there is no legal sanction for individual states or groups of states to engage in such actions without Security Council authorisation. R2P is thus a *permissive* norm - it allows the Security Council to authorise certain activities, but it does not *require* it to do so. Further, there continues to be much debate over the status of R2P and whether it is just a cover for neo-imperialism. This debate became particularly heated when the Security Council authorised military action in Libya in 2011. Many perceived the coalition of states which intervened to protect people from Muammar Qaddafi's forces to have gone too far when its actions ultimately led to Qaddafi's overthrow, with a resulting backlash from both Russia and China, as well as many developing countries. This backlash has perhaps contributed to the lack of support for robust action to protect civilians during the ongoing conflict in Syria - although there are also many other factors mitigating against military action.[3]

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The International Criminal Court

Whereas R2P provides a normative and political framework for protecting people at risk of genocide and other mass atrocity crimes, the International Criminal Court (ICC) aims to prosecute those who commit such crimes. It also lays claim to deterrence of such crimes. The ICC has a much firmer legal grounding than R2P, given that it is treaty-based. Finally, while R2P lays claims to universal application via the Security Council, the ICC is more restricted to state parties to the Rome Statute of the ICC (although jurisdiction can be extended to non-states parties by the Security Council). Yet, they are both part of the set of potential responses the international community can call upon to address mass atrocities.

The ICC has its roots in International Humanitarian Law (IHL), which dates back to the middle of the 19th century and which attempts to lay out what is unacceptable conduct during wartime. IHL was further codified in 1949 with the Geneva Conventions and the 1977 Additional Protocols. The ICC represents the institutional criminalisation of much of the Geneva Conventions, as well as the Genocide Convention. The most direct institutional antecedents to the ICC were the post-World War II war crimes trials in Nuremberg and Tokyo in 1945, and more recently the International Criminal Tribunals for the Former Yugoslavia and for Rwanda set up by the Security Council in the 1990s. It was recognised, however, that having a permanent international court for war crimes would be a more powerful statement. It would obviate the need for ad hoc tribunals, and could serve as a deterrent to those who might consider engaging in mass atrocities. In 1998 more than 160 countries gathered in Rome to complete negotiations on the Rome Statute of the International Criminal Court. One hundred and twenty voted in favour, 21 abstained and 7 voted against.[4] This signalled a fundamental shift in how the international community would deal with mass atrocities. It enshrined into international law individual criminal responsibility for genocide, crimes against humanity, war crimes, and aggression, and created responsibilities for states parties - including to arrest and surrender to the Court those with outstanding arrest warrants. The ICC formally came into existence in 2002, and currently has 122 member states. These 122 states include only two of the five permanent members of the Security Council (France and the United Kingdom), even though, as will be seen, the Security Council can play a formal role in ICC activities.

The ICC has jurisdiction for the prosecution of genocide, crimes against humanity, and war crimes. The Rome Statute also has a provision for jurisdiction over the crime of aggression, although this has yet to come into force. There are three ways a case can come before the Court. A State Party can refer a case over which the ICC would have jurisdiction to the Prosecutor, the Prosecutor can initiate an investigation, or the Security Council can refer a situation to the Court. In the first two cases the individuals who may ultimately be investigated and tried must be citizens of a State Party or the crimes must have taken place on the territory of a State Party, whereas the Security Council can invoke the jurisdiction of the ICC even in cases of a non-State Party. Of the eight situations now under official investigation, four came before the Court via the State Party referral process (all self-referrals - Uganda, Democratic Republic of Congo, Central African Republic, and Mali); two were

initiated by the Prosecutor (Kenya and Côte d'Ivoire) via the Prosecutor's *proprio motu* powers; and two came via a referral from the Security Council (Darfur and Libya). In addition to referring cases, the Security Council also has the ability under the Rome Statute to defer the proceedings in a case for up to 12 months (indefinitely renewable). The ICC is a court of last resort, and can only claim jurisdiction when a state has demonstrated an unwillingness or lack of capability to try suspects.

The ICC is not without controversy. There has been significant criticism of the fact that all active cases before the Court are in Africa, leading to charges of bias and neo-colonialism.[5] The fact that the Security Council, which will be discussed further below, also raises questions about the independence of the ICC. Questions of independence are also raised, in particular, when states self-refer. There may be a perception that the Prosecutor may be beholden in some way to the government in order to gain its ongoing cooperation. Such issues have been raised, for example, in Uganda and the DRC, where charges have been made against rebel forces but not against government forces and leaders who may have also been responsible for atrocities.

One claim made on behalf of the ICC is that having a standing court could deter individuals from engaging in genocide and other atrocity crimes. It is difficult to prove the negative - i.e. that crimes have not happened because of the existence of the ICC - and recent experience raises serious questions about the potential for deterrence. There is some limited evidence that the ICC may have had some effect in the DRC on the issue of child soldiers,[6] for example, but such evidence is difficult to corroborate. Regardless, the ICC has only been in existence for 12 years, and it is likely that a much more robust record of timely prosecutions and convictions (there have been only two convictions to date) will need to be built up before one can confidently predict any kind of deterrent effect. The fact that the ICC has no ability on its own to arrest suspects further undermines the deterrent prospects, since deterrence would require an expectation that the ICC could quickly and routinely transfer those with arrest warrants against them to The Hague for trial. This is not the case, given that it is dependent upon unsure cooperation from states and other actors, who have their own interests and agendas.

As noted, the Rome Statute provides a much more robust legal foundation for the ICC than is the case for R2P. It specifies in significant detail the jurisdiction of the court - both territory and subject - and also specifies the legal requirements for states to arrest and surrender suspects to the ICC. This differs from R2P which, while lacking the same firm legal foundation, is potentially more universal in scope (subject to the vetoes of the permanent members of the Security Council), although the ICC can gain more universality via a Security Council referral.

R2P and the ICC: Allies or Enemies?

R2P and the ICC are thus both possible responses to mass atrocity situations. They can be invoked individually or used together. They can be sequenced or implemented simultaneously. They might be mutually supportive, or they might undermine each other.

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Sequencing

The goal of R2P is to prevent or stop mass atrocities. The ICC can potentially support this end. Theoretically, it can deter mass atrocity situations in the first place, rendering R2P responses unnecessary - although we have seen little evidence of such deterrence to date. Once a mass atrocity situation is under way - or about to occur - the ICC could be useful in sending a signal. It could be a warning to those in power that if they continue with their actions, they could be prosecuted by the ICC - a nonviolent response compared to an R2P military intervention. The hope would be that the threat of prosecution would be enough to deter further atrocities - if not the top political leaders, then perhaps upper- or mid-level military commanders, who might be induced to defect to avoid participation in further atrocities and thus avoid prosecution. Even though most ICC investigations to date have been in the midst of ongoing atrocity situations, there is little evidence that defection is a likely outcome. However, a few encouraging signs have appeared, such as in defections from the Qaddafi regime, which might have been linked to fears of potential ICC prosecution. Yet, at the same time, the ICC took no action against rebel forces, thus undermining any potential deterrence effect for the rebels during the conflict and not deterring post-conflict abuses by militias.[7]

Invoking the ICC might also be a prelude to further action by the Security Council - it could serve as a justification for military action. By referring a situation to the ICC, the Security Council is making a statement that individuals involved in the conflict have transgressed international humanitarian law, thus providing potential justification for military action to stop those transgressions. This might be used cynically to provide a pretext for a military action for which there might be little support or other justification, or it could be part of a carefully calibrated strategy to build international support for needed R2P enforcement action. Sometimes it may be difficult to see the difference. In Libya in 2011, after a series of atrocities by the government, the Security Council, citing the possibility that crimes against humanity may have occurred and noting the government's responsibility to protect its population, referred the situation in Libya to the ICC in Resolution 1970 on 26 February. The resolution also made reference to the Security Council's ability to suspend ICC proceedings, perhaps as a way to induce Libya's leaders to stop the atrocities and avoid prosecution. The ICC issued arrest warrants for Qaddafi and two others in June 2011. By then, however, any hope that the referral might have been a deterrent were gone. On 17 March, in response to continuing atrocities and an imminent potential massacre in the city of Benghazi, the Security Council passed resolution 1973 which invoked the responsibility to protect and authorised the use of 'all necessary measures' to protect civilians. This led to air attacks by a coalition of Western states which resulted in Qaddafi's eventual capture and death. Given the short period of time between the two resolutions, there was little likelihood that the threat of ICC prosecutions would have had a sufficient effect to deter further atrocities. There is thus speculation that the referral was used to provide the normative and political rationale for the eventual intervention under UN auspices.

Conflict Management

While the ICC might put pressure on combatants, it can also complicate attempts to bring a conflict to an end by creating incentives to continue fighting. The threat of prosecution, with a promise or hint of withdrawing the threat if parties to the conflict stopped fighting, might induce such behaviour. However, once a situation comes before the Prosecutor, other actors have less control over the situation. If the Prosecutor decides to go forward with an investigation or prosecution, and is given authority to prosecute individuals by the Pre-Trial Chamber, there are few options for stopping a prosecution - particularly once arrest warrants are issued. According to the Rome Statute, the Prosecutor could apply to the Pre-Trial Chamber to halt proceedings based on the interests of justice.[8] They cannot stop proceedings based on the interests of peace - that is, on the basis that the prosecution might interfere with a peace process. The only other avenue for suspending proceedings is through the Security Council invoking Article 16 of the Rome Statute, which gives it the ability to suspend proceedings for up to a year. It can renew this suspension as many times as it wants, but the threat of prosecution would always be there - the Security Council could always choose not to renew a suspension, even if this had been a condition for a party to a conflict to lay down their arms and negotiate a peace agreement. Knowing that the threat would always be there, the individual(s) would have an incentive to keep fighting, since a peace agreement might lead to their capture and a trial in The Hague - regardless of whether or not a suspension had initially been put in place by the Security Council. Indeed, given the experience of others who had thought they had achieved immunity - including former Chilean president Augusto Pinochet (via a domestic amnesty law) and Liberian president Charles Taylor (by being given safe haven in another country) - but ended up being tried anyway under various mechanisms, those who come under the gaze of the ICC would be quite rational to think that any promises of immunity from prosecution were temporary at best.

Beyond this, however, there would be danger to the ICC itself if it were used as a conflict management tool in this way. If it was clear that the Security Council perceived the ICC as a threat which it could invoke or withdraw at will, the normative purpose of the ICC would be severely undermined, doing significant damage to the ICC, and ultimately undermining the perceived threat of ICC prosecution. The request by the Prosecutor in 2008 for, and ultimate issuance of, an arrest warrant for Sudanese president Omar al-Bashir in 2009 led to calls by the African Union for the warrants to be suspended by the Security Council, arguing that the arrest warrants undermined the peace process.[9] Given the actions of the Sudanese government before and since the issuance of the arrest warrant, there is little evidence that it has had an appreciable effect on the peace process, but it is a continuing concern.

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Universal Jurisdiction

Developing in parallel with the ICC is another framework for international criminal justice called universal jurisdiction. The Princeton Principles on Universal Jurisdiction state that universal jurisdiction:

> is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[10]

In other words, a state can try somebody for mass atrocities even if it did not happen within its territory and the perpetrator or victim are not citizens of the state. The justification for this is that these crimes have become international crimes - beyond nationality - through the adoption of the torture and genocide conventions, among others, and that states can act on behalf of the international community to bring these people to justice. This is a highly controversial concept, but it has developed significantly since the 1990s, with the case initiated by Spain against former Chilean President Augusto Pinochet the most famous instance of attempted exercise of universal jurisdiction. It has been invoked on a number of occasions to try individuals for war crimes and other atrocities, and although there has been a certain backlash against it, it continues to be an active avenue for pursuing international justice. Indeed, a recent and ongoing attempt to exercise universal jurisdiction demonstrates that the doctrine is alive and well. This is the case of former Chadian President Hissène Habré. In 1990, he fled Chad as a result of a coup, settling in Senegal. There were attempts to try him in Senegal in 2000, which collapsed, and Belgium indicted him and requested his extradition in 2005. A year later, the African Union asked Senegal to try Habré 'on behalf of Africa'[11] - indicating the collective and transnational nature of his crimes. In 2012, the International Court of Justice ordered Senegal to either extradite Habré to Belgium or to try him. Habré was indicted in Senegal and proceedings in the newly created Extraordinary African Chambers started in 2013.

The issue of universal jurisdiction is relevant because it is another avenue for international justice beyond the ICC which has the potential of creating similar complications as the ICC, with the added fact that whereas the ICC is limited in jurisdiction unless the Security Council expands that jurisdiction, universal jurisdiction could potentially be applicable to crimes committed anywhere, and tried anywhere. Further, while the Security Council has the ability to suspend proceedings of the ICC, it has no power over individual states' exercise of universal jurisdiction. Thus, a state might indict an individual in the middle of a conflict, and there is little the Security Council could do about it, even if it might undermine peace negotiations. Further, even if there was little prospect of gaining access to and putting on trial an individual in the near future, an indictment and arrest warrants - and thus potentially extradition requests - could remain for years or decades, beyond the resolution of any conflict. This has important implications for conflict management. No deal could be made

with the perpetrator as part of a peace deal to avoid prosecution which could be absolutely binding, since that prosecution would occur with a third party. Thus, regardless of whether the ICC stops a prosecution or the Security Council indefinitely suspends proceedings, any individual cannot be absolutely certain that he or she will remain free of prosecution in the future - even if, as the Taylor and Habré cases demonstrate, that person has been given safe haven in another country.

The invocation of the ICC in the midst of conflict can also have other potentially negative effects which undermine the goals of R2P - stopping mass atrocities. It could provide incentives for parties to a conflict who might not be the target of ICC investigation to keep fighting. For example, the President or Prime Minister of a country who had an arrest issued against him would thus be branded an international criminal and would lose legitimacy. This might embolden rebel groups to refuse to negotiate with an indicted war criminal, perceiving such delegitimisation as an advantage and support by the international community. Such moral hazard was evident in Darfur. After an arrest warrant was issued for Sudanese president Omar al-Bashir, some rebel groups refused to negotiate, saying that Bashir now lacked legitimacy.[12] Peace negotiations were thus imperiled.

Further, however, Darfur highlights another potential concern. Whereas the ICC referral in Libya may have paved the way for military action, the Darfur referral provided a political basis for avoiding military action. Even though the situation in Darfur had been labeled as genocide by the US government and others, and the UN had identified crimes against humanity, there was little appetite for a robust intervention to protect civilians, even though weak AU and UN peacekeeping forces were deployed. The ICC referral thus allowed the Security Council to make it seem like it was doing something to address the situation, even though that 'something' was not enough to protect civilians.[13] Using the ICC to highlight atrocities and bring perpetrators to justice is commendable, but not if it takes pressure off the international community to stop ongoing atrocities. Further, the Security Council has done little to provide support for the ICC in its attempt to bring Bashir and others to justice, prompting some to reverse their support for the referral. Indeed, this is a major concern. The ICC is a potentially very powerful institution, but it requires support from other actors to be effective. If it is invoked but does not receive such support, it risks being perceived as weak and a signal would thus be sent that the international community does not care about bringing people to justice, leading to a greater sense of impunity.

One situation where neither pillar 3 of R2P nor the ICC have been invoked is Syria.[14] With more than 100,000 people killed since 2011, chemical weapons used, and other crimes against humanity and war crimes identified, the international community has failed in a substantial way to uphold the norms embedded within R2P and the ICC. Geopolitical reasons have played a major role, with Russia supporting the Syria regime and neither China nor Russia wanting to support military intervention or an ICC referral. Any attempt in the Security Council to sanction the use of force in Syria would face a

veto by one or both countries. Western powers, too, however, are reluctant to intervene, given the political complexity and volatility of the region. Moreover, Libya was a much less complicated situation, making an intervention much easier than in Syria. However, the move in Libya from protecting civilians to regime change has undermined support for such interventions.[15] It appeared at one point that the West, led by the US, would intervene, if in a relatively limited way, after chemical weapons attacks in August 2013, although this threat dissipated once the Syrian regime agreed to give up its chemical weapons. Yet, the focus on chemical weapons did not address the much more widespread atrocities, ongoing today, which have been responsible for most of the deaths.

In this situation, with R2P action blocked by geopolitics and unclear interests on the part of the great powers, the ICC could be useful. The Prosecutor cannot initiate an investigation herself since Syria is not a party to the Rome Statute. However, the Security Council could refer the situation to the ICC, as it did in Libya and Darfur. In September 2013 at least six members of the Security Council had supported such a referral, including two permanent members the UK and France. And France had included ICC language in an early draft of a resolution on Syria, which was ultimately removed. Russia has come out against a referral, and neither the US nor China have expressed support.[16] While an ICC referral would not have an immediate impact on civilian protection in the way that R2P action would, it would still provide a signal to all parties to the conflict - both the government and the many competing rebel factions - that the situation is unacceptable and that those who are responsible for crimes will be held accountable. Indeed, anti-government forces are also responsible for significant atrocities - including in the context of in-fighting between various groups - and signaling that this is not acceptable is important (even if some groups, particularly those connected to Al Qaeda, appear to be immune to such entreaties). Given the lack of progress in the peace negotiations to date, it is unlikely that it would impede such efforts. But it would signal that the international community was serious about ending impunity. Further, the identification of specific criminality could create the conditions for more robust action to stop the killing, and the naming of names and the issuance of arrest warrants could reduce the freedom of movement of key players, particularly on the government side. All of this could put pressure on the various players to come to an agreement. The position from the West is that Assad must go - although there is little appetite for using force to ensure that this happens. Given his responsibility for widespread crimes, this is the only path to a stable and peaceful future for Syria. As in the Former Yugoslavia, where Slobodan Milosevic, Ratko Mladic and Radovan Karadzic were made pariahs after their indictments by the ICTY, Assad and others who have perpetrated atrocities would be labeled pariahs, making it harder for them to ultimately stay in office. And, making it clear that all sides would be investigated could allay fears of bias as well as helping to ensure that those who committed atrocities would not end up in power in a post-war Syria - a key development which would contribute to the prevention of further violence (although the current situation in Kenya, where both the President and Vice-President are on trial in The Hague, might cast doubt on this assertion). Assad appears determined to stand in elections due to take place in July 2014, and will almost certainly win. Being investigated

by the ICC or having an arrest warrant issued against him might further delegitimise him. However, given the experience with Bashir, as well as in Kenya, it is an open question as to whether further enhancing his pariah status would affect him domestically - particularly given the repressive nature of the political system in Syria.

R2P and ICC Working Together?

R2P aims to prevent or stop mass atrocities. The purpose of the ICC is to punish perpetrators of these atrocities. This division of labour would appear to make them ideal complements in the fight against widespread human rights abuses. However, geopolitics and practical considerations make their relationship much more complicated. Coercive R2P action is dependent upon the agreement of the permanent members of the Security Council - or at least an assessment on the part of at least some of the most powerful states that their interests went beyond a veto in the Security Council. In this sense, it is much more a political concept than a legal norm. It is also prospective or present-looking. The ICC is retrospective, in that it seeks punish perpetrators after the fact. Yet, it has a prospective function - to deter atrocities - even if there is little evidence for such an effect yet. And, to the extent it is deployed in the midst of ongoing crises, it also has a conflict management function - it can put pressure on parties to a conflict to come to an agreement, but can have the opposite effect - particularly if the investigation has progressed to the issuance of arrest warrants. At that point, parties to a conflict might have an incentive to keep fighting, thus undermining the goals of R2P. If the ICC is to be used in the middle of conflict, it requires further support from the Security Council and other actors. The ICC cannot stop atrocities by itself; nor can it bring combatants to the bargaining table without further external pressure.

R2P and the ICC could work together to bring an immediate halt to atrocities and remove from positions of power and authority those who perpetrate such atrocities. This requires coordinated efforts by a number of actors. If the country concerned is a State Party, the Prosecutor could initiate an investigation or another State Party could refer the case to the Prosecutor for investigation. The State itself could refer the situation, although such cases to date have led to one-sided investigations, and such an eventuality would not be likely if the main perpetrator of atrocities was the government. Investigations can put pressure on combatants. Simultaneously, the Security Council, or regional bodies such the AU, could support the ICC, by cooperation and coordination, and making a firm commitment to arresting perpetrators identified by the ICC. At the same time, the Security Council could signal its willingness to undertake the requisite forceful action necessary to immediately protect civilians, as well as its resolve that if the situation went too far, it would be necessary for a new political alignment in the country to ensure that such a situation did not occur again. If this did not deter further violence, then the Security Council, in conjunction with regional organisations where relevant, would have to take the necessary military action to protect civilians while arresting perpetrators to prevent those most responsible from initiating further violence.

A number of factors mitigate against this. First, the ICC is an independent body. It can initiate investigations in countries within its jurisdiction without approval of the Security Council or other bodies. This could potentially come into conflict with global and regional conflict management strategies (indeed this can happen regardless of whether the investigation was initiated by the Prosecutor or members states or the Security Council). Second, to be part of a coordinated strategy, the permanent members of the Security Council must be in agreement - or at least not willing to block action. Unfortunately such agreement or coordination has been significantly lacking. It was evident in Libya, but when perceived national interests become involved, as in Syria, any such efforts may be blocked. Further, the perceived overreach of the allied forces in Libya to bring about regime change under the banner of R2P leaves many states wary of supporting further R2P action. This could mean that the ICC is turned to by states unwilling to support more robust action, thus implementing half measures. This could be useful in some situations where there is a stalemate at the global level, but any realistic assessment must note that the ICC is not an adequate substitute. But, as noted above, such a referral might signal that the perpetrators have become illegitimate in some way and pave the way for further action. However, recent experiences such as in Darfur do not hold out much hope for this dynamic. And, there must be support for the ICC in the first place.

Other challenges must also be noted. Even when both R2P and the ICC have been deployed in a situation, the demands of one might come into conflict with the functioning of the other. For example, the ICC needs concrete information from the ground level on atrocities to makes its cases. Peacekeepers and others who have been deployed in the midst of crises will likely possess this information. Yet, for the ICC to expose that this information came from peacekeepers could endanger those peacekeepers or, in situations where this is relevant, undermine their claim to neutrality, which then undermines their ability to do their job.

MONUC and the ICC

The question of information from peacekeepers became a significant issue in the DRC, where the UN Mission in the Congo (MONUC) provided key information to the ICC. During the proceedings against Thomas Lubanga, the first case to be tried before the ICC, a question arose as to whether information provided by MONUC (as well as some humanitarian NGOs) should be turned over to the defense as potentially exculpatory evidence. The Prosecutor - and MONUC - did not want to turn over the information, since it could lead back to and endanger MONUC operations (as well as those of the NGOs), and impede the flow of necessary information in the future.[17] Yet, the accused is entitled to gain access to relevant information and denying them access could undermine the justice process. In the end a compromise was reached, but the situation highlighted very serious concerns regarding the working relationship between the ICC and those engaged in providing physical protection of civilians.

Peacekeepers might also be given a mandate to capture those who have ICC arrest warrants out

against them. This could be a positive complementary relationship. Indeed, the ICC is dependent on other actors - including states and other military forces such as peacekeepers - to arrest and surrender suspects. Yet, the military has frequently been reluctant to do so. NATO was extremely reluctant to engage in such activity in Bosnia.[18] In the DRC, such reluctance was also evident, although there were instances where UN peacekeepers have contributed to the capture of ICC indictees. In the DRC, there was a Memorandum of Understanding between MONUC and the government - rather than between MONUC and the ICC directly[19] - which indicated that it would 'give consideration' to helping the government arrest those who had arrest warrants from the ICC.[20] It was thus one step removed from a direct relationship between MONUC and the ICC, and was permissive rather than directive. It allowed MONUC to help, but did not require it to - in the same way that the World Summit Outcome Document allowed the Security Council to undertake or authorise R2P action, but did not require it to. This demonstrates a continuing weakness in the relationship between R2P and the ICC, although, in the end, MONUC did contribute to the arrest of Lubanga, as well as Germain Katanga.[21] Yet, it did not attempt to arrest Bosco Ntaganda[22] who, after having an arrest warrant issued against him, became a senior commander in the government armed forces, before rebelling against the government again. During all this time, he was allowed to operate in the open. Mounting an operation to arrest an individual like Ntaganda could be extremely dangerous and costly; yet, MONUC has come under significant criticism for coordinating with him while he was in the Congolese army.[23]

Uganda

Another situation where military operations have become intertwined with the ICC is in Uganda (and beyond) in the fight against the Lord's Resistance Army.[24] Uganda was the first case accepted by the Prosecutor, after a self-referral by the government. The ICC has issued arrest warrants for LRA leader Joseph Kony and several of his lieutenants. The ICC role has been very controversial. First, there have been charges of one-sidedness, given that the ICC has not investigated atrocities committed by government forces, and a perception that the ICC has given sanction to the government's fight against the LRA, as well as against the people of northern Uganda. Second, there is a perception that the ICC has interfered with the peace process and local justice mechanisms. Most recently, however, the arrest warrants have become wrapped up in broader regional strategies to address the LRA threat. The LRA has not been a threat within Uganda itself since 2006. However, as it has spread throughout the region, so have efforts to stop it. MONUSCO (the successor to the MONUC) has engaged in operations in the DRC to protect civilians from the LRA in the DRC, although given limited resources this has been in a more defensive than offensive posture, with only periodic offensive measures.[25] Uganda has engaged in military operations in the DRC, Central African Republic, and the

South Sudan. The AU has authorised a force of 5,000 (the African Union Regional Task Force), although it has not been fully deployed, has been dominated by Ugandan forces, and has been restricted in its access to affected areas by political and logistical factors.[26] This effort has been supported by the US since 2011, when the US sent 100 military personnel to support AU operations through training, intelligence operations, etc.[27] Another 150 troops were authorised in March 2014.[28] These troops are part of the recently established US Africa Command (AFRICOM). This deployment was part of the 2010 US 'Strategy to Support Disarmament of the Lord's Resistance Army,' which was focused on protecting civilians, arresting (or removing) Kony and other LRA commanders, promoting defections and providing humanitarian assistance. It cited the responsibility to protect in the context of holding those who target civilians to account.[29] The US has also offered a reward of $5 million for information leading the arrest of Kony and his top commanders. The 'hunt for Kony' has focused on arresting Kony, public support for which has been partially driven by the Kony 2012,[30] campaign which has been criticised for being too simplistic and not understanding the threat posed by the LRA today.[31] It explicitly ties military action to arresting Kony. And while it significantly underestimates the challenge posed by arresting Kony, such efforts have been supported by human rights campaigners, including the Executive Director of Human Rights Watch, Ken Roth, who advocated "the humanitarian use of force… to arrest Joseph Kony." Indeed, there is an obvious connection between military efforts which could be used to protect civilians while also looking for Kony. Yet, there is significant danger that any military action becomes so focused on finding Kony that both proportionality - the resources expended and more importantly the potential collateral damage - and the focus on protecting civilians could be undermined. When the focus becomes one individual who becomes demonised - as happened in Somalia with Mohamad Farah Aideed, or indeed, with Saddam Hussein in Iraq - the actual purpose of such initiatives like R2P or the ICC can be set aside.

Conclusion

There are obvious connections between R2P and the ICC. They both address the question of mass atrocities, although in significantly different ways. They can both be part of a strategy to deal with potential or ongoing atrocities. R2P actors can help to apprehend those with ICC arrest warrants issued against them. They are also both tied into the highest reaches of global power, which means they are also subject to the whim of that same power. While there are potential synergies, there are also potentially significant antagonistic interactions between the two. The ICC can get in the way of global or regional conflict management strategies. And, it can provide an excuse for not engaging in more effective actions, including military operations, to protect civilians. Much more thought must be given to questions of sequencing, while the Security Council and other actors must provide more support for the ICC, in particular when they invoke it as part of a strategy to deal with mass atrocities.

R2P IDEAS in brief

AP R2P
Asia Pacific Centre for the Responsibility to Protect

Recommendations

- The Security Council should consider the implications of an ICC referral and whether and how it might support (or undermine) efforts to protect civilians. Would such a referral delegitimise relevant actors in a conflict, thus weakening them and potentially contributing to the resolution of the conflict? Or would it further entrench leaders, thus undermining conflict resolution and the protection of civilians? Would an ICC referral enhance post-conflict justice, thus removing perpetrators from power and contributing to the prevention of atrocity recurrence?
- When the ICC is invoked, the Security Council must make clear that all parties to a conflict are potentially subject to investigation.
- When the Security Council uses its Article 16 power to suspend ICC proceedings in a case, it should do so with the clear understanding that this is, and must be, a temporary measure, and to plan accordingly.
- When the Security Council invokes the ICC, it should provide both normative and practical support for its operations. This would include not only subsequently reaffirming the goals of the ICC, but also supporting UN peacekeeping and other operations in apprehending suspects where feasible and appropriate.
- Consideration should be given, where appropriate, to ICC referrals after a conflict is ended. This would avoid potentially negative consequences for management of an ongoing situation while contributing to post-conflict justice and the prevention of further atrocities.

Biographical note and Acknowledgements

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