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SPOTLIGHT ON R2P

Dr Surin Pitsuwan Memorial Oration

The Responsibility to Protect (R2P) through the Human Rights Lens: Implications for South-east Asia

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The Dr Surin Pitsuwan memorial oration was presented by Professor Emeritus Vitit Muntarbhorn KBE>on the 27 th of August 2019. He was introduced by the Dr Karen Smith, Special Adviser of the United Nations Secretary-General on the Responsibility to Protect. The oration with permission from Professor Emeritus Vitit Muntarbhorn.

In 2005 the global community converged in adopting the World Outcome Document as a catalytic instrument propelling long-awaited changes in the United Nations (UN) system, guiding countries in their inter-State and inter-stakeholder relations. That Document incorporated the "Responsibility to Protect" as a key principle advocating that every State has a responsibility to protect its populations from four egregious violations and mass atrocities, namely, genocide, crimes against humanity, war crimes and ethnic cleansing, including in regard to incitement to such crimes.

In brief, genocide can be summarized as actions targeting the destruction of a group with specific intent against the group, for example, extermination of the group. Crimes against humanity take place in war and in peace and are based upon widespread and systematic attack on the civilian population, with intent, such as the repeated bombings of civilians without distinguishing them from military targets. War crimes take place in times of war (both internal and international armed conflicts) and can be single events, such as an attack on a hospital or killing of a prisoner of war. Ethnic cleansing is understood to cover the particular situation when the population is coerced to leave their homes en masse or cleared from locations forcibly, interlinked with ethnic reasons.

Subsequently the UN Secretary General elaborated upon the R2P by stating that there are three pillars for its operationalization:

- **Pillar One: The protection responsibilities of the State:** "Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement."
- **Pillar Two: International assistance and capacity-building:** "Pillar two is the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and sub-regional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system." This includes preventive action.
- **Pillar Three: Timely and decisive response:** "Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection." Actions may thus cover pacific measures under Chapter VI of the UN Charter, coercive ones under Chapter VII and/or collaboration with regional and sub-regional arrangements under Chapter VIII. There is thus a range of possibilities which should not be understood narrowly. Ultimately, in International Law, Chapter VII measures can, of course, include enforcement measures (in laypersons' terms: military and other sanctions), but they are subject to the veto powers of the five permanent members of the UN Security Council (UNSC).

These are now complemented by two UN advisers working on the prevention of genocide and on the R2P. Since the World Outcome Document, the R2P has been referred to many times in UNSC resolutions which are of a binding nature and it is today very much part of international law. The recent report of the UN Secretary General on the R2P and lessons learned concerning prevention should be underlined, with emphasis on managing diversity, strengthening accountability, promoting a vibrant civil society, safeguarding livelihoods and guaranteeing non-recurrence of violations, as well as early warning of potential atrocities.

The backdrop for the evolution of the R2P should not be forgotten. Prior to its inception, there was an unsettled global debate on whether a country or organization could send troops unilaterally (without UNSC backing) into another country to help the population against key human rights violations perpetrated by the authorities of the latter, on the basis of "Humanitarian Intervention" (HI). While academic quarters suggested various criteria for its validation, many countries were fearful of impingement by outsiders on their cherished State sovereignty and their sacrosanct notion of "non-interference in the internal affairs of a State".

The International Commission on Intervention and State Sovereignty which was tasked with examining this issue prior to the World Outcome Document was ingenious to offer an alternative approach: to project State sovereignty as based upon responsibility towards its people (rather than as an absolute right to non-intervention on the part of the State authorities), as well as to set defined criteria for the R2P with normative content. Thus, the constituents noted above:

1) State responsibility,

2) to protect its populations and

3) against four key violations.

It should be noted that rather than being a substantive offence, in international law, ethnic cleansing tends to be subsumed under the notion of crimes against humanity, particularly the angle of mass forced displacement of the population from their homes (in conflict situations) which is a crime under the laws of war or international humanitarian law.

The human rights dimension helps to concretise the R2P by interlinking between the role of the State and its population(s) in the sense that human rights are based upon entitlements advocated by the population to the State itself. In essence, the primary responsibility for the promotion and protection of human rights rests with the State (thus, the nexus with Pillar One). The R2P meets human rights at the crossroads where the State becomes dysfunctional and posits the shared responsibility of the international community to assist (thus, the nexus with Pillar Two) and to offer a timely and decisive response ranging from soft options such as aid to hard options such as Chapter VII-type coercive measures (thus, the nexus with Pillar Three).

Human rights are also based on the universality of standards with key international instruments as their backbone, particularly the 1948 Universal Declaration of Human Rights and a number of international human rights treaties, such as the International Covenant on Civil and Political Rights 1966. The indivisible range of human rights – civil political, economic, social and cultural – has to be underlined. Thus, the population is entitled to not only the right to life but also freedom of expression, freedom of movement, the right to education, an adequate standard of living and many other rights as the basic minimum to be guaranteed for all persons. There is inherently a key principle pervading the whole scenario, namely, non-discrimination which implies equality of treatment for all persons on the territory, irrespective of origins. Thus, the protection afforded is to not only nationals but also non-nationals on a State's territory.

Importantly, those treaties have monitors, such as the Human Rights Committee, which can help to highlight situations which might lead to egregious violations and ultimately one of the four listed by the R2P. In reality, this presence can act as early warning of potential atrocities. The UN has also general jurisdiction to monitor and advocate human rights promotion and protection, such as through its Universal Periodic Review and Special Procedures (for example,

UN Special Rapporteurs); that jurisdiction emanates from the UN Charter and does not depend upon a State's membership of specific human rights treaties. Commissions of Inquiry and fact-finding bodies have been set up increasingly to investigate hotspots and are particularly targeted to establishing initial evidence of egregious violations which may be tantamount to international crimes, such as crimes against humanity, for further scrutiny and accountability by the global community. They are serviced by the Office of the UN High Commissioner for Human Rights (OHCHR).

Advocacy of human rights protection on behalf of victims and critique of violations happen on a daily basis in the UN forum, such as in the UNSC, UN General Assembly (GA) and UN Human Rights Council (HRC), and this is part of international jurisdiction under the UN Charter which is not to be considered as interference in the internal affairs of a State.

Human rights thus provide a value added to the advocacy of the R2P, particularly in regard to:

1. action(s) expected from the State in regard to an indivisible range of rights with a universal backdrop and on the basis of international jurisdiction
2. covering all the population (not only nationals) without distinction and
3. in regard to the four egregious violations which raise further the issues of prevention, early warning, protection of rights, provision of remedies and accountability, and stakeholder participation.

They are paralleled by the rise of the international criminal responsibility of individuals in regard to four key violations, which overlap largely with the R2P, for which individuals might land up in an international criminal tribunal, especially the International Criminal Court (ICC), namely, genocide, crimes against humanity, war crimes and the crime of aggression. Even when a State is not a party to the Rome Statute of the ICC, its nationals might still be referred to the Court if there is a UNSC resolution backing the cross-referral. Therefore, today, State responsibility and individual criminal responsibility go hand in hand in this broader kaleidoscope of responsibility interlinked with accountability, as seen in various UNSC Resolutions citing the R2P, and the nexus between the R2P and human rights.

The normative setting of the R2P through the human rights lens has also to be grounded in political realities. While there was a sense of euphoria at the time of the World Outcome Document that people would be protected under the R2P, the invocation and utilization of the R2P has fluctuated with the times since then. The pinnacle of international operations under the R2P was seen in relation to the Libyan conflict - to counter the government under Colonel Qaddafi, when UN Security Council Resolution 1973 in 2011 permitted "all necessary measures" to protect civilians, thus opening up to UN-backed military action in the armed conflict with that government. This also justified the imposition of a no-fly zone to prevent the latter from resorting to aerial warfare. Individuals linked with that government were also listed by the UNSC for sanctions and cross referral to the ICC.

Interestingly, one power from the South-east Asian region abstained from the UNSC vote on Resolution 1973, although it has shown more hesitation towards the R2P subsequently and has cast its veto in later situations. This is partly due to the fact that in the Libyan operations, there was critique from some quarters over various actions, such aerial bombardments on the members of that government and related family, as not being congruent with the UNSC Resolution.

Since then, implementation of the R2P has been variable as witnessed in the context of the now longstanding and ferocious armed conflict in Syria. A key draft UNSC resolution to refer cases to the ICC was blocked by the veto exercised by some of the Powers. However, other UN Resolutions were agreed upon in regard to backing for Syria's elimination of chemical weapons and ratification of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Agreement could also be achieved in regard to support for humanitarian assistance to the affected population on the basis that aid agencies would need to notify the Syrian authorities before aid deliveries. Nevertheless, there remains a very intractable and caustic situation, highly instrumentalized by both global and regional Powers.

In more recent years, many UNSC Resolutions citing the R2P have been in relation to armed conflicts in Africa, particularly to support peacekeeping, protection and assistance for the affected civilian population, and peace processes, at times with a mention of individual criminal accountability. The bottom line is that it is easier to operationalize the R2P in relation to Pillar 1 and 2, but difficult in regard to Pillar 3 if it is related to Chapter VII enforcement measures. Another conundrum is this: what if the UN or international community itself is dysfunctional? Is there room for other operations with the risk of unilateralism?

Aptly, this invites consideration of the link between the R2P and human rights in our vicinity.

Implications: South-east Asia

The term "South-east Asia" is used intentionally here. Of course, it covers the ten member countries of the Association of South-east Asian Nations (ASEAN) and ASEAN as a regional organization, but it interlinks also with the neighbours – bigger and smaller, given the spill-over effect and collateral damage incurred in cross-border situations, and trans-frontier political leveraging.

In retrospect, auspiciously the countries of this region were part of the World Outcome Document and the accep-

tance of the R2P by the global community at its inception. However, there has been fluctuation of commitment since then, as witnessed by the Power from the South-east Asian region which has cast its veto on occasions since the Libyan situation above. Some ASEAN countries also have a tendency to often invoke the non-interference principle and adhere to a rather hard version of State sovereignty, steeped in exceptionalism.

This is not merely, because they fear the R2P is HI in disguise and may be a threat to their existence (even though it must be reiterated that the R2P is not HI in disguise; it is different as explained above). That equivocation is also due to the fact that a number of ASEAN countries (and nearby) are non-democratic and they are particularistic about any doctrines – such as human rights (especially political rights) and the R2P - which might question their power base and legitimacy, alias their "raison d'etre".

Yet, if that is one ASEAN way, there are also many ASEAN ways. If we move beyond the State-based approach (indeed the approach of some but not necessarily all States) in this or other regions, there are plenty of other actors, such as civil society organizations (CSOs) which are favourable to the comprehensive range of human rights and the relevance of the R2P.

In fairness, on scrutiny, a number of States in this region are open to a range of human rights protections, which are interlinked with the R2P. This is witnessed by these constructive developments:

First, all ASEAN countries are parties to three human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. They are all agreeable to the UN-backed Sustainable Development Goals.

Second, two ASEAN countries were parties to the Rome Statute of the International Criminal Court, and now Cambodia remains a party. Happily, their neighbours - both Bangladesh and Timor-Leste - are also parties.

Third, some ASEAN countries, including Myanmar, are parties to the Convention on the Prevention and Punishment of the Crime of Genocide which imposes upon the State party a responsibility to prevent and counter genocide.

Fourth , about half of ASEAN countries are parties to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment, all of which advocate measures against violations which might be interlinked with the four listed by the R2P.

Fifth, the ASEAN Charter refers to human rights and international law, and there is now the ASEAN Human Rights Declaration (accompanied by the Phnom Penh Statement of Heads of Government upholding international human rights standards), albeit needing holistic implementation.

Sixth, there is now an ASEAN Intergovernmental Human Rights Commission with a task to promote and protect human rights (albeit in reality, doing human rights promotion rather than human rights protection) and five ASEAN countries have national human rights commissions.

Seventh, all ASEAN countries and their South-east Asian neighbours participate in the UN's Universal Periodic Review and are opening up to some of the UN's Special Procedures.

Eighth, all ASEAN countries are parties to the four Geneva Conventions ("The Red Cross/Red Crescent Conventions") 1949 which deal with protection of civilians and related matters in times of armed conflict and through these treaties, they are invited to integrate at least the notion of war crimes into the national setting for accountability.

Yet, effective protection is the key and there are two test cases worthy of note: Cambodia and Myanmar. The former will be dealt with in brief here and in the context of Khmer Rouge accountability. Importantly, there is in this South-east Asian region the presence of the Khmer Rouge Tribunal which is a mixed – national and international – tribunal with a composite of judges. While there has been much critique of the expense, small number of cases, and lengthy trials and bureaucratic administration, at least three positive consequences should not be overlooked, interlinked with the R2P and human rights.

First, the presence of the Tribunal helps to establish standards for the rule of law and a fair trial which sets an example for local law and implementation, in particular in the general Cambodian criminal justice system.

Second, more than 350,000 people have sat through the trials and/or observed them as part of the public education which helps to nurture social understanding for access to justice and procedural and substantive rights, especially on mass atrocity crimes. There is thus a socialization process in terms of public discourse and catalysation.

Third, the trials themselves help to document history and ventilate and capture the experiences of victims and protagonists in an era where the alliances were often vague. We should remember the complexity of ASEAN's own actions during the 1980s prior to the Cambodian Peace Process of the 1990s and the political variations concerning which Cambodian group (out of several) should sit in the Cambodian seat in the UN GA (in the 1980s).

The Myanmar situation is the more current case in point. This is especially interlinked with the plight of Rohingyas, a Muslim group, driven out of Rakhine state in Myanmar. Nearly a million have sought refuge in neighbouring countries in recent years and there is an ongoing conflict in that State. A large number of Rohingyas remain in the State as internally displaced people, together with other Muslims and other minorities. The linkage between the R2P and human rights is particularly pertinent due to five developments as follows:

First, the UN backed fact-finding investigative commission set up by the UN HRC has already issued voluminous reports with findings of genocide, crimes against humanity and war crimes committed by Myanmar authorities, with particular military leaders named explicitly for accountability. There have also been violations on a smaller scale by non-government armed groups.

Second, there is now a follow-up Investigative Mechanism for Myanmar which documents evidence with a view to identifying individual criminal responsibility, possibly with a list of alleged perpetrators which will invite cross referral by the UNSC to the ICC. The setting up of parallel fact finding national or local mechanisms by Myanmar needs to prove their impartiality and objectivity if they are to be credible to the local and global communities. Care is needed when there is a tendency by the authorities to label opponents all too easily as "terrorists" without fulfilling objective standards under international law.

Third, even though Myanmar is not a party to the ICC, due to the cross-border nature of refugees and the fact that neighbouring Bangladesh is a party to the ICC and has received the bulk of Rohingya refugees, the ICC is now exercising its jurisdiction to investigate international crimes on the basis of the "deportations" with trans-frontier implications interlinking between the source and asylum countries.

Fourth, ASEAN has itself started to act by enabling the ASEAN Coordinating Centre for Humanitarian Assistance to help the population inside Myanmar. It is important to ensure effective access to aid and assistance for the local population, paralleling operationalization of Pillar 2 of the R2P.

Fifth, there is already a Memorandum of Understanding (MOU) between UN agencies and the authorities to open up Rakhine state to aid and assistance. Moreover, there is a bilateral MOU between Myanmar and Bangladesh raising the issue of voluntary repatriation of refugees now housed in the latter. What is at stake is whether the conditions in the country of origin are genuinely safe for a dignified return. To ensure any return on this basis, there should be effective monitoring by a credible third party, particularly the Office of the UN High Commissioner for Refugees (UNHCR), as well as adequate support for recovery and social reintegration, anchored on effective inclusion of all the population.

On another front, a major worry is the hate speech which is rampant against minorities. UN guidance on what to do and which are the preferred laws and policies is offered particularly by the recent UN Strategy and Plan of Action on Hate Speech and the International Covenant on Civil and Political Rights which Myanmar is now considering signing. Care should be exercised if a law is to be passed on this front, as there is a balance to be attained between freedom of expression and national security. If there is to be a law to address incitement to hatred, it should fulfill the criteria of Articles 19 and 20 of the Covenant to counter, by law, hate speech which might lead to violence or discrimination rather than to forbid "hate" as a general phenomenon; the latter needs to be dealt with through other measures. In particular, promotion of public education with a broad, tolerant mindset is much desired, as there is no substitute for an educated public to critically analyse information. In today's world of social media, there is a need for effective counter-speech to reject unfair portrayals and technological filtering can also be resorted to, bearing in mind international standards of free speech and possible limitations under international law. As importantly, programmes between different communities and religions are essential to nurture a sense of empathy needed to promote peace and cross-cultural understanding which are at the heart of an inclusive society.

In sum, the universalization of the R2P through the human rights lens invites the following orientations which can be directed at the international/multilateral level (global community), on the one hand, and at the regional/national level, especially in relation to Myanmar, on the other hand:

At the international level, there is a call for all countries to:

- Ratify the Genocide Convention, the Rome Statute of the ICC and the rest of the human rights treaties where States are not yet parties, implementing them well, and adjust national/local criminal law to incorporate at least the crimes of genocide, crimes against humanity and war crimes as part of accountability;
- Adopt policies and ensure practices to integrate the R2P and human rights into the national setting and to counter violence and discrimination as part of the commitment to "Leave No one Behind" under the universally accepted Sustainable Development Goals;
- Establish Focal Points to help implement the R2P and enhance the linkage with human rights and related organs;
- Support UNSC and other UN action on the R2P and human rights, and facilitate access by UN investigative mechanisms to collect evidence on accountability;
- Strengthen measures to prevent violations, ensure effective protection of human rights, provide remedies with accountability, foster stakeholder participation, and promote cooperation to implement the R2P and human rights as part of shared responsibility.

At the regional and national level, there is a call to South-east Asia, especially in relation to the situation in Myanmar, to:

- Support dialogue and related measures on the issue in the UNSC, UN GA, UN HRC, the rest of the UN system, and ASEAN, based on international law;
- Advocate that the UNSC should not veto cross referrals to the ICC in relation to international crimes relating to mass atrocities;
- Ensure that ASEAN access and aid is guided by the R2P and based on respect for human rights, particularly the principle of non-discrimination, with measures geared towards transparency and effective outreach to the affected population;
- Activate the political organs of ASEAN, such as the Heads of Government Summit and the meeting of Foreign Ministers, to apply (even implicitly!) the R2P and human rights holistically and comprehensively;
- Enable the ASEAN Intergovernmental Human Rights Commission to address human rights protection issues where there are serious violations, without having to wait for consensus; an X minus Y formula should be used accordingly;
- Open up access to UN investigative mechanisms and cooperate with the ICC with a view to a sustained follow-up;
- Abide by the principle of non-refoulement ("no push-back to dangers") in regard to incoming refugees and accord international and regional protection for lack of national protection in the country of origin;
- Ensure that voluntary repatriation of refugees is not promoted unless the human rights conditions are ripe, and unless there is an impartial and objective UN monitor involved (most directly UNHCR); there must be guarantees for safe and dignified return of refugees, with support for recovery and social reintegration, grounded on the full range of human rights;
- Promote education and public participation, anchored on fostering empathy and tolerance, targeted to maximise respect for the diversity of religions and cultures, and mobilize the public against incitement to hatred, discrimination and violence;
- Support inter-community and inter-faith dialogues and programmes from a young age to nurture cross-cultural fertilization and understanding, with a mindset for peace, human rights, democracy and sustainable development, personified by political and social will through exemplary leadership and constructive peer influence, transcending marginalization and alienation.

Those orientations thus epitomize the preferred South-east Asian way.

(Vitit Muntarbhorn is a Professor Emeritus at the Faculty of Law, Chulalongkorn University. He is a former UN Special Rapporteur, UN Independent Expert and member of UN Commissions of Inquiry on human rights. He first met Dr. Surin Pitsuwan decades ago when Dr. Surin was writing OpEds for the Nation newspaper and was teaching at Thammasat University in Thailand. Later, it was Dr. Surin who asked Vitit to replace him on the UN Human Security Fund Advisory Board in New York. Vitit also visited Dr. Surin in Jakarta when he was the ASEAN Secretary-General; at the time, the former was writing a book titled "Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region". This Oration is thus in remembrance of Dr. Surin and in gratitude for his wisdom, kindness and friendship. With fond memories.)

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