

**“Responsibility to Protect: Asian-African Perspectives” by Hon Rauff Hakeem,
Minister of Justice of the Democratic Socialist Republic of Sri Lanka and President of
the Asian-African Legal Consultative Organization, Tuesday, 24th January 2012 at
Indian Council of World Affairs (ICWA)**

Professor Upendra Baxi, the Chairman of today’s meeting,

Your Excellencies, the Ambassadors/High Commissioners of Member States of AALCO, Ambassador Sudhir T Devare, Director General of Indian Council of World Affairs, Excellency Prof Dr Rahmat Mohamad, Secretary-General of AALCO, Distinguished Invitees, Ladies and Gentlemen.

At the outset, I wish to express my esteemed appreciation for the Indian Council of World Affairs for inviting me to address you at this prestigious venue of Sapru House. I would also like to express my profound gratitude to Prof Rahmat Mohamad, Secretary-General of AALCO for inviting me to deliver this lecture on the subject of “The Responsibility to Protect (R2P): Asian-African Perspectives,” is of great relevance and timely.

R2P is an issue that raises serious reservations and doubts in the minds of policy makers of the less affluent nations who are all members of the Afro Asian group of countries. The Asian African perspective on R2P has therefore to be one of cautious deliberation that brings to my mind the oft repeated and somewhat aphorism that the road to hell is paved with good intentions. Rather I would opt to agree with either Milton Friedman who famously said “concentrated power is not rendered harmless by the good intentions of those who create it,” or with Bernard Shaw who was more realistic of the limits of human endeavourer when he said “Hell is paved with good intentions and bad ones. All men mean well.”

The two aphorisms I cited, more or less sums up our dilemma in reconciling the need to uphold international morality and the sanctity of state sovereignty that is pivotal to the world order as we understand it today. Before I discuss the concept of the R2P I would like to remind this audience of my own inability to be absolutely precise in differentiating between subjective assessment and objective assessment or absolute truth and virtual truth. I suppose that is why judges too are considered fallible and sometimes judgments are reversed.

The R2P concept as is pointed out by some of its eminent advocates is a concept that has come a long way from the time of the adoption of the UN charter. The founder nations of the United Nations wanted to avoid war between states and amongst states. It was essentially nation state centric in both substance and form. The language of Article 2(7): is explicit in declaring that sovereignty of member states is inviolate and stipulates that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” This is basically the chasm between those fierce advocates of “the right to intervene in order to protect” and those who hold the inviolability of national sovereignty. Here it must be pointed out that the concept of state sovereignty is violated totally when international intervention becomes coercive with or without boots on ground.

It is also useful to remind ourselves that we are discussing the subject of intervention in the backdrop of a unilateral intervention by a member of the Security Council, which the ex Secretary General of the United Nations Kofi Annan declared as a violation of international law. Ironically it was the same Mr Annan who in 2000 declared that I quote “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights?”

Secretary General Annan in 2000 called out in anguish for international help. The same Mr Annan in 2003 made a call in despair. Between anguish and despair our choice is very limited I think.

So let us agree that it is indeed a moral dilemma that has to be resolved by the community of nations. We need to do so in a complex world where morality is also a complex business. Some nations have the economic and military power that can enforce morality. Some others who do not have the military power accelerate their efforts to acquire them.

I will now summarize the evolution of R2P. It started with the collective consensus of “never again.”

A decade ago the international response to mass-atrocities or crimes against humanity such as genocide, ethnic cleansing, and other large-scale atrocities that violated the conscience of mankind was zone of ambiguity wherein there was no clear consensus in the community of nations.

Despite all pious declarations of "never again" rhetoric and frequent conventions on human rights, adopted since the end of the Second World War, there was no discernible international remedial action to prevent man committing atrocities against man. Human catastrophe after catastrophe from Cambodia in the 1970s to Rwanda and the Balkans in the 1990s left perplexing questions unanswered.

The concept of "responsibility to protect" or as commonly known R2P has become a frequently raised issue in international diplomacy. It has been given voice in crises from the Congo to Kenya and most notably, in the struggle in the last year in Libya.

Let us pause for a moment, and see how this concept of R2P has traversed this distance from a sharply divergent ideological divide to the present, towards forging a collective response to mass atrocities at least on the basic principles.

The term Responsibility to Protect was first introduced in 2001, in response to the genocide in Rwanda. It was when Mr. Kofi Annan, the then-Secretary General of the United Nations in his report to the General Assembly in 2000, challenged the international community to respond to the human catastrophe in Rwanda. He implored the international community to reach a consensus on when and how humanitarian interventions should be made in a sovereign State.

The theoretical foundations of the responsibility to protect as a guiding principle for the international community of States was sought to be built upon the rationale that (a) the obligation is inherent in the concept of sovereignty and that (b) it amounted to a specific

legal obligation under human rights law and international humanitarian law as reflected in Covenants, Treaties and Declarations as well as under national law.

The Report of the International Commission on Intervention and State Sovereignty (ICISS), constituted by Canada, consequent to the Kofi Anan appeal argued that the doctrine of State sovereignty does not imply the exercise of unlimited power by a State vis-à-vis its own people and underlined that Sovereignty implies a dual responsibility. Externally it required that States respect the sovereignty of other States consistent with the doctrine of sovereign equality, and internally, it required that States respect the human dignity and the basic human rights of all people within the territory of that State. The Report underlined the fact that this contemporary understanding of the meaning of sovereignty is of central importance in its approach to the question of intervention for humanitarian purposes and in particular, in the development of the concept of responsibility to protect.

In its attempt to legally and morally justify a “right to a humanitarian intervention” which ex facie is contrary to the principle of non intervention enshrined in the UN Charter and well established in customary international law, the Commission sought to engage in an exercise which it referred to as “shifting the terms of the debate”. It acknowledged that the traditional language of the “sovereignty-intervention debate” in terms of a “right of humanitarian intervention” or “right to intervene” is unhelpful, primarily for the reason that it focuses attention on the claims, rights and prerogatives of the potential intervening States, much more than on the urgent needs of potential beneficiaries of such action, namely people whose basic rights are at stake.

The principle of R2P rests on three equally important pillars¹. They are that (1) the primary responsibility of States to protect their own populations from the core crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from incitement to perpetrate such crimes; (2) The responsibility of the international community to assist a State to fulfill its R2P; and (3) the international community’s responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the State has manifestly failed to protect its population from one or more of the four crimes.

The point of departure of R2P from the earlier concept of humanitarian intervention was that it stressed on the primary responsibility of the State to protect its own population. R2P advances the idea that the international community should assist States in this endeavor. It has placed armed intervention within a broader range of measures that the international community might take to respond to genocide and mass atrocities.

In 2008, the present Secretary-General of the United Nations Mr Ban Ki-moon challenged the UN membership to translate its 2005 commitment from “words to deeds”². At the same time, the Secretary General carefully defined a scope of application of the R2P concept as

¹ UNGA, “2005 World Summit Outcome”, A/60/L.1, September 15, 2005, paras 138-40; UN Security Council, S/RES/1674 (2006), April 28, 2006; UNSC, S/RES/1894 (2009), November 11, 2009 and UNSC, S/RES/1973 (2011), March 17. On the three pillars, see Ban Ki – moon, “Implementing the Responsibility to protect: Report of the Secretary-General,” A/63/677, January, 2009.

² Ban Ki-moon, “On Responsible Sovereignty: International Cooperation for a Changed World,” Berlin, SG/SM11701, July 15, 2008.

reflected in the 2005 consensus of the Heads of the State or Governments. The Secretary General stated:

“The responsibility to protect applies, until member states decide otherwise, only to the four specific crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility”.

This statement indeed manifests an increasing sense of caution in applying a concept intended to apply to cases which “shock the conscience of mankind” somewhat expansively to situations which were never envisaged when developing the concept of R2P.

In the treatment of the topic Protection of Victims in the event of Disasters the International Law Commission had occasion to take a considered view on the application of R2P to the topic. In his preliminary report the Special Rapporteur (A/CN.4/598) had taken up the position that the “appropriateness of expanding the concept of responsibility to protect and its relevance to the present topic both require careful consideration. Even if the responsibility to protect were to be recognized in the context of protection and assistance to persons in the event of disasters, its implications would be unclear”. The Commission, subsequently at the 61st Session in 2009, engaged in a comprehensive debate, in which sharply divergent views emerged. Some members questioned the applicability of the R2P concept to the topic of Protection of Victims of Disasters, as the legal parameters of this concept were yet unclear and consequently could have a destabilizing effect.

At the 63rd Session in 2011 the ILC endorsed the position taken up in the Secretary General’s Report and confirmed the inapplicability of R2P to the topic of Protection of Victims of Disasters.

These developments reflect a growing concern on the part of the international community of States as well as within international organizations of the potential for abuse of a concept which may originally have been developed from a humanitarian perspective.

The disagreements are therefore on the actual scope of application of the concept, much as they did before 2005. Critics argue either that the R2P is a dangerous concept with imperialist designs that undermine the principle of national sovereignty and political autonomy of the relatively weak nations or quite the reverse, that it is a symbolic gesture and pretense that promises meager protection to vulnerable populations.

How did the principle evolve in the United Nations

The Debates about implementing R2P through the UN, did not receive a very positive response at the initial stage. This was largely due to the persistent concerns about R2P’s potential to legitimize interference in the domestic affairs of States and other fears of abuse. Given the composition of the Security Council, there were legitimate concerns as to who is to judge impartially, whether a particular situation warranted the invoking of R2P. Therefore, number of states wanted to prevent the further pursuit of this concept.

Despite the commitment to R2P at the World Summit, it took six months of intense debate for the Security Council to unanimously adopt Resolution 1674 (2006), dealing with “Protection of Civilians in Armed Conflict”, wherein in the operative paragraph 4, the Security Council “Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.

The resolution adopted by the Security Council on the situations in Darfur (Resolution 1706, 2007) and Somalia (Resolution 1814, 2008) referred to protection of civilians without referring to R2P³. This indicates that initially the Security Council was willing to use R2P in ongoing conflicts; however since then it seems that its stance has changed to referring to R2P only in thematic resolutions, maybe because it is not appropriate to use the concept before the General Assembly has considered the matter.

Some other UN bodies also were not in favour of using the R2P concept in ongoing situations of armed conflict. For example, when the UN Human Rights Council’s High-Level Mission on Darfur reported in 2007 that the Government of Sudan was failing in its responsibility to protect Darfuris, the Arab Group, the Asia Group, and the Organization of the Islamic Conference all questioned the report and tried to prevent debate on its findings⁴.

More recently, the Security Council Resolution 1970 adopted under Chapter VII of the Charter pointed to the widespread and systematic attacks against civilian population which may amount to crimes against humanity and reminded the Libyan authorities of their responsibility to protect the population. Thus for the first time in the UN Security Council an explicit reference was made to the concept of responsibility to protect (R2P) and its proponents regard this as a triumph for R2P as an emerging norm.

Nevertheless Security Council Resolution 1973 which followed SCR 1970 gave rise to a divisive debate in the Security Council with 5 countries (Brazil, China, Germany, India and Russia) abstaining. The abstaining countries expressed a range of concerns about how and by whom the resolution is going to be implemented. Concerns were also expressed on what limits would be placed on the military intervention and about unintended consequences including possible large loss of human lives and expansion of hostilities throughout the region.

Here, I would also like to quote from the Statement made by H E Ambassador Maged A Abdelaziz, The Permanent Representative of the Arab Republic of Egypt to the United Nations, on behalf of the Non-Aligned Movement (2009)⁵,

“Many elements in the Secretary-General’s report received support, based on historical national or regional experiences, as well as the conviction that no country or region is immune from risks. In the meantime, mixed feelings and

³ Global Responsibility to Protect 1, no. 3 (2009) p. 307

⁴ “Report of the High-Level Mission on the Situation of Human Rights in Darfur” pursuant to Human Rights Council Decision S-4/101”, A/HRC/4/80, March 9, 2007 and A/HCR/5/6, June 8, 2007.

⁵ Permanent mission of the Arab Republic of Egypt to the United Nations, 23 July 2009
<http://www.nameav~t.org>

thoughts on implementing R2P still persist. There are concerns about the possible abuse of R2P by expanding its application to situations that fall beyond the four areas defined in the 2005 World Summit Document, misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States. There are also pertinent questions about the role to be played by each of the principal organs within their respective institutional mandates and responsibilities in this regard. These issues will have to be thoroughly addressed in any discussion on implementing R2P. We should work to reconcile all the divergent concerns and viewpoints through an honest, comprehensive, all-inclusive and transparent dialogue. The General Assembly is indeed the right venue for such a dialogue.”

The challenge, the General Assembly agreed, was to implement R2P, not renegotiate it. The debate also highlighted some concerns mainly about four issues in particular:

- (1) Modalities and need for an early warning capacity. Several member States were of the view that information gathering and assessment by the UN violates sovereignty and can easily be politicized.
- (2) The respective roles of the Security Council and the general Assembly, including the reform of the Security Council. Several opponents of R2P maintained that expanding the Council’s membership should be a prerequisite to the implementation of the R2P and that the general Assembly should oversee the work of the Council in this area. There appears to be increasing apprehension the potential for abuse of R2P for political purposes would provide legitimacy for intervention in the internal affairs of States which would otherwise be regarded as clear violations of the UN Charter and general international law having a destabilizing effect on international peace and security.
- (3) The potential for R2P to legitimize coercive interference and lack of trigger for armed intervention and
- (4) Potential for R2P to draw resources away from other UN programs and without adding value⁶ were also raised.

What these concerns collectively convey is the increasing apprehension on the part of the States of the potential for abuse of the R2P concept for political purposes, providing legitimacy for intervention in the internal affairs of states, which would otherwise be regarded as clear violations of the UNs Charter and general international law. In order to allay these concerns a greater degree of democratisation of the UN system as a whole, in particular, the Security Council, its composition and working methods, to ensure wider representation of the international community and greater transparency are required. Further, a greater pro active role for the General Assembly to act as a buffer against possible political abuse becomes imperative, if the R2P concept is to receive the general acceptance of the international community as a whole, in particular Asia Africa.

Challenges to R2P and the Asian-African Perspectives

⁶ Global Centre. “Implementing the responsibility to Protect,” pp 6-7 and Asia-Pacific Centre for the responsibility to Protect, “Implementing the Responsibility to Protect: Asia-Pacific in the 2009 General Assembly Dialogue”, October 2009, pp 12-17.

As many of the Asian and African States have experienced colonial rule and the imposition of coercive force of colonial governance, most of them hold the principle of sovereignty and non-intervention sacrosanct. These concerns are far more powerful than R2P advocates care to admit.

Implementing the responsibility to protect is practically difficult. More often than not, R2P operations of all kinds involve significant compromises. Resources are never enough, mandates are contested, distances are great, alliances are brittle and the quality and commitment of intervening organizations are uneven. Therefore, this leaves us with many unanswered questions. Is it wise to push the democracy agenda as part of preventive efforts or will such policies accelerate divisions? Is it wise to use international force and risk a longer internationalized war in a hostile region? Is it wise to repair and rebuild a post-war State to a degree of sophistication that its post-war economy cannot sustain? All these challenges test the assumptions that are at the heart of the R2P concept that has been formulated by people who are deeply embedded in the kind of liberal democracy practiced in major affluent countries where the enthralled ideologues even claim that their liberal democracy has signaled the end of history.

Much of the resistance to R2P does appear to come from the idea that it will legalise what used to be illegal uses of force. This fear may not be entirely justified. Even without reference to R2P interventions can take place with the licence of the Security Council, acting under Chapter VII of the Charter. In other words, the use of force can be made procedurally legal on the basis of “threats to international peace and security”, as has been done in many recent cases.

The question often posed is: Is it ever justified to use force against another State? Often this is justified on the basis of preventing mass atrocities, and as a last resort. But who decides when force is to be used? Who ensures that such use is proportionate? In other words, who guards the guardians?

The question concerning the use of force is an emotive one. Not just R2P, but also International Human Rights Law, and International Criminal Law are in many ways compromised by global geopolitics. For instance when the Iraq was invaded under false pretexts – an action that the then Secretary General to the UN, Kofi Anan, described as “illegal” – is clearly the sort of action that should be resisted (not encouraged) through international norms and mechanisms. The fear and rejection of R2P by many countries is linked, undoubtedly, to the concern that it could lead to more rather than less of such unjust unilateral actions.

In recent years, it has become clear that States remain reluctant to invoke the concept of R2P. Some States support R2P it seems in part because it remains somewhat vague. There still exists a large degree of theoretical ambiguity about what R2P means and when it is applicable and who determines when it should be invoked and when it is applicable. More is needed to clarify what it is, when it is applicable, and when and how it ought to occur in practice. In the absence of benchmarks and standards that can be applied each time a situation arises where R2P may be applicable, debate about its applicability becomes acute and unavoidable.

In this connection I wish to reiterate the need for the R2P initiative to go hand in hand with greater democratization of the UN system in particular, the Security Council. The division between the global north and south continue to remain major obstacles to the more successful use of the concept to prevent and deal with conflict.

The shortcomings of global governance are well known. They include most worryingly the absence of power to implement decisions at the level of global institutions and therefore the reliance on States to implement the Security Council mandates, and the lack of representation and the inequality of voting power in the Security Council. Add to that is the deficiencies we have in the global governance system which, by the way that history has played out, undermined the confidence of the global south in the even-handed and just application of the R2P concept.

Since the adoption of the R2P concept in 2005 world summit, it has been given varying interpretations and definitions. This process has gathered momentum since the intervention in Libya is sharpening the rhetoric of the skeptics as well as its proponents. The Libyan experience was an eye opener. International support and approval at the initial stages evaporated with the devastation of the bombing and human suffering. The epic is still in the stage of writing and it is too early to claim mission accomplished. Perhaps, we are still too close to events.

In conclusion, I would like to venture briefly into a territory that is fraught with some controversy. That is to express the essence of the positives and the negatives of R2P as seen from an Asian African perspective. To do that I rely on two eminent men who voiced their reservations and hopes on the concept of responsibility to protect. The views I present are those expressed by them in an interactive dialogue on R2P that took place at the United Nations on 21st July, 2009 wherein the UN Secretary General emphasized that sovereignty and responsibility are mutually enforcing principles. I do not think the Asian African perspective to be in divergence with that position.

Let us now see what others thought at the same debate. Professor Jean Bricmont of Belgium told the General Assembly Interactive thematic Dialogue “R2P is an ambiguous doctrine. On the one hand, it is being sold to the United Nations as something essentially different from the “right of humanitarian intervention”, a notion that was developed in the West at the end of the 1970's, after the collapse of the colonial empires and the defeat of the United States in Indochina. This ideology has been relying on the human tragedies of the newly decolonized countries to lend a moral justification to the failed policies of intervention and control by the Western powers over the rest of the World.”⁷

Professor Noam Chomsky has this to add. “. The maxims that largely guide international affairs are not graven in stone, and, in fact, have become considerably less harsh over the years as a result of the civilizing effect of popular movements. For that continuing and

⁷ Statement by Professor Jean Bricmont to the United Nations General Assembly, Interactive Thematic Dialogue on the Responsibility to Protect, United Nations, New York 23 July 2009, <http://www.un.org/ga/president/63/interactive/protect/jean.pdf>

essential project, R2P can be a valuable tool, much as the Universal Declaration of Human Rights has been.”⁸

We in Asia and Africa know that nothing in the international discourse is graven in stone. However, before R2P can command a broad international consensus, the legitimate concern that has been raised particularly by the developing countries of Asia and Africa, of the potential for its political abuse, must be unambiguously addressed.

Thank you all.

⁸Naom Chomsky’s lecture, titled “ Responsibility to Protect” given at UN General Assembly, New York City, July 23, 2009, <http://www.chomsky.info/talks/20090723.htm>