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The Sri Lankan Situation and the Principle of the ‘Responsibility to Protect’

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As the Sri Lankan army presses on with its final assault on the Liberation Tigers of Tamil Eelam (LTTE) stronghold, with over 50,000 civilians feared entrapped in the fighting, Indian External Affairs Minister, Pranab Mukherjee, made a public statement on the evolving situation. He said, “These killings must stop. The Sri Lankan government has a responsibility to protect its own citizens and the LTTE must stop its barbaric attempt to hold civilians hostage.” A key element in his remarks was the use of the phrase ‘responsibility to protect’. Was he referring to the recently-adopted United Nations (UN) principle which also goes by the acronym of ‘R2P’ and hinting at its relevance to the Sri Lankan context? It is most likely not the case, at least, in a military sense.

India’s relations with the Sri Lankan government are excellent and, despite some diplomatic manoeuvrings to satisfy Tamil voters at home in the midst of the elections, New Delhi, no friend of the LTTE, who had assassinated Prime Minister Rajiv Gandhi, is unlikely to stand in the way of the Sri Lankan army’s final victory. However, the safety of the civilian population, including the Tamils, will continue to concern India. It is a factor in the politics of the southern Indian state of Tamil Nadu, whose Chief Minister, M. Karunanidhi, an ally of the ruling Congress, went on a ‘fast unto death’ to secure the safety of Tamil civilians, which critics said was prompted by his foreknowledge that, on 27 April 2009, Sri Lanka’s President, Mahinda Rajapaksa, would order a cessation of aerial bombing and heavy artillery shelling, partly as a result of Indian and Western pressure. The fast happily began and ended on the same day and no death was involved as a consequence.

The ‘R2P’ Principle

Of course, the Indians need to tread a delicate path as their government is well aware of the tremendous Sri Lankan sensitivities to any mention of the ‘R2P’ in this context. About two years ago, a foreign academic, Dr Rama Mani, who was the Executive Director of the International Centre for Ethnic Studies in Colombo, was sacked and her visa cancelled for espousing this idea. Also trenchantly criticised by the pro-government media in Colombo was Gareth Evans, former Australian Foreign Minister, who is the President of the International Crisis Group and a champion of the principle, for suggesting at a lecture hosted by Dr Mani

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that, while the current situation did not yet warrant invoking 'R2P', it may 'deteriorate' to such a level as to justify it.

What is the 'R2P' principle, how did it originate and what is the debate around it? The idea was first propounded as a principle of international relations in a report of the International Commission on Intervention and State Sovereignty (ICISS) established by the Canadian government in December 2002. Very briefly, the principle held that if a country was failing or was unwilling to prevent severe abuses of its own civilian population, the responsibility to do so would devolve on the international community who would use peaceful methods to try and resolve the problems, and those failing, could resort to the use of military force. Though it was pushed by personalities such as Mr Evans, this stood little chance, at the beginning, of universal acceptance, particularly given the backdrop of the United States' and the North Atlantic Treaty Organization's interventions in Iraq and Afghanistan, of which much of the developing world, particularly some key members of the Non-Aligned Movement (NAM) were wary.

However, the UN is about setting standards and norms, and some elements of the concept appealed to many. Nonetheless, it would require considerable sharpening and honing to make it universally acceptable. An opportunity came when the process of the UN reforms received a fillip in 2005 under the leadership of the President of the UN General Assembly (UNGA), Foreign Minister Jean Ping of Gabon. He appointed a small group of 10 'facilitators' to help him with drafting the 'Outcome Document' of the September 2005 World Summit that would contain proposed reforms of the UN system. The task of negotiating the paragraphs on the 'R2P' was given to two of the 'facilitators', namely, the Slovenian Permanent Representative, Ambassador Roman Kirn, and me (then representing Bangladesh at the UN) – a European and an Asian coming from two distinctly-diverse perspectives.

Thereafter, the Slovenian Ambassador and I, as the two responsible 'facilitators' working on behalf of the UNGA President, conducted a series of intense negotiations spread over months through 2005. A number of the NAM countries, including Cuba, Iran, Pakistan and Egypt, had strong reservations, arguing that the concept would enable 'neo-imperialist'-type interventions by the powerful countries in pursuance of their own interests. Russia and China opposed it in sympathy with these views. The United States was indifferent to the proposal. The United States apprehended that the proposal would thrust greater responsibilities on it and it was, in any case, reluctant to have its soldiers serve under any non-United States command. The European Union and Canada were supportive but realised it was impossible to build a consensus around it without including sufficient 'safety clauses' to satisfy the NAM detractors.

Eventually, the agreed language, adopted by the World Summit in September 2005, was contained in Paragraphs 138 and 139 of the Outcome Document. The first accepted that 'each individual state has **the responsibility to protect** its populations from **genocide, war crimes, ethnic cleansing, and crimes against humanity**'. The second entailed that the 'international community, **through the UN**, also has the responsibility to use appropriate **diplomatic, humanitarian, and other peaceful means**, in accordance with Chapters VI and VIII, to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The rest of the paragraph goes on to say that, 'In this context, we are prepared to take **collective action** in a timely and decisive manner, **through the Security Council**, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in

cooperation with relevant regional organisations as appropriate, **should peaceful means be inadequate**, and national authorities **manifestly fail** to protect their populations from genocide war crimes, ethnic cleansing and crimes against humanity.’ The paragraph also deals with the responsibility in this regard of the General Assembly to assist countries under stress in ‘capacity-building’ to avoid such situations from occurring.

The ‘safety clauses’ are in bold print. The principle could only be invoked under four circumstances (repeated several times for emphasis), that is, ‘genocide, war crimes, ethnic cleansing and crimes against humanity’. Thereafter, action could be taken only ‘through the UN’ and that too acting in a ‘collective’ manner, thus ruling out unilateral action. Initially, the intervention would have to use ‘appropriate diplomatic, humanitarian and other peaceful means’. Any use of force would also have to be through ‘the Security Council’ (with Iraq in view?) which would imply the endorsement of the two early detractors, Russia and China, who have ‘veto’ powers to reject any decision. Regional bodies such as the African Union would need to be roped in (this was introduced due to the African insistence). To give it a development perspective, the NAM saw to it that the element of ‘capacity-building’ was also included, much to the chagrin of some western ‘donors’.

Reactions to the “R2P”

The original enthusiasts of the idea lamented the rather ‘toothless’ (in their view) outcome but they had little choice but to go along. However, they were able to obtain a Security Council Resolution, Number 1674, which buttressed the World Summit Outcome Document contents on the ‘R2P’. Adopted on 28 April 2006, it “reaffirmed 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”. It also committed the Security Council to action to protect civilians in armed conflicts. It is this element that gives this powerful body some leeway. Several major debates have been held in the Security Council on ‘the protection of civilians in armed conflicts’, in the course of which many delegations have linked the subject to the ‘R2P’. In December 2006, UN Secretary General, Kofi Annan, who was at the helm when the world leaders adopted the ‘Outcome Document’, left office and was succeeded by Ban Ki-moon. The new Secretary General demonstrated his support to the concept by appointing a Special Adviser for the ‘R2P’, Professor Edward Luck, in February 2008.

As the debates at the UN demonstrated, the views of the governments and, in this piece we will examine those of the Asia-Pacific region, were diverse. Australia was strongly in favour and its representative, Ambassador Robert Hill, said on 2 October 2007, “We recognised ‘the responsibility to protect’ as a central tenet of our shared humanity. (It) underpins the notion that states must protect their own populations. But should they fail to do so, the international community must act; not to stand idly by in the face of atrocity, genocide or ethnic cleansing... (T)his means we must commit to prevent and respond to those most serious crimes wherever they occur”. Canada’s Ambassador John Mc Nee said in the Security Council on 22 June 2007, “This Council, indeed the international community as a whole, will be judged on our ability to protect the most vulnerable. It is a challenge that we simply must meet.”

The developing countries of the region were far more cautious. At the General Assembly World Summit in September 2005, President Susilo Yudhuyono of Indonesia argued that, “We need a consensus on the responsibility to protect... (T)o this end, force should be used

only when all other means have failed". Malaysia's Foreign Minister, Syed Hamid Albar, was quoted in Bermuda Times on 13 June 2006 as saying, "Actions must be in accordance with the respect for sovereignty and territorial integrity of states as well as observing the principle of non-interference". The Chinese position, as articulated by Ambassador Liu Zhenmin at the Security Council on 4 December 2006 was that, "(In implementing the R2P, the international community) should not infringe upon the sovereignty and territorial integrity of the countries concerned, nor should they enforce intervention by circumventing the governments of such countries".

Japan's and Singapore's positions were somewhere in between those presented above. At the Security Council on 9 December 2005, Japan's Ambassador Kenzo Oshima said, "World leaders formally acknowledged (the R2P) at the 2005 Summit, and it was reaffirmed by the Security Council in its resolution 1674. Yet these words have not adequately been transformed into action. We need to discuss in this body what other concrete measures we can take". The Singaporean representative, Ambassador Vanu Gopal Menon, stated at a UN meeting on 7 April 2005, "It is high time that massive killings and crimes against humanity be things of the past. Yet, these things continue to happen and they continue to be protected by the walls of an antiquated notion of absolute sovereignty". Indeed, on 19 April 2005, he challenged the General Assembly, and that failing, the Security Council, to frame criteria to prevent such abuses. Later that year, the 'R2P' was adopted.

Pressure Groups

Powerful pressure groups in the non-governmental and academic circles are now in place to monitor the application of this principle. One such institution is the Global Centre for R2P at the Ralph Bunche Institute for International Studies at the City University of New York set up in February 2008. During the last UNGA Session on 25 September 2008, the Centre organised a roundtable session in New York where the keynote speakers were Foreign Minister Maxine Verhagen of the Netherlands, Foreign Minister Bruno Stagno of Costa Rica and me, then Foreign Advisor (Foreign Minister) of Bangladesh. Professor Luck was also present at the session. The possibilities of the application of the 'R2P' in the case of Myanmar were hotly debated for the first time perhaps at a high-enough level to shape the UN's policies, and arguments made on both sides at a purely inter-governmental level politics and diplomacy would have combined to preclude such a debate. It is noteworthy that, earlier, such an intervention had been favoured by the French Foreign Minister Bernard Kouchner but it was shot down by China and Russia. Interestingly, the immediate reason for the intervention in Myanmar would have been not so much the repressive measures of the regime as its reluctance to accept humanitarian assistance following the devastating Cyclone Nargis.

The initiative has been replicated in Southeast Asia by the setting up of the Asia-Pacific Centre for the Responsibility to Protect also in February 2008. At inter-governmental regional levels, and the principle acknowledges the role of such bodies in this regard, this part of the world has not seen too much action to fulfil even the non-military aspects of the 'R2P'. While a commendable achievement of the landmark Association of Southeast Asian Charter of November 2007 was the creation of a Human Rights Body, the closest it got to the 'R2P', the principle of 'non-interference' remains a liability. Indeed, President Gloria Macapagal Arroyo of the Philippines has warned that her country would not ratify the Charter unless the Myanmar authorities commit themselves to democratic reforms and release Aung San Suu Kyi. In the other major Asian regional body, the South Asian Association for Regional Cooperation, comprising the South Asian countries, Article X which debars discussions on

any contentious issues, would most certainly stand in the way of establishing a regional mechanism to pursue the concept.

The Sri Lankan Situation

In the Sri Lankan situation, with which this paper began, we have seen how exercised the government had become to any reference to the 'R2P'. On it, James Traub wrote in *The Washington Post* on 22 April 2009 that "the fighting threatens to produce exactly the kind of cataclysm that states vowed to prevent when they adopted 'the responsibility to protect' at the 2005 UN World Summit." The renowned and retired UN diplomat, Lakhdar Brahimi, writing in *The International Herald Tribune* on 20 March 2009, described the Sri Lankan situation as a "slaughter waiting to happen".

The Sri Lankan government would argue, as it does, that it is seeking to eliminate a group considered as 'terrorists' in many countries. A further complication is the fact that, while both parties to the conflict may be culpable, the writ of the UN would extend to only the government, and not to the non-state actor, that is, the LTTE. It may be argued though whether the time has come to expand the concept of the 'R2P' to bring non-state actors within its purview (though the assent of the concerned state would still be necessary). However, to go beyond the 'agreed language' of the world leaders will entail much legal and practical difficulties.

However, this does not mean that once the war is over, the grievances of the Tamil minorities can be swept under the carpet. Indeed, if this is done, Sri Lanka's travails will continue to fester as Professor Neil de Votta, a United States-based Sri Lankan analyst, has very powerfully argued in his essay 'Sri Lanka at Sixty: A Legacy of Ethnocentrism and Degeneration'. However, it must also be pointed out that while Sri Lanka has resisted any formal application of the 'R2P', it has not been averse to external interest as evidenced in its acceptance of connected visits by senior Indian officials as well as by Foreign Minister Bernard Kouchner of France and the United Kingdom's Foreign Secretary, David Miliband, though the efforts of the latter two to secure a ceasefire did not succeed. At the same time, the determination of the Sri Lankan government to use the sovereign card was also seen in the refusal to grant visa to a powerful European politician, Foreign Minister Carl Bildt of Sweden.

Conclusion

Be that as it may, the 'R2P' principle has its critics. Walden Bello of Chulalongkorn University, Thailand, has criticised it as a form of 'imperialism'. Precisely for that reason, the NAM and G77 have sought to build in the effective 'safeguards' into its operation that this article deals with earlier. Indeed, in his report on implementing the 'R2P' dated 12 January 2009, the UN Secretary General underscored the necessity to thwart states from misusing the doctrine. To this end, he proposed a strategy that focuses on prevention and assistance through education and training, and saving lives through "timely and decisive action", instead of an "arbitrary, sequential or graduated policy". In fact, the original proponents, the ICISS, raised the threshold of a military intervention very high – it would be permissible only as a just cause when the intention is right, as only a last resort, by a legitimate authority, using proportional means, and with reasonable prospects of success.

The 'R2P' is a global norm, a value, and a standard. It is not a single action but a continuum, requiring a series of measures by the international community, starting early and well in time. The wise old adage 'prevention is better than cure' is most apt in this case. The element of 'capacity-building' as a component of the concept deserves much greater stress. Professor Luck believes that the 'R2P' "has come to stay" but he argues that the realisation of the vision "will depend on many others as well – (UN) member states, the Secretariat, regional and subregional organisations, and civil society, among others".

It is the responsibility of the international community to protect human kind from falling into the morass of poverty, underdevelopment, disease and despair. Development, good governance, empowerment of the vulnerable and the rule of law are key to preventing such unpalatable situations from occurring in the first place.

This will happen if and when the UN itself implements the many resolutions it has adopted on these subjects in the past. These include honouring aid commitments, supporting indigenous initiatives to allow for development to be home-driven, and according preferential treatment and market-access to particularly the poorest among the least developed countries. It is only then that 'genocide, war crimes, ethnic cleansing, and crimes against humanity', the four infamous horsemen of apocalypse, can be prevented from arriving.

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