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Why Reports about the 'Death of R2P' May be Premature: Links between the Responsibility to Protect and Human Rights Fact-Finding

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Introduction

Much of the rhetoric concerning the Responsibility to Protect (R2P) has focused on 'grand themes' of international law, such as sovereignty and the use of force. R2P can be easily perceived as a 'threat' if it is associated with coercive action 'from the outside'. Too often, R2P has been associated with an extension of the option for military intervention. Situations such as Libya or Syria have highlighted tensions in the interplay between R2P, collective security and international criminal justice. It it is frequently disregarded that R2P is a 'multi-faceted'[1] concept that involves a broad range of actions, including prevention and non-coercive responses. As rightly observed by *Anne Orford*, limited attention has been paid to 'prosaic and everyday practices involved in the softer forms of international executive action […] Yet it is in those routine practices – of surveillance, prevention, policing, and administration – that the significance of the [R2P] concept will be determined.'[2]

One of the areas in which R2P has become increasingly relevant in a 'softer', and potentially less coercive way,[3] is in human rights fact-finding.[4] In particular, the crime-based trigger of R2P ('genocide, war crimes, crimes against humanity and ethnic cleansing') provides a nexus between R2P and the action of fact-finding bodies. Over the past two decades, the UN has established more than twenty international commissions of inquiry with mandates to investigate serious violations of human rights, international humanitarian law violations or international crimes.[5] Some of them have made use of reference to R2P in the exercise of their mandates.

In this post, we argue that fact-finding practice provides a counter-narrative to reports about the alleged 'death of R2P'.[6] We (i) examine the relationship between fact-finding and R2P, (ii) the use of the concept by international commissions of inquiry as a species of human rights fact-finder and (iii) their interplay with different R2P strategies. We

conclude that fact-finding constitutes one field where R2P is internalized through practice and where some normative propositions of the concept may strengthen fact-finding practice and guide principled follow-up action.

1. The relationship between fact-finding and R2P

R2P and fact–finding initiatives share synergies. R2P has an 'alert' function and entails an appeal to take action, directed at authors of gross human rights violations and the international community. It includes a 'duty to react', but offers a broad spectrum of responses to address violations.

In his 2009 Report on 'Implementing the Responsibility to Protect'[7], the Secretary-General categorized R2P in three pillars. *Pillar one* refers to the responsibility of each state to prevent 'atrocity crimes'. *Pillar two* refers to the responsibility of the international community to encourage and assist states to meet their responsibility. *Pillar three* encompasses collective responses by the international community where the state has manifestly failed to protect its population. This formulation rested on the recognition in the World Summit Outcome Document.[8]

Human rights fact-finding missions share certain goals and functions of R2P. They raise awareness about potential or actual atrocity situations. They provide greater transparency about violations, by establishing context, facts and events. They also have a responsive dimension. They report on the concerned state's ability to deal with violations and offer recommendations as to how violations should be addressed (e.g. identification of perpetrators and possible follow-up action).[9] These functions are relevant to both pillars two and three.

An evident link to *Pillar two* is the nexus to early warning and prevention. It is questionable whether a mission's 'mere presence in the State concerned, can contribute to the prevention of further crimes'.[10] Practice suggests that the deployment of a mission alone has limited deterrent effects. For instance, the work of the UN-deployed investigative missions in relation to the former Yugoslavia and Rwanda had no significant impact on violations on the ground.[11] Cases such Israel/Palestine, Syria or the Democratic People's Republic of Korea (North Korea) show that it is particularly difficult to identify traceable effects on existing regimes when missions are barred from *in situ* access. The strength of fact-finding missions may thus lie in their 'alert' function. The assertion of 'deterrent' powers may in some cases harden investigations and prevent access to evidence, since it reduces the prospects of cooperation and assistance by a 'defiant' regime.

One of the undeniable assets of human rights fact-finding missions is their potential role of assistance in relation to societies under stress. Commissions may identify and recommend appropriate accountability and domestic response mechanisms, including transitional justice options. They also have preserving and distributive functions. They may, in particular, preserve evidence and share records, materials and findings with domestic stakeholders.

Human rights fact-finding missions may also act as a *Pillar three* response by establishing the facts of atrocity crimes and identifying further response strategies. They tend to be deployed when a state has already shown that it has failed to prevent atrocities, and serve as catalysts for further international responses. For instance, international commissions of inquiry in respect of Timor-Leste, Sri Lanka and Cambodia were established specifically to explore options for accountability responses that complied with international standards. Missions with an investigative focus have provided important groundwork for accountability strategies. In some cases, they served as a trigger for international prosecutions (e.g., former Yugoslavia, Rwanda, Darfur, Lebanon). In other cases, they have supported international investigations and preliminary examinations (e.g., Libya, Ivory Coast and Guinea).

But such missions suffer from shortcomings which constrain their ability to serve as ‘response’ mechanisms under Pillar three. Their mandates are typically limited to short periods of time. They enjoy limited capacity to protect witnesses and victims. With a few notable exceptions, such as the International Commission of Inquiry on North Korea (‘North Korea Commission’) and the UN Fact-Finding Mission on the Gaza Conflict (‘Goldstone Commission’), limited thought has been given to sustainable ‘exit strategies’. Human rights fact-finding should therefore not too easily be placed into specific pillars of R2P.

2. Use of R2P in Fact-Finding Practice

One of the alleged weaknesses of R2P is its marginal influence on international decision-making processes. Proponents of the concept carefully scrutinize UN resolutions to identify tangible traces of its relevance in UN practice. The International Court of Justice had the opportunity to refer to R2P in the *Genocide case (Bosnia and Herzegovina v Serbia and Montenegro)*,[12] but refrained from invoking it expressly in jurisprudence.

A look at fact-finding practice sends a different signal. Although there is no systematic reference to R2P by mandating bodies, several resolutions have included references to the concept.[13] Moreover, the concept has been applied incrementally in the working practice and reports of fact-finding missions. Some commissions have found that the concerned state failed to exercise its responsibility to protect its population. For instance, the International Commission of Inquiry on Syria (‘Syria Commission’) held that the Syrian Government had ‘manifestly failed in its responsibility to protect the population’.[14] An OHCHR fact-finding mission in Kenya in 2008 reported that the State had failed to meet its responsibility to protect its population.[15]

Findings that states have failed to protect their populations have been coupled with conclusions that the international community has a duty to act. For instance, the North Korea Commission recently reported that ‘[t]he international community must accept its responsibility to protect the people of the [North Korea] from crimes against humanity, because the Government […] has manifestly failed to do so.’[16] The Syria Commission

underlined the responsibility of the international community 'in the search for peace and the commitment to international human rights and humanitarian law.'[17] Reference to R2P was also made in the 2009 report of the Goldstone Commission.[18]

In their recommendations for responses to atrocity crimes, commissions have engaged with pillars two and three of the R2P concept. Commissions have recommended that the international community provide assistance to the concerned state to improve the human rights situation;[19] build judicial and law enforcement capacities[20] and engage in de-escalation strategies such as refusing to recognise illegal situations[21] and curbing the proliferation of weapons in armed conflicts.[22] Commissions have further recommended collective responses such as referral by the Security Council to the International Criminal Court (Darfur, Guinea, Syria, North Korea),[23] exercise of universal jurisdiction (High-level Mission on Darfur, Goldstone Commission)[24] or the establishment of *ad hoc* international tribunals. More rarely, commissions have recommended targeted sanctions[25] and deployment of peacekeeping forces.[26]

This practice provides a counter-narrative to reports about the 'death of R2P'. It indicates that the concept is becoming gradually entrenched in international practice, perhaps not so much through references in key resolutions or landmark judicial decisions, but through actual working practices of UN mechanisms.

3. Future interaction

One of the challenges for future action is to organize the interplay between R2P and fact-finding in a way that respects their mutual strengths and weaknesses. We would like to offer a few considerations.

(i) One of the first lessons is that there is a need for greater caution in the framing of R2P strategies. Framing fact-finding as a tool for the implementation of R2P may downplay the merits of 'fact-finding' as an 'end in itself'.

(ii) It is important to make distinctions between different types of fact-finding mechanisms. While long term monitoring mechanisms may be well situated to detect situations at risk of escalation, *ad hoc* international commissions of inquiry are usually responsive to atrocities that are suspected of having been committed. While not so well placed to act as 'early-warners', they can act as urgent alert systems, recommending accountability responses and galvanising future action.

(iii) Since fact-finding missions undertaken by OHCHR are not subject to the same political modes of establishment as those of the Human Rights Council and Security Council, they could be used where there is a risk of escalation or where there may not be political will to establish a commission of inquiry.

(iv) Attaching stigmas of 'failure' to behaviour may result in a lack of territorial access, rejection of commissions' findings or refusals to accept international assistance. One option to maintain engagement with non-willing States, while maximising the impact of

reports, is to provide utmost transparency as to methodologies used and the evidentiary basis for findings. The decision of the North Korea Commission to make testimony publicly available is a compelling example.[27]

(v) Commissions that call for action using the R2P concept should be careful to avoid feeding perceptions that R2P is primarily employed to justify coercive collective action. In 2009, the Secretary-General stated if the political leadership of a State 'is determined to commit crimes… pillar two would be of little use'.[28] This statement deserves re-consideration. Even where atrocity crimes have already occurred, pillar two strategies may be adopted in tandem with pillar three measures to reinforce the international community's commitment to the prevention of further atrocities.

(vi) Commissions should be explicit in their recommendations for appropriate response mechanisms. Otherwise, they may undermine the leverage of their recommendations. A 'negative' example is the Syria Commission, which vaguely recommended "possible referral to international justice".[29]

(vii) Finally, fact-finding missions' mandates generally end upon the delivery of their report, so continuity in terms of follow-up is crucial. Follow up may include the establishment of mechanisms to monitor the implementation of recommendations, as occurred in respect of the Goldstone Commission.[30] Capacity should be improved to organize de-briefing and the sharing of records and information with appropriate institutions, particularly international criminal mechanisms.

4. Concluding remarks

R2P and human rights fact-finding may positively complement each other. Goals of fact-finding do not necessarily coincide with the accountability- and response-driven logic of R2P. But fact-finding may strengthen broader dimensions of R2P, such as the protective capacity of domestic jurisdictions, the international community's enduring responsibility to prevent atrocities and the role of non-coercive collective responses.

At the same time, R2P can strengthen fact-finding. The invocation of the concept, and its normative ban of the use of 'sovereignty as a shield' may provide leverage for commissions to argue in favour of duties of cooperation of 'defiant States' and access to territory by States where violations are occurring.

But there is at the same time a need for caution. Commissions should not too easily focus on criminal notions and constructive interpretations of international criminal law in order to attract attention to their cause. This might ultimately weaken their human rights mandate and blur the distinction with formal accountability bodies who are better equipped to make findings on individual criminal responsibility.[31] The use of the international crimes trigger under R2P thus has strengths and weaknesses. It facilities operation, as it uses accepted legal rubrics with identifiable thresholds. But it also comes with risks since it reduces the complexity of social realities into the rudimentary language of criminal law.

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[1] 'Where R2P Goes From Here', Canadian International Council, 21 August 2013, http://opencanada.org/features/the-think-tank/interviews/where-r2p-goes-from-here/.
[2] Anne Orford, 'Rethinking the Significance of the Responsibility to Protect Concept', 106(1) *ASIL Proceedings* (2012) 27-31.
[3] See 'R2P Is Dead, Long Live R2P The Future of the Responsibility to Protect', at http://www.stanleyfoundation.org/resources.cfm?id=779&article=1 .
[4] See e.g., 'Prevention Toolbox', at http://acmc.gov.au/wp-content/uploads/2013/09/6-The-Prevention-Toolbox-COI.pdf; Rob Grace and Claude Bruderlein, 'On Monitoring, Reporting, and Fact-finding Mechanisms', http://www.esil-sedi.eu/node/190; *Secretary-General: Responsibility to protect: timely and decisive response*, UN Doc. A/66/874–S/2012/578, 25 July 2012.
[5] See Larissa van den Herik and Catherine Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry', at http://dx.doi.org/10.2139/ssrn.2387554.
[6] See, e.g., 'Michael Newton: "R2P is dead and done" due to response to Syria', 16 September 2013, http://www.vanderbilt.edu/jotl/2013/09/newton-%E2%80%9Cr2p-is-dead-and-done%E2%80%9D-because-of-response-to-syria/.
[7] Secretary-General*: Implementing the responsibility to protect*, UN Doc. A/63/677, 12 January 2009.
[8] *2005 World Summit Outcome*, GA Res. 60/1, 24 October 2005, paras. 138-139.
[9] See Secretary-General, *supra* note 4, para. 27.
[10] *Ibid*., para. 12, referring to Guinea.
[11] See Prevention Toolbox, *supra* note 4.
[12] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007 43.
[13] Examples: SC Res. 1564 (2004); HRC Res. S-15/1(2011); HRC Res. S-17/1 (2011); SC Res. 2127 (2013).
[14] UN Doc. A/HRC/19/69, 22 February 2012, para. 126.
[15] Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, at 12.
[16] UN Doc. A/HRC/25/63, 7 February 2014, para. 86.
[17] UN Doc. A/HRC/22/59, 5 February 2013, para. 171.
[18] UN Doc. A/HRC/12/48, 25 September 2009, para. 1875. See also paras. 1913-1914.
[19] UN Doc. A/HRC/25/63, 7 February 2014, para. 94(h) and (i).
[20] UN Doc. A/HRC/19/68, 2 March 2012, para. 136(b).
[21] UN Doc. A/HRC/22/63, 7 February 2013, para. 116.
[22] UN Doc. A/HRC/23/58, 4 June 2013, para. 164(d); UN Doc. A/HRC/22/59, para. 175(b).
[23] Report of the International Commission of Inquiry on Darfur, 25 January 2005, paras. 571-589 and 647; UN Doc. S/2009/693, 18 December 2009, para. 266; UN Doc. A/HRC/22/59, para. 180(b); UN Doc. A/HRC/23/58, para. 94(a).
[24] See para. 1975.
[25] UN Doc. A/HRC/23/58, para. 94(a).
[26] UN Doc. A/HRC/4/80, 9 March 2007, para. 77(d).
[27] Videos and transcripts are available at http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx**.**
[28] Secretary-General, *supra* note 7, para. 29.
[29] UN Doc. A/HRC/24/46, 16 August 2013, para. 206(d). See also UN Doc. A/HRC/25/65, 12 February 2014, para. 154.
[30] UN Docs. A/HRC/15/50 and A/HRC/16/24.
[31] See, e.g. Catherine Harwood, 'Human Rights Violations Clothed as International Crimes? An Inquiry into the Embrace of International Criminal Law by UN Human Rights Council Commissions of Inquiry' (25 September 2013), available on SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330808.