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R2P, the International Criminal Court and the Prevention of Mass Atrocities in Africa

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RECOMMENDATIONS

- If frustrated with the apparent direction that R2P has taken, South Africa must debate the issue.
- It must contribute to the development of the emerging norm of R2P by identifying those aspects with which it is dissatisfied and proposing alternatives – potentially, the criteria for military intervention. (Brazil, for example, has attempted to contribute to the debate with the concept of 'Responsibility with Protection'.)
- If unhappy with the perceived bias of the ICC, South Africa must engage on the matter.
- The Malabo Protocol may have something to offer, but South Africa must ensure that if and when the protocol comes into effect, it is operationalised without fundamentally undermining the cause of international criminal justice.

EXECUTIVE SUMMARY

Following the massacres in Yugoslavia and Rwanda the international community committed itself to preventing similar occurrences in the future. The developing doctrine of Responsibility to Protect (R2P) and the institution of the International Criminal Court (ICC) were the principal strategies that were to form the new order. Because of the centrality that human rights were to have in its foreign policy, following its democratic transition South Africa played an important role in supporting these initiatives. Twenty years on South Africa's foreign policy is less focused; it appears to be championing continental solidarity while courting external players able to advance its internationalist ambitions. In the process, South Africa's foreign policy has become more pragmatic; initiatives that allegedly advance Western interests – such as R2P and the ICC – are viewed with suspicion. If it wishes to contribute to the international agenda, it will have to engage with these initiatives, articulate its suspicions and proffer reasoned alternatives.

INTRODUCTION

The ambivalent relationship that South Africa currently appears to have with both the R2P doctrine and the ICC reflects its increasingly confused foreign policy. Immediately after the democratic transition in 1994, the role South Africa intended to play in the international community was framed in terms of certain fundamental moral imperatives. While acknowledging that pragmatic considerations also had to be addressed, then president Nelson Mandela was unequivocal about the focus of South Africa's international relations: '[H]uman rights will be the light that guides our foreign policy.'[2] A country that had peacefully progressed from an apartheid past to a

democratic present was, through its example, to lead Africa – and, possibly, the world – to a future in which the dignity of all would be respected. Twenty years later, that light burns less brightly.

At the time when South Africa was undergoing its democratic transition, the world was coming to terms with two horrific tragedies – the multiple conflagrations in the former Yugoslavia and the genocidal violence in Rwanda. The soul-searching provoked by the inadequate international response to these tragedies demanded a commitment to prevent their re-occurrence. States and their leaders would never again be allowed to ride roughshod over the fundamental rights of their citizenry. Were they to do so, the international community would respond; any attempt to hinder that response through claims to sovereignty and non-interference would no longer succeed. Alleged perpetrators would no longer be able to escape liability for their actions; accountability was to trump impunity. Two initiatives that were to underpin this 'new world order' were the doctrine of R2P and the creation of the ICC. South Africa – for a time – lent its important support to both.

RESPONSIBILITY TO PROTECT

R2P is rooted in the concept of humanitarian intervention: in the event of a 'humanitarian crisis' – either caused by a state or to which a state is unable to respond adequately – the principle of non-intervention is suspended and military intervention by an outside state, or group of states, is justified. The potential abuse of the doctrine and the failure of the international community – through the UN Security Council (UNSC) – timeously to intervene in Yugoslavia and Rwanda provoked then UN secretary-general Kofi Annan's challenge to member states attending the 54th session of the General Assembly in September 1999 to 'find common ground in upholding the principles of the Charter, and acting in defence of our common humanity'.[3]

Canada's response to the challenge was the establishment of the International Commission on Intervention and State Sovereignty (ICISS) in September 2000. The 2001 Report of the ICISS, while recognising the importance of state sovereignty, suggested that sovereignty must be recast to imply 'responsibility'.[4] Thus, in circumstances where a population is suffering serious harm – because of internal war, insurgency, repression or state failure – and the responsible state is either unable or unwilling to act, the concept of non-intervention must yield to an international responsibility to protect. This international responsibility embraces three specific responsibilities: to prevent (to address both the root causes and the direct causes of internal conflict and other man-made crises); to react (to respond to situations of compelling human need with appropriate measures, which may include coercive measures such as sanctions and international prosecution and, in extreme cases, military intervention); and to rebuild (to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert). If military intervention is contemplated – ideally authorised by the UNSC – six criteria need to be fulfilled: the action must be for a just cause (genocide, crimes against humanity or similar); have the right intention (meaning without a subversive agenda); be used as a last resort; be authorised and executed by a legitimate authority; adhere in action to the principle of proportionality; and have a reasonable prospect of success.

The concept of R2P enshrined in the ICISS Report was subsequently adopted as the World Summit Outcome Document by the UN at its September 2005 meeting. R2P received further endorsement in UNSC Resolution 1674 in April 2006, concerning the protection of the civilian population during times of armed conflict, and in Secretary-General Ban Ki-moon's 2009 report *Implementing Responsibility to Protect*. In the latter report, Ban specifically addressed the new understanding of 'sovereignty as responsibility':[5]

> [T]he responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention. By helping States to meet their core protection responsibilities, the responsibility to protect seeks to strengthen sovereignty, not weaken it. It seeks to help States succeed, not just to react when they fail.

South Africa, along with many other African states, supported this new understanding of sovereignty. Apart from the personal contributions to the development of the concept made by Sudan's Francis Deng (a former UN Secretary-General's Special Representative on Internally Displaced Persons), Ghana's Annan, and Algeria's Mohamed Sahnoun (the co-chair of ICISS), many have acknowledged the important contribution made by Africa to the development of R2P. In his 2009 report, Ban notes that 'the evolution of thinking and practice in Africa has been especially impressive'.[6] In theory, the concept is reflected in article 4(h) of the Constitutive Act of the AU and forms the basis for the operationalisation of the AU's Peace and Security Council.

However, South African – and, to a considerable extent, African – support has lost its lustre. The 2011 Libyan crisis coincided with South Africa's second term as a non-permanent member of the UNSC. Framed in broad R2P terms, South Africa – along with India and Brazil – supported Resolution 1970, which imposed selective sanctions on Libya and referred the Gaddafi regime to the ICC. Shortly thereafter, in March, while leading AU initiatives to resolve the crisis diplomatically, South Africa – with Nigeria and Gabon, but now without India and Brazil – voted in favour of Resolution 1973. Again couched in R2P language and with the support of the Arab League, Resolution 1973 imposed a no-fly zone over portions of Libya and authorised recourse to 'all means necessary' to protect the civilian population – particularly the citizens of Benghazi. It thus sanctioned the consequent NATO bombing campaign led by the US, Britain and France.

African opposition to the resolution – particularly from the AU – was vociferous, as the resolution effectively undermined the AU initiative. South Africa's volte-face was almost immediate: having been one of R2P's staunchest supporters – at least in theory – South Africa was now both wary and doubtful.

INTERNATIONAL CRIMINAL COURT

When the ICC was established in 2002, the majority of African leaders embraced it – Senegal was the first state to deposit its instrument of ratification and, of the 122 parties to the Rome Statute, 34 are African, representing the largest continental support bloc. Over the past six years, however, the embrace has become less warm. The arrest warrant against Sudan's Omar al-Bashir in March 2009, the indictment of Kenya's Uhuru Kenyatta and William Ruto in March 2011, and the arrest warrant against Libya's Muammar Gaddafi in June 2011 have soured relations between the ICC and Africa. Albeit explicable, a perceived bias against African leaders on the part of the ICC has encouraged the continent, through the AU, to introduce mechanisms to curtail its reach: in June 2014, the Malabo Protocol of the AU Summit proposed the establishment of a third chamber for the proposed African Court of Justice and Human Rights, which will have jurisdiction over certain designated 'international' crimes. In January 2015, at the close of the 24th AU Summit in Addis Ababa, the newly elected chair of the AU, Robert Mugabe of Zimbabwe, announced that an African withdrawal from the ICC would be an agenda item for the next AU Summit, to be held in South Africa in June 2015.

Although South Africa has not been as vociferous as some in its condemnation of the ICC, it appears to sympathise with those critical of the perceived African bias. Apparently, at its October 2013 Summit, South Africa supported the call for African signatory states to withdraw their membership of the Rome Statute and the ICC.[7] In March 2014, South Africa's then deputy president, Kgalema Motlanthe, suggested that the criticism of the ICC and its actions was inextricably linked with resentment towards, and frustration with, prevailing geopolitical arrangements and Africa's subservient position within these arrangements.[8]

SOUTH AFRICA'S FOREIGN POLICY

At issue in respect of its relationship with both R2P and the ICC is a 'Janus-like' conundrum that South Africa will have to resolve. After its democratic transition, the international community – desperate for an African state to offer direction to the continent and set an example of stability – commended South Africa as *the* continental power with moral authority and as a member of a select group of emerging international powers, potentially deserving a seat at the table of the 'great'. South Africa bought into the

rhetoric and attempted to placate both continental interests and powerful new and influential friends beyond the continent.

In doing so, on the one hand, South Africa has championed something akin to Ali Mazrui's idea of the *Pax Africana*: Africans themselves need to create and consolidate peace on the continent; Africa needs to become its own policeman; 'African solutions to African problems'. On the other hand, beyond the continent – perhaps resentful of Western states failing to accord it the honour their support in 1994 suggested it deserved – South Africa is progressively consolidating a position of consequence as a member of BRICS.

In South Africa's case, the obvious casualty in the game of maintaining the delicate balance between a commitment to continental sovereignty and the role of an emerging international power has been the initial commitment of its foreign policy to human rights. Pragmatism now reigns triumphant: despite the constant rhetoric in support of quiet diplomacy during the Mbeki years, South Africa failed positively to intervene in Zimbabwe, and during its first term as a non-permanent member of the UNSC in 2007–2008, South Africa's support for human rights was lacklustre. It opposed a draft resolution criticising the human rights record of the incumbent military junta in Myanmar and acquiesced in the suspension of the SADC Tribunal in August 2010.[9]

CONCLUSION

Despite indications to the contrary, South Africa continues to maintain that human rights are a core value underlying its foreign policy; as such, it remains committed to the idea of responsible sovereignty through the prevention of mass atrocities, and is determined to ensure an end to impunity for those who perpetrate gross human rights violations. If this is indeed so, South Africa is obliged, once again, to clarify its focus. As both an important continental player and an emerging power, the country has a contribution to make.

Unreasoned criticism and petulant rejection not only do South Africa a grave disservice but also jeopardise the lives of those who rely on the strong and the good to act positively and promptly in the interests of the weak and the poor. South Africa must re-embrace the 'human rights imperative': as Mandela said, 'to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others'.[10]

ENDNOTES

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2 Adams S, 'Emergent Powers: India, Brazil, South Africa and the Responsibility to Protect', 14 September 2012, http://www.globalr2p.org/media/files/adams-r2p-ibsa-1.pdf, accessed 11 March 2015.

3 ICISS (International Commission on Intervention and State Sovereignty), *Responsibility to Protect*, 2001, p. 1, http://responsibilitytoprotect.org/ICISS%20Report.pdf, accessed 11 March 2015.

4 *Ibid*., p. xi.

5 UN General Assembly, *Implementing the Responsibility to Protect. Report of the Secretary-General*, 12 January 2009, pp. 7–8, http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf, accessed 11 March 2015.

6 *Ibid*., p. 6.

7 Bullock J, 'AU and the ICC – how they voted', *ThinkAfricaPress*, 15 October 2013, http://thinkafricapress.com/legal/au-and-icc-how-they-voted, accessed 4 July 2014.

8 The Presidency, 'Public Lecture by Deputy President Kgalema Motlanthe at the University of Pretoria, Tshwane, Gauteng', 31 March 2014, http://www.thepresidency.gov.za/pebble.asp?relid=17119, accessed 24 April 2014.

9 Melber H, 'Promoting the rule of law: Challenges for South Africa's policy', *South African Foreign Policy Initiative Commentary*, 5, August 2012, pp. 8–10.

10 Cited in Adams S, *op. cit*.

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