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ICC's Verdict on Darfur: Whose Responsibility?

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The International Criminal Court's unprecedented ruling to arrest the Sudanese president for crimes against humanity is a step further in advancing the doctrine of the Responsibility to Protect (R2P). However, in the global arena of competing state interests, coupled with a lack of international consensus on the R2P and other pressing global challenges, the step forward is beset by a number of obstacles. Nonetheless, the implications on Asia are significant.

FOR THE first time, on 4 March 2009, the International Criminal Court (ICC) indicted a sitting head of state, Sudanese president Omar al-Bashir, for crimes against humanity towards the citizens of Sudan. The president of the northern African state has been indicted for two counts of war crimes and five counts of crimes against humanity. Bashir is suspected of crimes involving intentional attacks against the civilian population in the Darfur region of western Sudan. Although he is not the first person from Sudan who has been charged with such crimes, Bashir is the first serving head of state to be called out on these charges. Others who have been charged in the aftermath of internecine conflict in Sudan starting in 2003 include the Sudanese humanitarian affairs minister and a pro-government militia leader.

Bashir's indictment is contentious yet highly significant as it coincides with the ongoing global effort to advance the Responsibility to Protect doctrine as an international norm. The ICC announcement came on the day when one of the authors of the R2P, former Australian Foreign Minister Gareth Evans, was launching his book on *The Responsibility to Protect: Ending Mass Atrocity Crimes Once*

and For All at the S. Rajaratnam School of International Studies, Nanyang Technological University.

The timing of the two events was fortuitous and noteworthy as the ICC's indictment of Bashir constitutes precisely a form of institutional support for R2P. The ICC has jurisdiction over the four crimes under the R2P – genocide, crimes against humanity, ethnic cleansing and war crimes. The ICC also holds states responsible for the prosecution of those responsible for mass atrocity crimes committed within their borders, and when a state is unable or unwilling to do so, the situation would fall under the ICC's jurisdiction.

Like the ICC, the R2P doctrine holds states responsible for the protection of civilians from mass atrocity crimes, and when states fail, the responsibility becomes that of the international community. Taken together, the ICC could provide strong institutional support for R2P and address precisely the challenge Evans talked about – the lack of institutional mechanisms for the R2P.

Ending mass atrocities

Ever since the horrors of genocide during the Second World War, the people of the world have been proclaiming, "Never again!" The reality, however, is that both state and non-state actors have stood by while mass atrocity crimes were committed in the latter half of the 20th century until the present day. This was most obvious in places such as Cambodia, Rwanda, Bosnia and most recently, Darfur in Sudan.

As the world's conscience is pricked, this has given rise to debates about who should protect, and when and how to prevent and respond to mass atrocities. The R2P doctrine was adopted by UN member countries at the 2005 United Nations World Summit to address these dilemmas and to prevent future occurrences where the international community stands by while civilians suffer the horrors of mass atrocities.

Three pillars of R2P

The R2P conceptualises 'sovereignty as responsibility', which emphasises the obligations of a state towards the people residing within its borders. Three pillars uphold this principle. First and foremost, Evans emphasised that each state is responsible for protecting its population from genocide, war crimes, ethnic cleansing and crimes against humanity, including any incitement of these acts. Second, the international community has the responsibility to assist states in meeting their obligations. The third pillar calls for the United Nations (UN) and its member states to respond in a timely and decisive manner, in accordance with the UN Charter. It calls on them to help protect populations against the

four mass atrocity crimes if a state is manifestly failing to do so, or are in some cases, the cause of the atrocity.

Challenges and advancement of R2P

Evans has identified three challenges of the R2P – conceptual, institutional and political. The conceptual challenge comprises making clear beyond doubt that the R2P is for the protection of civilians through prevention of the four mass atrocity crimes. It offers a wide variety of tools to do so, ranging from soft diplomatic pressure to the use of force as a last resort. The institutional challenge lies in establishing the necessary structures and mechanisms to ensure governments and international organisations follow appropriate processes when dealing with potential R2P situations. Lastly, the political challenge is in consistently generating adequate political will to prompt the UN Security Council and regional organisations to act in an R2P situation.

Therefore, the move to indict the president of Sudan is a big step in the right direction, and enhances strongly the application of the R2P. However, now that the momentum is set, what are its implications for Asia, and is the international community ready to take the R2P forward?

Implications and modalities for Asia

The emphasis in Southeast Asia, as it is at the global level, is on prevention rather than reaction. As global and regional institutions and processes develop, they should take into account regional sensitivities by involving regional organisations in decision-making and overall action. This is extremely pertinent to Asia, as the participation of regional organisations in potential R2P situations would give the R2P greater legitimacy in the eyes of post-colonial states. ASEAN member states, for instance, could adopt the R2P doctrine and render assistance to individual members in times of crises.

The R2P can also be applied through the ASEAN Security Community, which has in place a set of strategic priorities including conflict prevention, resolution and post-conflict peace building, all of which are congruent with R2P. At the same time, the proposed ASEAN human rights body can serve a dispute settlement and early-warning role with support from regional civil society networks that have a good feel of happenings on the ground.

The advancement of the R2P through the ICC may be a case of ‘one step forward and several steps back’. The controversy raised by the ICC verdict and its implications on the norm of non-interference could add to the reservations about the R2P. And, while the international community is engaging the issue at the UN, the ambiguity and misunderstandings still surrounding the conceptualisation of the

R2P, including the institutional mechanisms for its application, could impede progress. Nevertheless, in the larger context, this development can be seen as part of the building blocks for promoting human security in Asia and the rest of the world.

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