A COMMON STANDARD FOR APPLYING R2P

POLICY BRIEF

Holocaust, Genocide and Human Rights Program
WHAT IS THE RESPONSIBILITY TO PROTECT?

The responsibility to protect—known as R2P—is a global commitment to protect populations from mass atrocities.

R2P is most authoritatively expressed in the 2005 World Summit Outcome, where it was unanimously endorsed by U.N. Member States. Within the Summit Outcome Document, individual States reinforced their commitment to protect their populations from atrocities characterized by: genocide, war crimes, crimes against humanity, and ethnic cleansing. This commitment includes the prevention of such crimes and their incitement. Member States pledged to assist other States, as appropriate, in fulfilling their obligations. Finally, in instances where national authorities are ‘manifestly failing’ to protect their populations, the international community has a responsibility to take collective action to protect populations. The R2P is increasingly framing the debates on national security, human rights policy, and collective efforts to ensure peace and security.
A COMMON STANDARD FOR THE APPLICATION OF R2P

- **Promotes the full continuum of R2P actions**
  The lack of a common standard at early stages of potential crises is hampering action, and is a factor behind the continued focus and association of R2P exclusively with military intervention.

- **Targets application of limited resources**
  A common standard concerning which situations will benefit most from international assistance will ensure effective allocation of limited resources.

- **Enhances Legitimacy**
  A common standard will begin to require parties to explain their reasoning from a common reference point.

- **Reduces Uncertainty**
  A common standard will diminish the depth and duration of debate that is centered on whether a situation would benefit from the application of R2P.

OVERVIEW

The Responsibility to Protect (R2P) provides an opportunity to overcome international inaction in exceptional situations of genocide or other mass atrocities. During R2P’s first decade, however, its unique potential to address mass atrocity situations has been hamstrung by debates over whether a situation comes within the R2P remit. While countries have a constant responsibility to protect their own populations from atrocities, debate about whether an R2P framework should be applied by the international community often delays or impedes discussion and implementation of measures necessary to protect populations.

Over the past decade, R2P has been invoked in situations of widely different origin and intensity including Darfur, Kyrgyzstan, Burma, Cote d’Ivoire, Sri Lanka, Libya and Syria, with international responses ranging from ineffective to highly effective. A common standard against which to measure and analyze incoming information to determine whether an R2P framework is appropriate will assist in overcoming this uncertainty.

Moreover, debates concerning R2P’s application have been most vigorous in situations where violent conflict and the loss of life have already commenced. The main issue on the table in these cases has been the legality, morality and prudence of intensely coercive forms of intervention, particularly military action. This late term engagement with R2P continues in spite of the fact that UN Secretary General Ban Ki-moon and UN members states have unambiguously stated that prevention is the single most important dimension of R2P.

Our research advances the ability of states, regional organizations, international institutions and civil society to practically implement measures to prevent mass atrocities at a stage when such prevention has a reasonable prospect of success. The research achieves this aim by developing a standard and its guiding principles, against which relevant actors can assess incoming information in respect of R2P to determine when they should act pursuant to their R2P commitments.

Despite the use of the terminology of “standard” and “guiding principles,” they are not intended to be implemented as legally
binding tests against which to gauge the appropriateness of action. Instead, the standard and guiding principles are designed to assist relevant stakeholders in determining whether a situation benefits from being considered within the R2P framework.

WHY A COMMON STANDARD FOR THE APPLICATION OF R2P?

The practical consequences of invoking R2P will vary from situation to situation. R2P supports stakeholders acting based on existing legal obligations through a continuum of measurable and agreed steps by national and international actors. It does not dictate, however, the precise means by which R2P should be implemented in a given situation. Nonetheless, relevant stakeholders have been working to improve the understanding and appropriate application of the concept. A widely-accepted standard specifically developed for R2P will assist in preventing atrocities and protecting populations in four ways:

Promote the full continuum of R2P action
While it is universally agreed that the best form of protection is prevention, the lack of a common standard of assessment at early stages of potential crises is hampering action. It is also one factor behind the continued focus and association of R2P exclusively with military intervention. A common standard that spans the full range of potential scenarios will help to ensure that prevention is forcefully promoted every time it is needed.

Targeted application of limited resources
Given the constraints on time and resources that stakeholders can direct to address mass atrocities, a common standard of assessment concerning which situations will benefit most from international assistance will ensure the most effective allocation of those limited resources.

Legitimizing effect
A unified, common standard will add a level of transparency, credibility and accountability to the deliberations over the application of R2P to a given situation which will, ultimately, result in greater consistency in outcomes of State action and norm legitimacy. A common standard of assessment, while inevitably open to interpretation by all parties, will, at a minimum, begin to require parties to explain their reasoning from a common reference point. Actions that are taken, or decisions not to take a particular course of action, will be seen as more legitimate if the standard is the basis for the decision to act.

Reduce uncertainty
A common standard, along with guiding principles, will increase the likelihood that all relevant stakeholders (including States, regional organizations, NGOs and international organizations) focus their discussion on appropriate action in any situation of stress, and will reduce the depth and duration of debate that is centered on whether a situation would benefit from the application of R2P.

STANDARD AND GUIDING PRINCIPLES

The Standard aims to provide a systematic and coherent approach to assessing and analyzing incoming information on a case by case basis in potential R2P situations. It is believed that the application of the standard will increase transparency and accountability around deliberation on the application of R2P to a given situation and promote consistent State action. The Standard can be used by States, regional and international organizations, civil society and other actors called upon to determine the applicability of R2P.

The Standard and the guiding principles take the salient features of, and build upon, well-established national and international practice in designing a basis for determining existing risk levels and thus a basis for assessing future threat developments with an acceptable level of certitude. Moreover, the Standard and principles are inspired and guided by areas of international and national law, which share similar goals and normative designs as R2P.

THE STANDARD

The situation will be considered in the context of R2P, if the examination of the situation establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing are occurring or could occur in the future.

PRINCIPLE 1
Determination of relevant human rights violations
1. The objective in determining whether relevant human rights violations are occurring is not the identification of
separated legal categories of mass atrocity crimes on the one hand and other human rights violations on the other, but a common consciousness of the risks involved in any massive violation of human rights.

2. The following human rights violations have been of particular relevance in past cases of mass atrocities: killings, torture, mutilation, rape and sexual violence, abduction, forced population movement, expropriation, destruction of property, looting, lack of freedom of speech/press/assembly/religion, destruction of subsistence food supply, denial of water or medical attention, man-made famine, redirection of aid supplies, acute discrimination against a particular group(s), restricted movement.

PRINCIPLE 2
Determination of the level of gravity or seriousness of potential violations

1. The persecution of large parts of the population based upon particular identities applied by the perpetrators as a basis for persecution is the main element of the exceptional situations relevant to the application of R2P.

2. The significance of human rights violations will be assessed in light of the number of potential victims of violence or level of irreparable harm that may be caused to potential victims taking into account the following risk factors: Selection of the victims based upon identity criteria linked to race, color, descent, religion, ethnic, or national associations, citizenship status, gender, sexual orientation or other grounds and/or their association with a specific political opinion or group; public hate speech, incitement to violence; exclusionary ideologies that purport to justify discrimination; a past history of violence against perceived groups; a climate of impunity in which these events unfold.

3. The following circumstances can increase the risk-level for potential victims: Armed conflict, which may disproportionately affect a specific group or a large part of the population; existence of and support to militias that could carry out attacks against potential victims; elections.

PRINCIPLE 3
Application of R2P

1. The R2P requires States to take concrete measures, based upon existing legal obligations, to mitigate the real risk of mass atrocities. The R2P encourages a concept of consecutive, measurable steps by national and international actors, based upon existing resources and strategies, but does not prescribe particular measures.

2. The nature and timeline of the steps that should be taken depends on the gravity and urgency of the situation. Such measures could include: Public acknowledgement and condemnation of human rights violations; clear and public order to military, police or security forces to respect international human rights and humanitarian law; immediate enforcement of accountability for the most relevant violations; ensuring humanitarian assistance and protection for victims of violence; and, in cooperation with relevant stakeholders, including potential victims, drawing up an action plan with timelines for mitigating the most urgent risk factors.

3. Action of the international community should support and complement action by the national government rather than substitute domestic action.

PRINCIPLE 4
Determination whether a State is “manifestly failing” to meet its responsibility to protect

1. When the national authorities are manifestly failing to meet their responsibility to protect, the responsibility moves to the international community.

2. The determination—whether a State is “manifestly failing”—should be based upon the available information relevant to human rights violations, the state of implementation of measurable steps to mitigate risk factors, and its impact on the real risk that exceptional grave violations of human rights could occur in the future. Manifest failure occurs
when relatively foreseeable consequences have not been addressed and the risk level prevails or increases.

3. The measures taken by the government and their impact on the risk-level should be monitored.

**BASIS FOR THE DEVELOPMENT OF STANDARD AND GUIDING PRINCIPLES**

**Exposing the Preventive Dimension of the Responsibility to Protect**

Most scholars and practitioners agree that as it currently stands R2P, as a whole, is not a legal norm. Rather, it has evolved into a defining principal in international relations. The R2P’s greatest contribution—to date—is its harnessing of disparate areas of international law to provide a useful framework for each one’s relevance and application to addressing mass atrocities. With a view to the multiple types of measures undertaken by a variety of actors within the scope of R2P, it would be a grave error to associate the R2P mainly with military intervention for humanitarian purposes. Rather, R2P contemplates a far wider range of policy tools to forestall the need for such intervention in recognition that prevention is the best form of protection. Any standard developed for the R2P context must take the prospective lens of prevention into its ambit.

**The Urge to Turn to Criminal Law**

The use of international criminal law terminology within the 2005 World Summit Outcome Document has both comforted and confused all those dealing with R2P. The result of both compromise and principle, three of the acts set out as being ones that R2P aims to prevent and halt—genocide, war crimes and crimes against humanity—find relatively detailed definition within international criminal law. Ethnic cleansing is one possible form of crimes against humanity, and may be a component of both genocide and war crimes. This delimitation was intended to restrict R2P to exceptionally grave situations where international law had already defined limits to the principle of sovereignty. This compromise, however, has resulted in much confusion. Above all, it should be self-evident that R2P cannot apply only at the stage at which responsibility under international criminal law for an individual culprit could be established. Such a standard would ensure the immediate demise of the normative concerns embedded within R2P, most of all its ability to proactively attempt to prevent on-going, or at risk, mass atrocities. Therefore, alternative standards amalgamated from national and international law animated the standard and surrounding guiding principles developed for R2P.

**OTHER SOURCES OF LAW AND PRACTICE**

The assessment of the likelihood of future events occurring is by its nature a very different enquiry than the assessment of evidence to determine whether a fact has been proven about past conduct. The enquiry involving R2P will often, perhaps, always, have elements of both forward-looking and backward-looking investigations, assessing whether sufficient acts have occurred to fall within R2P and whether future atrocities are likely to occur.

Analyzing various evidentiary standards has shown that international and national courts have successfully addressed questions similar to those posed by the R2P, namely how to determine the risk of a future violation of international (and national) legal obligations based upon present facts and circumstances. In the context of R2P, the level of harm that would potentially occur in the future must be, by definition, exceptionally grave, as characterized by the crimes considered at the apex of international crimes. At the same time, engagement to prevent such crimes must be measured and reasonable in light of the precautionary principle as well as the prerogatives of sovereignty. As a result, the mid-level standard of a “real risk” that exceptionally grave human rights violations are occurring or are likely to occur, appears most suitable to the objectives and goals of R2P articulated by member states and further elaborated upon by the Secretary General, since it requires individualizing risks and considering concrete scenarios. (See *A Common Standard for Applying the Responsibility to Protect*, 2013.)

**CONCLUSIONS**

This briefing has outlined how a common standard of assessment against which to analyze incoming information developed specifically to engage the normative concerns of R2P will assist in the effort to prevent atrocities and protect populations. It does so by promoting the full continuum of R2P actions, including mid-term prevention, by enhancing the credibility of engagement taken within the R2P framework, by establishing the type and scope of evidence analyzed to reach a judgment, and finally by reducing the depth and duration of debate that is centered on whether R2P applies, to allow for a focus at an earlier stage on appropriate action to protect lives.
This policy brief is based upon the results of a multi-staged research project undertaken by the Holocaust, Genocide and Human Rights Program (HGHR) at Cardozo Law, Yeshiva University in New York, NY. The project is led by Professor Sheri Rosenberg, Director of HGHR. Ekkehard Strauss, an independent researcher and consultant on mass atrocities and Adjunct professor at Griffith University, is an Expert Consultant to the project and co-author of the brief.

Our research clarifies and addresses the normative concerns embedded within R2P, systematically develops a common standard against which incoming information may be assessed in respect of the application of R2P, coherently develops guiding principles for the application of the standard, and rigorously assess the benefits of the adoption of a common standard for the implementation of R2P framework; including norm legitimacy, efficient allocation of resource and strategic mid-term prevention.

The full research report on A Common Standard may be requested at sprosenb@yu.edu.

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CARDOZO LAW
The Holocaust, Genocide and Human Rights (HGHR) program housed within Cardozo Law, is a leading global center for the study of—and advocacy related to—the law and politics of atrocity prevention including, international human rights and transitional justice. Funded by a Holocaust claims settlement award, its central aim is to strengthen laws, norms and institutions to prevent mass atrocities and strengthen human rights protections. Founded by Professor Richard Weisberg and led by Professor Sheri Rosenberg, the HGHR’s research and pedagogy addresses all aspects of mass human rights atrocities, including the unfinished business of the Holocaust, unique aspects of identity-conflict, the processional nature of genocide, the development of international criminal justice, the intersection of mass atrocities with forced migration, asylum and refugee law, and post-conflict governance and transition.

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