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UNSC and ICC Patern(al)ship in the Praxis of the R2P: Insights from Darfur and Libya

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JIDE MARTYNS OKEKE, MAY 17 2012

Since the concept of Responsibility to Protect (R2P) was first introduced by the 2001 International Commission on Intervention and State Sovereignty (ICISS), there has been a considerable surge in both academic literature and policy debate. Edward Luck, the UN Assistant Secretary General on the R2P recently remarked that the growing literature on the R2P could establish a small library.[1] There is a lot of truth in such a remark. Debates on R2P have produced at least three categories of analysis. The first, are the main protagonists of the R2P norm. This spans from the ICISS commissioners to UN staff that have produced a rich collection of information on the conceptualisation, operationalisation and various channels of implementing the R2P. These pundits have also ascribed to themselves the role of imposing clarity whenever there seems to be potential or actual controversy on the application of the R2P. For example, in cases of the 2008 Russia's invasion of Georgia, Cyclone Nargis in Burma (2008), post-election violence in Kenya (2007-08), war in Darfur (since 2003), 2011 North Africa and Middle East revolutions including the NATO-led military intervention in Libya. The second category constitutes those that continue to perceive R2P as a tool for legitimising imperialism. Noam Chomsky, Mahmood Mamdani and David Chandler[2] amongst others have led criticisms against R2P along this direction. The third category is the plethora of civil society organisations that have been strong advocates of the praxis of the R2P whether in intense war like the crisis in Darfur or advocating for preventive action like in the case of Jos, Nigeria. Through the International Coalition of the Responsibility to Protect (ICR2P), there have been sustained efforts to prevent and respond to mass atrocities through activism justified by the states endorsement of the R2P. These different categories have indeed produced significant contributions on the conceptual foundation and development of R2P.

An important dimension in this development is the need for states through the UN and other relevant international, regional and sub-regional institutions to forge relationships on how to implement the R2P. Within this discourse, the role and relationship between the UN and the International Criminal Court (ICC) in the implementation of the R2P has been articulated. In particular, the nexus between the United Nations Security Council (UNSC) and the ICC have been pedagogically explained as a mutually reinforcing relationship and operating on the same track in the prevention and response to mass atrocities. More importantly, the UNSC remains the only body that is able to enforce the jurisdiction of the ICC to non-states members under the Chapter VII procedures of the UN Charter. This power is given to the UNSC under Article 13(b) of the Rome Statute. Hence, even though the UNSC is not the only means of extending the jurisdiction of the ICC to non-members, it is the only organ outside of the ICC that is given explicit powers over jurisdiction to non-members. It is within this context that the creation of the ICC provides a complementary institution on the promotion of international peace and security through the pursuit of justice. At the same time, the ICC aspires to achieve its goal through judicial independence but with the support of the UN.

In practice, the ICC interventions in Darfur and Libya provide a basis for re-considering the relationship between the UNSC and ICC in the implementation of R2P. These two cases are significant because they were specifically referred by the UNSC to the ICC. It however seems that these referrals were made in pursuit of underlying but differing interests that transcends the implementation of R2P. In Darfur, the UNSC referral to the ICC was made within the context of specific international climate and geo-political interests that were adverse to military intervention. This is not to suggest that military intervention as opposed to a political solution was the right means for ending the crisis in Darfur. However, the decision by the UNSC not to intervene militarily in the case of Darfur was driven by the

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US-led wars in Iraq and Afghanistan; the need to maintain progress in the implementation of the Comprehensive Peace Agreement which formally ended more than two decades of civil war between Sudan and South Sudan and of course, the outright opposition by China and Russia. At the same time, there was strong activism led by the Save Darfur Movement for a possible military intervention in Darfur mostly in the streets of Washington and London. Sending lawyers to Darfur through the ICC rather than putting boots on the ground could be considered as a form of intervention geared towards reducing domestic pressure in Western capitals rather than a genuine pursuit of peace through justice. Notwithstanding, the unprecedented ICC indictment of Omar al-Bashir, the incumbent President of Sudan received strong concerns from African states including those that are parties to the Rome Statute. Three main concerns have been expressed by African states against the pattern of ICC intervention in Darfur. First, Sudan is not a state party to the Rome Statute and therefore should not be subject to the jurisdiction of the court. The referral of the UNSC of a non-state party is however admissible in the absence of voluntary acceptance of jurisdiction and an independent investigation by the ICC Prosecutor. Second, the unprecedented issuance of an arrest warrant against an incumbent president is tantamount to an attempt to force regime change. Third, the ICC intervention makes it more difficult for a regime to cede power through constitutional means and may therefore deepen insecurity.

On the other hand, the role of the ICC in the Libya uprising and especially in the NATO military intervention ensured that a political solution was very unlikely. Within a few weeks of the UNSC referral of the Libyan crisis to the ICC, Ocampo indicted late Muammar Gaddafi, his sons and some allies for mass atrocities. Again, this seemed to be the promotion of R2P through the complementary role of the ICC. The timing of the ICC indictments in Libya is quite significant. It coincided with the 17th African Union Summit in Malabo which attempted to find and impose a political solution to the crisis in Libya. The ICC indictment (in)advertently provided a clear support to opposition forces in Libya that were working closely with NATO to force regime change. The ICC pattern of intervention in Libya may have also strengthened the recalcitrance of the late Muammar Gaddafi to remain in power until his brutal assassination.

In conclusion, the two cases briefly explained here convey the initial assumption of the architects of the R2P that the role of the ICC and other relevant organisations could form part of the toolbox for ending mass atrocities once and for all. Nonetheless, questions must be raised about the ostensible judicial activism and impropriety; putative independence of the ICC in relation to the UNSC and, the direct involvement of the ICC in active conflicts especially in African states.

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[1] See Luck, E. (2010) "The Responsibility to Protect: Growing Pains or Early Promise" *Ethics and International Affairs* Vol. 20(4): 349-365

[2] For example see Mamdani, M (2009) *Saviors and Survivors: Darfur, Politics, and the War on Terror*, New York: Pantheon Books; Chandler, D (2011) "Libya: The End of Intervention", *E-International Relations* <http://www.e-ir.info/2011/11/17/libya-the-end-of-intervention/> accessed on 20/04/2012