

## Briefing Paper: The Responsibility to Protect (**R2P**) in Myanmar

1 September 2021

### 1. Overview

Since the 1 February coup d'état in Myanmar, residents of the country have requested assistance from the international community. Particularly during the early stages of the coup, many protesters carried signs calling for "R2P," seemingly in hope of foreign military intervention. People around the world saw these calls for R2P in international media.

But seven months later, the international community has still not taken collective action under the R2P principle. The United Nations Security Council in particular has not taken any significant action at all to respond to the unlawful coup and the related human rights violations by the Myanmar military, the Tatmadaw. Many people are understandably frustrated and deeply disappointed.

This briefing paper by the Special Advisory Council for Myanmar (SAC-M) provides background information on R2P and how it is invoked, and offers some explanation as to why there appears to have been no collective response to the calls for R2P made during the protests.

This briefing paper highlights that, while foreign military intervention in Myanmar is extremely unlikely, there are other actions that can and should be taken under R2P. These include arms embargoes, targeted sanctions and promoting accountability.

Some individual States and groups of States have already taken such actions since the coup, designed to protect civilians in Myanmar. SAC-M has called upon States to expand and strengthen these actions, through an international "three cuts" strategy:

1. Cut the weapons supply to the Tatmadaw;
2. Cut the cash supply to the Tatmadaw; and
3. Cut the impunity of the Tatmadaw.

An online database tracking these actions is available at: <https://specialadvisorycouncil.org/>

Finally, this briefing paper also explores suggestions for people wanting to call on the international community to do more to protect the people of Myanmar, including by invoking R2P.

### 2. What is the principle of R2P?

The R2P is a political commitment that there is a "Responsibility to Protect" populations against the atrocities of genocide, war crimes, crimes against humanity and ethnic cleansing. This political commitment is firmly based on the legal obligations of States in the UN Charter and under international law.

R2P was endorsed at the United Nations World Summit, a rare convening of world leaders held in September 2005. Its purpose was to enable more effective responses to situations involving atrocities, such as those seen in the 1990s in Rwanda and the former Yugoslavia. Peacekeepers there failed to stop atrocities, largely due to their limited authority to act.

R2P is the responsibility of all States (the "international community"), through the UN. Usually, but not necessarily, it involves the UN Security Council authorising action, including military action, to protect civilians. It has also included measures such as arms embargoes and targeted economic sanctions. Recently, on 21 May 2021, the UN General Assembly adopted a resolution to include R2P as a topic in its annual meeting agenda. 115 States voted in favour, with 28 abstaining and 15 voting against it. The last time the General Assembly adopted a resolution on R2P was in 2009.

### 3. What are the “pillars” of R2P?

The UN has defined three “pillars” of R2P:

1. Each State is responsible to protect its own population against atrocities. This can include measures to address impunity, including ratifying the Rome Statute of the International Criminal Court (ICC).
2. When a State cannot fulfil its responsibility, the international community should provide encouragement and support. This tends to involve assistance to prevent atrocities, such as combating hate speech. It can also involve statements by the UN General Assembly, which call upon a State to fulfill its duties, but are not enforceable.
3. When a State manifestly fails to protect its population, the international community has a responsibility “to take collective action, in a timely and decisive manner.” This usually applies when State institutions are themselves committing atrocities, and it can lead to action by the Security Council.

### 4. What is required to invoke R2P?

There are no set criteria on when R2P applies, and what specific measures should be invoked. However, two factors clearly must be present.

The first factor is the need to protect civilians against atrocities. These days, many early warning systems exist, and the international community almost always has ample warning that civilians require substantial protection.

The second factor is the political will of States to act. Global geo-political dynamics have changed since world leaders endorsed R2P in 2005. Many atrocity situations have gone unaddressed by the Security Council, particularly when permanent members perceive that their political interests differ.

### 5. What is the UN Security Council’s role?

For the lawful use of military force under R2P, authorisation is required from the Security Council, using its powers under the UN Charter (see below). An exception could be where a State invites another State to enter its territory to provide protection support, but that is highly unlikely to occur outside a UN resolution.

Security Council authorisation is not required for arms embargoes, targeted sanctions or accountability efforts. However, Security Council authorisation is helpful, because it makes the measures universally legally binding and enforceable. But separately from the UN, States can generally take these actions, either unilaterally or multilaterally with others (as with European Union sanctions, for example).

### 6. What are different types of R2P actions?

#### Use of military force

The original and central intention of R2P was to compel the Security Council to authorise military force and other coercive measures to protect civilians from atrocities, even without permission from the State concerned. Several resolutions have authorised the use of force in reference to the responsibility to protect.

Separate to this is strengthening the ability of UN peacekeepers to protect civilians. The norm for UN Missions is that peacekeepers can only use their weapons in self-defence. Each Mission usually needs to sign a legal agreement with the host country committing to this. In several cases in the 1990s, peacekeepers failed to stop atrocities for this reason. So, another intended objective of R2P was to address this problem by enabling the mandate of UN peacekeepers to be widened beyond self-defence.

#### Arms embargoes

The scope of action under R2P has widened due to Security Council inaction in authorising military force. R2P has been invoked as a reason to

restrict or prohibit the flow of arms and police equipment into a country, with the intention of preventing weapons going to perpetrators. This is a type of sanctions that can take the form of a comprehensive arms embargo on a country. Because it is authorised by a Security Council resolution, it is binding on all States and enforceable.

For example, in a December 2013 resolution that referred to the responsibility to protect, the Security Council outlawed arms transfers to the Central African Republic. This embargo included: weapons and ammunition; military vehicles and equipment; spare parts for arms-related equipment; related training; and related items. This applied to arms going to any actor, with an exception for peacekeepers.

Note that the Security Council would not impose an arms embargo selectively, that is, an arms embargo that affected State institutions, such as the Tatmadaw, but not non-State armed groups, such as Ethnic Armed Organisations (EAOs). Any arms embargo would likely apply to all actors.

### **Targeted sanctions**

Another measure can be targeted sanctions. The objectives could be: to penalise individuals and institutions involved in atrocities; to demonstrate an international commitment to respond to atrocities; and to discourage others from perpetrating atrocities. This may even prevent atrocities, by depriving perpetrators of the resources required to continue them.

For example, in a July 2018 Security Council resolution that referenced the responsibility to protect, asset freezes and travel bans were imposed on several individuals in South Sudan, including for their involvement in atrocities.

### **Promoting accountability**

Impunity threatens the protection of civilians, particularly by emboldening perpetrators to continue carrying out atrocities against them. When a State is unwilling to prosecute perpetrators of crimes under international law,

the Security Council has a responsibility to respond, including by referring the situation to the International Criminal Court (ICC). In a February 2011 resolution referencing the responsibility to protect, the Security Council referred the situation in Libya to the ICC. This is the second of only two cases the Council has referred to the ICC. The first case was the situation in Sudan's Darfur region in 2005, months before the global commitment to R2P.

When a State is unable to prosecute perpetrators of atrocities, it can refer the situation to the ICC itself, if it is a party to the Rome Statute, the treaty creating the Court. If the State is not a party, it can declare acceptance of ICC jurisdiction, and then ratify the treaty to best enable prospects for justice. While not strictly part of R2P, this is consistent with the core principle of atrocity prevention.

### *The international "three cuts" strategy*

The Special Advisory Council for Myanmar was conscious of these action options under R2P when it called for the international "three cuts" strategy against the Myanmar military:

1. Cut the weapons supply: a global arms embargo;
2. Cut the cash supply: targeted sanctions against junta leaders and companies that are owned or controlled by the military;
3. Cut the impunity: bring the junta leaders before the International Criminal Court.

### **Other measures**

These days most R2P measures fall under the UN's pillars 1 and 2, to encourage and assist States to protect against atrocities. Activities typically include: situation monitoring; risk analysis; early warning systems; and prevention work such as developing legislative measures to counter hate speech. The UN Office on Genocide Prevention and the Responsibility to Protect, including a Special Adviser on R2P, support these activities. These are all endorsed by the UN General Assembly.

In some cases, measures could also include diplomatic efforts to prevent atrocities, such as a principled mediation engaging all parties.

## 7. Is R2P a law?

R2P is a political and moral commitment to act against atrocities. While it is based on law, it is not a law itself, and does not create new legal obligations upon States. But it does broaden legal justifications for international responses to atrocity situations. A key purpose of R2P is to encourage the UN Security Council to use its existing authority to prevent atrocities.

International law has long required each State to protect its own population against atrocities. But international law generally does not oblige States to protect the populations of other countries. The main exception to this is in cases of genocide, where members of the Genocide Convention are obliged to take action to prevent and punish it. Yet even in genocide situations, States often fail to act, particularly if it involves military intervention.

Under the UN Charter, war is illegal except in self-defence or where it has been authorised by the Security Council under the UN Charter. State sovereignty and non-intervention are key aspects of international law. Historically, States have considered these as more important than preventing atrocities. This is one of the main reasons the international community has often not intervened decisively in situations of atrocities.

To address this, R2P proposed a new political concept: while State sovereignty was traditionally understood to mean having the right to control the territory of a country, the R2P proposal was that State sovereignty also involves responsibility. If the State could not meet its responsibility to protect its population against atrocities, this would permit certain international actions to ensure its responsibility was met. Even at that time, it was a complex and controversial argument, involving politics as much as it involved law.

When the UN General Assembly endorsed R2P at the 2005 World Summit, it referred to Chapter 7 of the UN Charter. This empowers the Security Council to authorise interventions to protect international peace and security. That could include using military force, arms embargoes, and other coercive measures. The 15-member Security Council therefore has a special responsibility for R2P. Lawful actions must be authorised through a resolution, which requires at least nine votes in support, with no use of veto powers by any of the five permanent members (China, France, Russia, UK and US). When so authorised, the actions become binding on all UN member states and legally enforceable.

## 8. What are the main critiques of R2P?

One criticism of R2P is that, once military action is authorised by the Security Council, it can be extended beyond a protection of civilians mandate to forcing regime change. This is cited as a reason the Security Council has not agreed to apply R2P in Syria and Yemen.

Another criticism is that R2P is applied selectively, mostly in places where none of the five veto-wielding permanent members of the Security Council has significant political interests. This may partly explain the lack of decisive responses in Syria and Myanmar.

Also, like the application of the Genocide Convention, States can sometimes waste time debating whether R2P applies, rather than taking timely actions using the tools available.

## 9. Is R2P applicable in Myanmar?

Since the 1 February 2021 coup, Tatmadaw soldiers have been involved in killings, torture and arbitrary detention – some of which appear to constitute crimes against humanity.

Members of the Tatmadaw, a State institution, have perpetrated atrocities against individuals and groups throughout Myanmar for decades. These have included war crimes, crimes against

humanity, ethnic cleansing and possibly genocide. Many of these atrocities have been extensively documented, including by members of SAC-M when in the recent past they each held senior positions commissioned by the UN Human Rights Council.

There have been calls for R2P in Myanmar in the past, including in 2008 to facilitate an international humanitarian response to Cyclone Nargis, and in 2017-2018 to protect people against atrocity crimes by the military, especially the Rohingya in Rakhine State. There has been and there remains a clear need for the Myanmar population to be protected from atrocities perpetrated by the Tatmadaw.

## **10. Can the international community protect civilians against atrocities in Myanmar?**

Based on an assessment of global political dynamics and the experience of interventions in other countries, any foreign military intervention in Myanmar is extremely unlikely and could also drastically worsen the situation.

However, the UN Security Council has the responsibility and authority to invoke other measures, namely: imposing a comprehensive arms embargo on Myanmar; imposing targeted financial sanctions against senior military officials and all military-owned companies; and referring the situation in Myanmar to the International Criminal Court.

Several important international justice initiatives are already seeking to address atrocities in Myanmar by combatting impunity, including: the International Criminal Court; the UN Independent Investigative Mechanism for Myanmar; and proceedings in the International Court of Justice. The UN Human Rights Council also mandates a Special Rapporteur for human rights in Myanmar.

At the same time, it is important to recognise that those justice processes can take a long time, and the outcomes are not guaranteed.

The Security Council, for its part, has a lengthy history of failing to act decisively to protect civilians against atrocities in Myanmar. No action has ever been taken on Myanmar, not even in response to crimes against humanity and possibly genocide against the Rohingya. The possibility for action following the coup should be understood in this context.

## **11. Could R2P be invoked to address the COVID-19 crisis in Myanmar?**

For decades, successive military regimes have prioritised military spending over public health infrastructure. Since the 2021 coup, medical workers who refuse to work under the junta have been threatened, beaten and detained. The COVID-19 public health crisis has been significantly exacerbated due to these factors.

SAC-M has called upon the UN Security Council to urgently mandate an international humanitarian intervention in Myanmar, including aid workers on the ground, to get life-saving assistance to millions of people suffering under the COVID-19 outbreak. This call has been made without reference to R2P.

R2P was developed to address atrocities. If it could be established that the junta has deliberately withheld medical care to the population as a deliberate strategy to weaken resistance to the coup, this may constitute an atrocity and thereby justify calling for R2P. But it could take time to establish if these are the facts. If R2P is called for in this instance, States may waste time debating whether R2P applies, delaying the urgent action that is required now. This is what happened when R2P was unsuccessfully proposed after Cyclone Nargis.

## **12. Should people call for R2P in Myanmar?**

Residents of Myanmar continue experiencing massive assaults on human rights, democracy and the rule of law – involving atrocities and tactics of terror employed by the Tatmadaw. They have a



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specialadvisorycouncil.org

info@specialadvisorycouncil.org

right to call for international protection as they see fit. Historically, a strong and unified nationwide movement tends to be the most powerful tool against colonialism, repression and atrocities.

The feasible options for international action are cutting arms to the Tatmadaw; cutting cash to the Tatmadaw; and cutting the Tatmadaw's impunity for crimes. SAC-M calls this the global "three cuts" strategy.

The Security Council should remain under pressure to take actions under R2P, but history suggests the Council will be slow to act, if it acts at all. The Security Council has a sorry history of failing to fulfil its obligations under the UN Charter.

Outside the R2P framework, some members of the international community are already imposing measures. Many States have imposed targeted sanctions, some businesses have cut military ties, and in June 2021 the UN General Assembly asked all States to prevent the flow of arms into Myanmar. Although not yet sufficient, these measures are significant.

The National Unity Government has already responded to calls for R2P by accepting ICC jurisdiction back until 2002, when the treaty entered into force. Accepting jurisdiction since 2002 signals to minority groups that the atrocities they have experienced are worthy of investigation, as well as the crimes committed since the 2021 coup. Retrospective jurisdiction also enables the IIMM and ICC to use existing investigation files, therefore strengthening their ability to bring trials. The NUG should take the next step now and promptly ratify the Rome Statute.

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*The Special Advisory Council for Myanmar is a group of independent international experts, who came together in response to the February 2021 military coup in Myanmar, to support the peoples of Myanmar in their fight for human rights, peace, democracy, justice and accountability. For information about SAC-M and details of our work, please visit <https://specialadvisorycouncil.org/>*