

Revisiting 'R2P' and the rant of an irresponsible hypocrite

Wednesday, 06 May 2009

Last Updated Wednesday, 06 May 2009

By Kalana Senaratne I admired Prof. M Sornarajah's authoritative work titled 'The International Law on Foreign Investment' during the course of my law studies in London a few years ago. Little did I know then that he unabashedly defended one of the most brutal terrorist organizations in the world, the LTTE. He argued once that confederacy should be seriously considered, as 'if war is to recommence, there is still the fact that the borders of the Tamil state would have been drawn up in a recognized manner'. Why? Because 'the best solution is the creation of Eelam', and confederacy paves the way for that (see his 'Eelam and the Right to Secession'). Unfortunately, this was hypocrisy of a most serious and irresponsible kind, exhibited so shamelessly by an academic attached to a prestigious institution as the National University of Singapore.

Today, he writes what seems to be a hastily-drafted, mind-boggling piece titled 'An opinion: Does Britain have a right to intervene in Sri Lanka?', in which he argues (sadly, but not surprisingly) that Britain should intervene militarily. The opinion, as Prof. Sornarajah admits, has been sought by some British citizens of Tamil origin. As it exasperates me greatly to argue with one who is well and truly converted, who is already a theoretician of sorts of the LTTE and who justifies its terrorism, I wish to avoid debating the question of whether or not Britain should intervene. In any case, the limitations of British power today to get a ceasefire deal in place, let alone initiate military intervention, were quite evident after British Foreign Secretary David Miliband's recent visit to Sri Lanka. However, what is sad about the opinion of Prof. Sornarajah is that it reflects very clearly how impoverished he is today in his analysis of certain principles of law as well as his understanding of the concept of Responsibility to Protect (R2P). I limit my views to certain issues raised by him as regards this R2P concept. R2P: 'right'/'duty' and intention Prof. Sornarajah claims that in devising the concept of R2P the 'idea was to ensure that, whatever the international law position on the principle of humanitarian intervention is, there is a right recognized by the international community to provide assistance to a civilian people'. Firstly, there is something fundamentally wrong here. I ask again, a 'right' to provide assistance? Or, shouldn't it be: a 'duty' to provide assistance? While the jural correlative of 'right' is 'duty' (as pointed out by Hohfeld), it is the providers of assistance who have a duty to provide such assistance, while those who receive assistance, if at all, should possess the right to receive such assistance. Secondly, Prof. Sornarajah's understanding of why this R2P concept was devised is misplaced. As pointed out by Ramesh Thakur, R2P sought to do three things; to change the conceptual language from 'humanitarian intervention' to 'responsibility to protect', to pin the responsibility on state authorities at the national and the UN Security Council, at the international level, and ensure that when interventions do take place they are done properly (see The United Nations, Peace and Security). Hence, the authors of R2P were well aware that if R2P is to gain legitimacy it couldn't subvert the Charter provisions relating to the use of force, or proceed to come up with a concept promoting intervention 'whatever the international law position on the principle of humanitarian intervention is', as Prof. Sornarajah thinks. Whatever the flaws of the concept may be, it still does provide for certain precautionary criteria (i.e. the six criteria for military intervention, the threshold criteria of just cause, right intention, last resort, proportionality etc.) that should be taken note of before intervention takes place. Hence, Prof. Sornarajah's interpretation is wholly irresponsible and damaging to a clear understanding of why the R2P was devised and what it contains. R2P: its status in international law Prof. Sornarajah makes another assertion: 'The Responsibility to Protect is now well recognized in international law. It results from an international instrument which the General Assembly of the United Nations approved in 2005 at the World Summit'. It is quite unclear as to what is meant here. The fact is that while R2P is not a concept well recognized in international law, the responsibility to protect citizens is a basic responsibility not so novel to international law. What is the meaning of 'recognized' in this specific context? Does Prof. Sornarajah mean 'legitimacy'? What is the purpose of his rather lousy reference to an 'international instrument' approved by the UNGA in 2005? To be precise, this 'international instrument' he refers to is the 2005 Outcome Document of the High Level Plenary Meeting of the General Assembly - which is not a legal document. It was a political document, and as is the case with all documents of a political nature drawn up by states; it is wrong to rush in to attach legal connotations or regard such documents as creating any legal obligations. In addition, what was recognized by states in the above document (as set out in paragraphs 138-140 of the document) was the state's responsibility to protect its population and not the concept of 'Responsibility to Protect' (if Prof. Sornarajah understands the distinction). The paragraphs merely reiterate the current position in international law - i.e. the need to resort to peaceful means to protect populations as per Chapters VI and VII of the UN Charter, failing which Chapter VII measures would be looked into. The R2P concept (as opposed to the general responsibility of states to protect its citizens) contains much more than what is covered in the three paragraphs of the 2005 Outcome Document.

Humanitarian intervention Prof. Sornarajah also claims in this opinion that where this duty to protect is violated by a state, it is 'incumbent on other members of the international community to intervene and ensure that the persecuted group is protected' (in other words, he is referring to the notion of 'humanitarian intervention'). Having said so, he goes on to state that 'such intervention is legitimate in international law' and that 'it is opposed only by a few states like China, Russia, Sudan and Zimbabwe'. This is a rather serious and pathetic claim. Humanitarian intervention, while being the exceptional form of intervention which falls outside the provisions of the UN Charter, cannot by its very nature be always legitimate. Its 'legitimacy', if at all, is to be assessed on a case-by-case basis. Secondly, it is wrong to state that such intervention is opposed only by a few states. The most striking feature about the Kosovo intervention was that it was opposed thrice by the NAM group of states at the UN General Assembly (a total of 113 member states then). Where then is the support or endorsement of the

notion of humanitarian intervention? As pointed out very clearly by Ramesh Thakur (quoted above), who was part of the International Commission on Intervention and State Sovereignty (ICISS), which drafted the R2P report, "the weight of historical baggage is too strong for a new consensus to be formed around the concept of humanitarian intervention...all parts of the developing world (as well as others) are seriously concerned about issues of double standards and selectivity", and "there is unanimous opposition to the idea of Western military intervention unauthorized by the UN", which is the principal method in which humanitarian intervention takes place. This opposition is further established by the fact that three months after the NATO action in Kosovo, a Ministerial Declaration produced at a meeting of Foreign Ministers of the Group of 77 noted: "The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or international law." As Ian Brownlie (Chichele Professor (Emeritus) at Oxford) notes, this represented the views of 132 states, including 23 Asian states, 51 African states, 22 Latin American states and 13 Arab states. Does this reflect the opposition of a few states, as Prof. Sornarajah claims? R2P: confusion over process Towards the end of his opinion, Prof. Sornarajah claims: "In the case of the British Government, its duty is clear in this regard. It, now, subscribes to a principle of humanitarian intervention, which justifies even the use of unilateral armed force in order to achieve humanitarian ends such as the protection of the civilians caught up in the hostilities in the North of Sri Lanka. Failing the use of this doctrine, it has the duty to ensure their protection as a result of the new doctrine relating to the Responsibility to Protect". In other words - if unilateral intervention fails, armed intervention as per the R2P doctrine should be resorted to. Firstly, it is abundantly clear that Prof. Sornarajah not only wholeheartedly supports unilateral intervention which goes beyond basic international law norms, but supports the intentional repetition of such an illegal course of action to offer a lifeline to a terrorist organization, such as the LTTE. Secondly, Prof. Sornarajah exhibits sheer ignorance of the R2P concept and the process by which military intervention could be resorted to under the R2P concept. The fundamental position of the R2P concept is that military intervention is to be considered as the absolute last resort, and such intervention, if necessary, should be principally authorized by the UN Security Council (as per the UN Charter). Now, unilateral intervention by a state takes place beyond the Charter provisions, illegally, when there is absolutely no prospect of garnering sufficient support at the Security Council. How then could a state, logically, resort to unilateral intervention and having failed that later on try to initiate intervention as per the UN Charter? Such a proposition as pointed out by Prof. Sornarajah makes absolute nonsense, a complete mockery of the situation. How ridiculous, how desperate a proposition is this! The invasion of Iraq, just like the Kosovo intervention, shows the procedure adopted by those wanting to intervene. Noble concept "R2P" is undoubtedly a noble concept which attempts to address a serious question relating to the protection of citizens of a state. But it contains serious flaws, and as I have pointed out earlier (in R2P or R2PT?: Responsibility to Protect from Terrorism), R2P does not justify military intervention in the Sri Lankan context. But there is a greater problem that R2P faces today - the problem of protecting itself from being thrown around and thrashed about irresponsibly by two-bit academics who cannot make head or tail of what the concept truly means. Yes, by academics like Prof. M. Sornarajah, who have reached unfathomable depths of desperation, willing to sacrifice decades of expertise, repute and standing acquired in the field of international law, just in order to save a terrorist organization as the LTTE. (The writer holds an LL.M degree from University College London) Courtesy: Island.lk