International Crisis Group
WORKING TO PREVENT CONFLICT WORLDWIDE

Testimony by Mark L. Schneider, Senior Vice President, International Crisis Group on "International Disaster Assistance: Policy Options" to the Senate Foreign Relations Subcommittee on International Foreign Assistance, Economic Affairs and International Environmental Protection

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I want to thank the chairman Senator Robert Menendez and the ranking member Senator Chuck Hagel for the opportunity to testify before the Subcommittee this afternoon on "International Assistance: Policy Options."

The current humanitarian crisis in Burma following the devastation of Cyclone Nargis has raised again the question of the policy options available to the international community when governments pose the risk of large-scale loss of human life to their own people. As the committee has noted, Darfur, and most recently Zimbabwe, raise the same complex questions of what recourse exists when a government's actions, its failure to act or its inability to act produce massive humanitarian crises.

What is the responsibility of the international community and the nation states that comprise that community when the magnitude of loss of life appears likely to reach or crosses the line of mass atrocities---whether genocide, war crimes, ethnic cleansing or crimes against humanity?

Let me begin by noting that the International Crisis Group came into being in the aftermath of Rwanda and Srebrenica more than a decade ago. The intent of our founders was to bring field-based analysis of conflict situations to the desks of decision-makers in an effort to help them find policy options to prevent massive loss of human life or to bring deadly violence to an end. We now operate in some 60 countries with permanent offices or on-going presence in 29 countries. We also have advocacy offices in New York, London, Moscow and Beijing as well as the Washington office I direct. Our methodology has been clear, nearly from the start:

--First, our analysts in the countries identify the drivers of conflict.
--Second, based on that analysis, together with our senior staff, Crisis Group defines policy recommendations on how to prevent those factors from erupting into deadly violence, how to end it or how to work in a post conflict environment to prevent its recurrence.
--The third leg of our conflict prevention stool involves advocacy by our board and senior staff in the countries themselves, and around the globe.

Our board is abnormally large, abnormally impressive and hopefully abnormally influential. Today it is co-chaired by Lord Patten of Barnes, former European Commissioner for External Relations, and Career Ambassador Thomas Pickering, former Under-Secretary for political affairs. Of the Americans, we have one former Republican Senator, one former Democratic Senator as a founder and a chairman emeritus and a former cabinet member from each party. We also have a half dozen former heads of state, more than a dozen former ministers of defense and foreign relations, former international officials, including as of July 1, former Secretary General Kofi Anan, and business and civil society leaders.

Crisis Group is led by our president Gareth Evans, former Australian foreign minister, and also previously co-chairman of the Canadian-sponsored International Commission on Intervention and State Sovereignty and a member of the Secretary-General's High-Level Panel on Threats, Challenges and Change in 2005.

Gareth Evans championed the concept of a "Responsibility to Protect" (R2P) specifically to enable common ground to be found -- and this was a very divisive debate right through the 1990s -- between those who argued for an almost open-ended 'right to intervene' in the case of catastrophic human rights disasters, and those who argued at the other extreme that state sovereignty meant that there could be no such intervention without the consent of the state involved. In the past 50 years, the international community has come to recognize that a Rwanda, Darfur, Cambodia or Sarajevo cannot be veiled from international responsibility by a curtain of national sovereignty. From the Genocide Convention, the Universal Declaration of Human Rights, the International Covenants, the International Treaties against the use of Torture and Disappearance to the establishment of the International Criminal Court---it is clear that there are limitations on state sovereignty today that did not exist before the Holocaust and post Second World War belief that "Never again" must become more than rhetoric.

As someone who served in the first Bureau of Human Rights in the State Department, I still harbor enormous optimism about how far we have come in overcoming those who assert the absolute nature of national sovereignty. We could never have imagined then that a doctrine incorporating a collective "responsibility to protect" individuals against mass atrocities would be unanimously adopted by the United Nations General Assembly.

In specific response to the committee's question, yes, the Responsibility to Protect is a fundamental element of a multilateral framework to prevent and respond to mass atrocities.

The doctrine begins with the recognition that states bear primary responsibility for protection of their populations against mass atrocity crimes -- genocide, war crimes, ethnic cleansing and crimes against humanity -- and the international community's normal role is to cooperate, support and help states acquire the capacity to protect their populations.

***The World Summit Outcome Document**, September 2005. Heads of state and government attending the 60th Session of the UN General Assembly agreed as follows:*

"138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."

The concept begins with prevention, focusing on root causes as well as the potential triggers of a crisis and with the development of an "early warning" capacity on the part of the United Nations to be able to recognize conditions approaching R2P situations. We still would argue that much more needs to be done to enable the UN and regional organizations to fulfill that early warning capability.

The concept then accepts in paragraph 139 a collective responsibility where states fail, through intent or incapacity, working through the United Nations, to react, when conditions reach the point of "genocide, war crimes, ethnic cleansing and crimes against humanity". The concept calls first to use the whole array of peaceful tools---diplomacy, humanitarian assistance, special rapporteurs, commissions of inquiry, arms embargos, targeted sanctions on the responsible government officials, economic and financial sanctions, even preventive deployment of military forces—for instance EUFOR on the Chadian border.

"139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."

In fact, the Responsibility to Protect encompasses three finite components: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild, particularly the latter if the military force has occurred. ICISS and Secretary General Kofi Annan, in his report to the 2005 Summit, entitled "In Larger Freedom: Toward Development, Security and Human Rights for All," embraced that multi-faced nature of the Responsibility to Protect.

A month before the Millennium Plus 5 Summit, I had the occasion to address the Global Partnership for the Prevention of Armed Conflict at the United Nations, which brought together civil society from around the world in support of the R2P concept. We were there in part to urge its adoption by the Summit. It was civil society from north and south that was demanding a collective response when states engaged in, or failed to stop mass atrocities, but also that prevention had to be at its core.

Secretary Ban-Ki-moon, in naming my distinguished fellow panelist, Professor Edward Luck, his special advisor on R2P, emphasized the importance of making it "operational" and in that context, hopefully, this hearing will advance that effort.
Crisis Group also is helping that process as one of the founders of the "Global Centre for the Responsibility to Protect" which was launched in February with a strong statement of support by Secretary General Ban. He urged the Centre, based at the Ralph Bunche Institute at CUNY, to help the international community "take the principle of the responsibility to protect from concept to actuality, from word to deed." That is still the challenge.

As we engage in this discussion, I think it is useful to recall what the Responsibility to Protect is not.

- It is focused squarely on mass atrocity crimes like genocide and crimes against humanity, and not human security problems more generally like HIV/AIDs or the impact of climate change or natural disasters (where these don't also involve the commission of mass atrocity crimes).
- It is not the same as "humanitarian intervention" when that term is understood, as it almost invariably now is, as meaning solely the coercive use of military force against the wishes of the involved nation-state to preserve human life: it is a broader concept, focused heavily on prevention, and assistance and persuasion, with coercive measures, including military force, only appropriate as a last resort.
- It does not justify the automatic and unconditional use of military force even when violation reaches the levels of mass atrocities: there are other prudential criteria to be satisfied, including whether coercive intervention would on balance do more harm than good.

How then does the Responsibility to Protect help us in considering the cases of Burma, Darfur, and Zimbabwe?

For Burma/Myanmar, the starting point has to be that R2P is not itself about protecting people from the impact of natural disasters. Of course they **should** be protected – and our humanitarian obligation as an international community is to do everything we possibly can to ensure that they are – but the R2P principle, as agreed in 2005, and with all that it implies about the possible coercive use of military force if all else fails, only cuts in when mass atrocity crimes are involved.

The real question here is whether it can be argued that crimes against humanity **were** involved in the recklessly indifferent response of the generals.

The official figures in May were of some 60-100,000 dead and 2.4 million affected. It was unconscionable that the Burmese generals prevented international aid and international aid workers for several weeks from reaching the victims. Amnesty International has estimated that two weeks after the cyclone, two-thirds of the victims had not yet received aid. Surely had all western ships in the area been allowed to bring relief to bear---some of them would have received water and food and life-saving help.

On Friday, the UN's Office of Coordination of Humanitarian Assistance (OCHA) issued its 31st Situation Report noting that still more than one million of the 2.4 million victims of the cyclone have yet to receive aid. It cited a month-old government estimate of 77,738 killed and 55,917 missing. It also noted that some 250 international aid workers from ASEAN, the UN and supporting countries are making a new assessment of need.

This weekend, I noted that USAID and Agricultural officials have been able to go on the ground to assess the cyclone-affected areas, that USAID has been able to coordinate 35 DOD C-130 flights with relief aid. The UN, ASEAN and other relief teams currently are engaged in assessment and coordination. However, let us be clear. Not enough was done immediately and people died needlessly as a result. And not enough is being done today to reach all of the victims with all of the resources available from the outside community—without obstacles, without visa restrictions, without considering whose flag is on whose ships or whose planes.

So does this constitute a crime against humanity of a kind that would trigger the R2P principle?

On the face of it, whether the government sends its armed forces to murder large numbers of its citizens or whether it denies them food or medicine and they die of hunger or disease is different only in kind.

The definition of crimes against humanity, most recently incorporated by the international community in the Rome statute states, covers along with widespread or systematic murder, torture, persecution and the like, "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Starving villages by denying food relief on a continuing basis until the residents died when such relief was available seems, on any view, to get very close to what is punishable here, although there is obviously room for lawyers to argue about

whether "intentionally" means cold- blooded, deliberate willingness to cause death or reckless, negligent, indifference as to whether people died or not.

Even if one gets past this hurdle, there is still an issue, in any application of the R2P principle, as to whether the coercive use of military force is appropriate.

The relevant criteria (which have been part of all the public discussion of R2P but unfortunately were not included in the 2005 World Summit resolution – partly because of U.S. administration objections) include not only "the **just cause** threshold", that is the finding of "serious and irreparable harm"; **right intention**, such that the primary purpose of the intervention is to halt or prevent the harm; **last resort**, that non-military means have been tried and failed, or can be judged unlikely to succeed; **proportional means** that the "scale, duration and intensity" of the planned military intervention is the minimum necessary to protect the population; and – very importantly– **reasonable prospects** that the intervention will prevent the crime or bring the atrocities to a halt and that the consequences of the intervention will not themselves be worse than if there had been no intervention. In the Burma/Myanmar context many voices were heard from aid agencies and others arguing that as a practical matter military intervention would not work, or make matters on the ground even worse for the affected population.

There are no easy answers to any of these questions, and it is clear that there was no consensus about how to answer them in the Security Council, which is under international law the proper forum to debate and resolve any issue involving the use of military force other than in self-defense.

But one can certainly argue that the existence of the R2P norm—as endorsed by the UN General Assembly at the 2005 World Summit, and endorsed subsequently by the Security Council in resolutions -- on protection of civilians in armed conflict UNSCR 1674 and again in UNSCR 1706 in authorizing UN peacekeepers to Darfur—may well have been a factor in the decision-making of the Burmese generals to remove some of the obstacles to relief. The French foreign minister's call for urgent military action based on that concept undoubtedly did not go unnoticed in Burma even if, at the time, it brought him much criticism. When in subsequent days the argument was expressed by the UK and others a little more carefully, making clear that crimes against humanity had to be involved, not just an inadequate disaster response, if the R2P principle was to apply, and that there was at least a prima facie case to be made that crimes against humanity were being committed, there is reason to believe that the possibility of being held to account by international criminal law concentrated the minds of the generals.

Overall the diplomatic pressure did have some effect, and the R2P argument was part of it. Burma's Asian neighbours -- the ASEAN countries, China and India -- were reluctant to go down this path, but clearly made important representations of their own. There is quite a distance to go in winning international consensus on how the R2P principle should apply in a variety of situations, and few will be more difficult – or raise more arguments on both sides – than the Burma case. But the effort to build that consensus,

and further refine and develop the R2P doctrine so that it does become an effective blueprint for action, should continue.

The Committee also raised the question of the applicability of the "Responsibility to Protect" in other situations:

Zimbabwe: If the hijacking of food relief aid continues as well as the widespread denial of food assistance to the political opposition in Zimbabwe continues, then we may well have to ask the question as to whether we are approaching a similar R2P situation in Zimbabwe in which crimes against humanity, not just lesser human rights violations, are involved, with all that implies. At the very least, reenergized diplomatic efforts are urgently called for—both with respect to the humanitarian crisis and with respect to the political crisis. WFP has said some 4 million people are in need of food aid.

Darfur: The case of Darfur is much more clearly a matter of R2P and the United Nations Security Council has considered the matter not once but multiple times with the adoption under Chapter VII of Resolution 1706, authorizing the UN Mission in Sudan to "use 'All Necessary Means' to Protect United Nations personnel, Civilians under threat of physical violence" and specifically citing R2P in that context. If there is any indication of the need to make R2P operational it is Darfur. Resolution after resolution, the United Nations members have failed to follow through on their commitments---whether to impose a no-fly zone, to act when the government of Sudan failed to disarm the Janjaweed, to take over by last December from the African Union full operational control of the peacekeeping force, to establish unity of command and lastly to fully deploy the 26,000-strong UN force with the troops needed, whether or not the government of Sudan approves.

This was not a failure of the doctrine of R2P but the failure of will of the members of the UN to enforce the authority of the Security Council, and to use instruments of international pressure that will really work. That remains a challenge even as we speak. It is not a matter here of assuming that the only remedy is the coercive use of military force: there are strong reasons for believing that this, even if it could be mobilized, would be counterproductive, and many of those engaged in humanitarian relief have argued that the negative collateral costs are too high in terms of halting relief aid and putting humanitarian workers—foreign and domestic—at risk. What is disturbing is that the willingness to use the full range of other instruments and to maintain unceasing pressure to achieve an end to the crisis has been lacking. Making R2P fully operational remains an ongoing challenge.

The Committee also has asked that we look beyond R2P to whether other policy instruments which might be implemented and whether regional organizations have a role to play. Clearly there are roles of regional organizations and the work of ASEAN in inducing Burma to move as far as it has is one example. In the Western Hemisphere, the Pan American Health Organization has a long history of cooperation on humanitarian issues and with the OAS might well be a source for movement towards regional agreements on mandatory access for humanitarian relief. Multilateral organizations like

the OAS or the UN are more likely to be accepted by nation states than countries whose motives might be suspect. The principles begin with the notion that it is people who are sovereign, not governments. While a state has primary responsibility, the International Committee of the Red Cross and others have suggested that when a state refuses or is unable, an international treaty would require that humanitarian assistance be allowed in accord with certain principles:

- That humanitarian assistance be provided without discrimination
- That it be provided through an inter-governmental organization or a qualified organization unaligned with any government and qualified by OCHA
- That priority in assistance go to those most urgent cases of distress
- That it not be used to advance any political or religious view
- That where possible it respect local culture, customs and norms

In the 21st century, surely we are at a stage where norms should protect human life and people rather than the absolutist definitions of state sovereignty coming out of the 17th century.