

# THE RESPONSIBILITY TO PROTECT: CONSOLIDATING THE NORM

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## 1. A very specific responsibility

The problem that the concept of the responsibility to protect was designed to address is a very specific and quite narrowly focused one. What should the international community do about the very worst things that human beings can do to each other, the mass atrocity crimes of genocide, ethnic cleansing, other crimes against humanity and war crimes? What should we do if and when we are confronted with the horror of another Cambodia, another Rwanda, and another Bosnia?

The responsibility to protect is not about conflict more generally, or human rights violations more generally, or human security more generally: it is not about solving all the world's problems, just one small sub-set of them. Around the world there are, at any given time, many situations of actual or potential conflict within or between states, which justify international attention and concern, to a greater or lesser extent, in the United Nations Security Council or elsewhere: the International Crisis Group reports each month on around 70 of them. And around the world at any given time there may be as many as 100 different human rights situations which may justify, to a greater or lesser extent, concern or attention in the UN Human Rights Council or elsewhere.

But the country situations which will properly justify concern on responsibility to protect grounds are many fewer than these, probably no more than 10-15 at any given time. They are countries where mass atrocity crimes are clearly being committed, here and now. They also include countries where such crimes seem to be imminently about to be committed, because all the early warning signs have been building to a crescendo. In addition, these are countries – which are a little harder to pin down, but still important – where there seems to be a serious risk that such crimes will be committed in the foreseeable future unless effective preventive action is taken, with that risk being evident on the basis of such factors as a history of such crimes in that country, the continuation or re-emergence of relevant internal tensions, and weak or struggling institutional capacity to keep a potentially explosive situation under control.

## 2. Mass atrocities and the international community after 1945

Until very recently there was no consensus at all on how the international community should respond to these situations. The prevailing notion was that it was no-one's business but their own if states murdered or forcibly displaced large numbers of their own citizens, or allowed atrocity crimes to be committed by one group against another on their soil. Even after World War II – with the creation of the UN and many new notional international human rights protections, including the Genocide Convention –

there was no generally accepted principle in law, morality or state practice to challenge that approach.

The state of mind that even massive atrocity crimes like those of the Cambodian killing fields were just not the rest of the world's business prevailed throughout the UN's first half-century of existence: Vietnam's invasion, which stopped the Khmer Rouge in its tracks, was universally attacked, not applauded; and Tanzania had to justify its overthrow of Uganda's Idi Amin by invoking 'self-defence', not any larger human-rights justification.

With the arrival of the 1990s, the break-up of various Cold War state structures, and the removal of some superpower constraints, conscience-shocking situations repeatedly arose, above all in the former Yugoslavia and in Africa. But old habits of non-intervention and the focus, to the exclusion of anything else, on Article 2(7) of the UN Charter died very hard. Even when situations cried out for some kind of response, and the international community did react through the UN, it was too often erratically, incompletely or counter-productively, as in the debacle of Somalia in 1993, the catastrophe of Rwandan genocide in 1994 and the almost unbelievable default in Srebrenica, Bosnia, just a year later, in 1995.

Things came to a head again with the new round of killing and ethnic cleansing starting in Kosovo in 1999. Most governments and commentators – though not all – accepted that the situation was deteriorating so rapidly and alarmingly that external military intervention was the only way to stop it. At the same time, the Security Council found itself unable to act in the face of a threatened veto by Russia. The action that was then taken, by a so-called coalition of the willing, was outside the authority of the Security Council, in a way that challenged the integrity of the whole international security system (just as did the invasion of Iraq four years later, in far less defensible circumstances).

### **3. The emergence of the responsibility to protect**

Throughout the decade of the 1990s a fierce argument raged, not least in the UN General Assembly, with the trenches dug deep on both sides and the verbal missiles flying thick and fast. On the one hand, based largely in the global North, there were those who rallied to the cry of 'humanitarian intervention': the notion that there was a 'right to intervene' (*droit d'ingérence* in Bernard Kouchner's influential formulation) militarily, against the will of the government of the country in question, in these cases. On the other hand, those in the global South were much more inclined to take an absolute view of state sovereignty, understandably enough given that so many of them very proud of their newly won sovereign independence, very conscious of their fragility, all too conscious of the way in which they had been on the receiving end in the past of not very benign interventions from the imperial and colonial powers and not very keen to acknowledge the right of such powers to intervene again, whatever the circumstances.

This was the divide that cried out for a new consensual approach to be forged. And this was the divide which the new concept of the responsibility to protect was designed to

bridge. The core idea was first articulated in the report in 2001 of the International Commission on Intervention and State Sovereignty (ICISS), which I co-chaired with Mohamed Sahnoun, and has continued through to underlie the unanimous resolution of the General Assembly in 2005, adopting the Outcome Document of the 2005 World Summit.<sup>1</sup> And that core idea is a very simple one.

The issue is not the '*right*' of big states to do anything, including throwing their weight around militarily, but the '*responsibility*' of *all* states to protect their own people from atrocity crimes, and to assist others to do so by all appropriate means. The core responsibility is that of the individual sovereign state itself, and it is only if it is unable or unwilling to do so that the question arises of *other* states' responsibility to assist or engage in some way. The core theme is not intervention but *protection*: look at each issue as it arises from the perspective of the victims, the men being killed or about to be killed, the women being or being about to be raped, the children dying or about to die of starvation; and look at the responsibility in question as being above all a responsibility to *prevent*.

The question of *reaction* – through diplomatic pressure, through sanctions, through international criminal prosecutions and ultimately through military action – arises only if prevention has failed. And coercive military intervention, so far from being the heart and soul of the doctrine – as was the case with 'humanitarian intervention' – should be considered only as an absolute last resort, after a number of clearly defined criteria have been met, and the approval of the Security Council has been obtained.

There are no inherent or necessary double standards in any of this. The responsibility to protect is a universal doctrine of universal application. We all know that there are potential problems with the exercise of the veto by the permanent members of the Security Council, but that is a constraint that applies across the whole of the UN's peace and security role, and is in no way made worse by the embrace of the new norm. The whole point of the responsibility to protect is to open up a new universe of policy options, and to make the issue of coercion in any form only very rarely applicable.

The language of the World Summit Outcome Document did contain some changes as compared with the original proposals in the ICISS and the other reports which preceded the 2005 Summit from the High Level Panel<sup>2</sup> and the Secretary-General<sup>3</sup>, but they were essentially presentational: the core underlying ideas remained unchanged. There was a tightening in the description of the conduct – or feared conduct – necessary to make a case one of RtoP concern, with the focus now on four specific categories of crime under international law, rather than 'serious harm' to populations more generally. And when it came to describing the nature of the response required, whereas the earlier documents cut the cake horizontally (into three layers: prevention, reaction and rebuilding), the

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<sup>1</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001); United Nations, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, October 24, 2005, paras. 138, 139, and 140.

<sup>2</sup> A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change, annex to the Note by the Secretary-General, UN Doc. A/59/565, December 2, 2004.

<sup>3</sup> In larger freedom: towards development, security and human rights for all, report of the Secretary-General, UN Doc. A/59/2005, March 21, 2005.

summit document sliced it vertically into three segments, emphasising, respectively: the role of the state itself, that of others to assist it and that of others to take appropriate action if it was ‘manifestly failing’ to prevent its own people suffering atrocities, with the emphasis in each case being primarily on prevention, but embracing reaction and rebuilding as well. But whichever way one slices it, it is the same cake. The ‘four crimes and three pillars’ of paragraphs 138 and 139 of the 2005 Outcome Document are described with great clarity in the Secretary-General’s report now before us, and I would like to make it clear that I personally – although one of the primary authors of the original formulations – am completely comfortable with, and supportive of, this language and do not argue for amending it in any way.<sup>4</sup>

So in 2005, with the Outcome Document language unanimously adopted by more than 150 heads of state and government, we did achieve the long-dreamed international consensus. It was not a matter of the North pushing something down the throats of the South: there was strong support in the debate from many countries across the developing world, and from sub-Saharan Africa in particular, with many references to antecedents for the new principle in the Constitutive Act of the African Union (AU), and the AU’s insistence that the real issue was not ‘non-intervention’ but ‘non-indifference’. And there was certainly recognition that mass atrocity crimes had occurred as terribly in the North – most recently in the Balkans – as they ever had in the South: this was a universal problem demanding a universal solution.

The new language – with its fundamental conceptual shift from ‘the right to intervene’ to ‘the responsibility to protect’ – enabled us to find at last common ground on what had been for decades a hugely divisive issue, and for centuries a neglected one. Those who want to continue the debate wholly in terms of ‘the right to intervene’, and to rail against ‘humanitarian intervention’ as a continuing manifestation of the age-old tendency of the powerful to do as they like against the weak, are flogging a very dead horse. ‘Humanitarian intervention’ is dead; it is ‘the responsibility to protect’ that lives.

#### **4. The substance and normative character of the responsibility to protect**

I do not argue that the responsibility to protect can be properly described at this stage as a new rule of customary international law. That will depend on how comprehensively this new concept is implemented and applied in practice, as well as recognised in principle, in the years ahead. But I do argue that, with the weight behind it of a unanimous UN General Assembly resolution adopted at head of state and government level, the responsibility to protect can already be properly described as a new international norm: a new standard of behaviour, and a new guide to behaviour, for every state.

The task now – as the Secretary-General makes clear in his report, shortly to be debated in the UN General Assembly – is not to revisit or renegotiate the 2005 consensus, but to

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<sup>4</sup> Implementing the Responsibility to Protect, report of the Secretary-General, UN Doc. A/63/677, January 12, 2009.

ensure that the responsibility to protect concept is properly and effectively implemented in practice.

The Secretary-General's report, superbly crafted by his Special Adviser Ed Luck, is an excellent description of the many different kinds of action that are relevant, under each of the three pillars: (1) if states are to meet their own responsibility to protect their own people; (2) if other states are to discharge their responsibility to assist those seeking help and support in achieving more effective protection; and (3) if other states are to respond in a 'timely and decisive fashion' if a state is 'manifestly failing', for whatever reason, to protect its own people.

The report recognizes that while many UN member states may be more comfortable focusing just on the first two pillars, which are about prevention rather than reaction, and by definition do not have any element at all of involuntary intervention or coercion, it is crucial – if we are to be really serious about ending mass atrocity crimes once and for all – that there be equal readiness to act under the third pillar if circumstances cry out for this. And that does not just mean 'sending in the Marines': it can mean, for example, diplomatic persuasion and pressure of the kind that was exercised so well by Kofi Annan in Kenya, the threat of international criminal prosecution, arms embargoes, targeted sanctions, or perhaps the jamming of hate radio stations.

The report also makes clear, as does the 2005 consensus resolution, that if coercive military force does seem the only way of stopping mass atrocity crimes, that has to be done absolutely in compliance with the UN Charter, which means for most practical purposes by resolution of the Security Council under Chapter VII. Part of the unfinished business of 2005 is to reach agreement on the criteria for the use of force the Security Council should apply in deciding whether coercive military force is justified in any particular case. If the Security Council behaves erratically or disappointingly on these issues, as it sometimes has in the past, the task is not to find alternatives to the Security Council, or go round it, but to make the Security Council work better.

What does *not* need any further clarification is the Security Council's power to make such a decision. The suggestion sometimes made that, when atrocity crimes are being committed within the boundaries of a single state there cannot be a threat to "*international* peace and security", as Chapter VII of the UN Charter requires, is completely at odds not only with the Security Council's own practice, but also the very long chain of General Assembly resolutions from the 1960s to the late 1980s, describing the monstrous apartheid regime in South Africa as just that.

## **5. The General Assembly's consideration of the responsibility to protect**

The debate about to be held in the General Assembly in July of 2009 will be an extremely important one, for at least three reasons. First, it will be an opportunity to clarify some of the conceptual misunderstandings which still continue to exist about the scope and limits of the responsibility to protect. We should not be disconcerted that it has taken some time for clarity and consensus to emerge about the precise scope and limits of the responsibility to protect: that is just the way the world works. There has

been argument, and a degree of confusion, as to how individual cases should be characterised, but the definitional lines are now becoming much clearer. For example the ongoing Darfur and Eastern Congo cases, the Kenya case of early 2008, and that of Sri Lanka this year, are on any view clear-cut responsibility to protect situations. By contrast Iraq in 2003 and Russia's intervention in Georgia 2008 were, on any objective view, *not* such cases. And the Burma/Myanmar cyclone case in 2008 was an initially ambiguous one which took time to clarify: the cyclone was not itself a responsibility-to-protect trigger, but if the inadequate military regime response had continued long enough to itself amount to a crime against humanity because of the reckless indifference to loss of life involved, then it would have been. All these distinctions seem to be much better understood and accepted than they were even just a year ago, but the UN debate will be an opportunity to clarify them further.

Secondly, the debate will be an excellent opportunity to explore in detail the range of policy options available to states under all three pillars, and the many institutional and resource-availability challenges which will have to be overcome if we are going to be able in practice to put in place effective preventive measures, effective reaction measures, and effective post-crisis rebuilding measures to ensure that underlying causes are addressed and the problem does not recur. We should not be too disconcerted if the necessary international response to even clear-cut responsibility to protect situations has been less effective than it could and should have been: that is another regrettable fact of international life. The lesson is not that the concept is irrelevant but that we have to do better in applying it in the future. Darfur is a case in point. Clearly the international response has been inadequate to resolve the situation, and it remains an appalling abdication of responsibility that there has been still no progress made on the key issue of supplying the 22 helicopters needed by the UNAMID peacekeeping force, when there are over 11,800 such aircraft in the global military inventory. But that said, international engagement has clearly improved since the worst horror period in 2003-04 and, for all the new problems that the ICC arrest warrant issued against President Bashir in March 2009 has produced, it does seem to be building up the pressure on the governing regime to improve its behaviour. And it remains misconceived to think that Darfur was ever a case for coercive military intervention: even if resources had been on offer, on any view this would have done more harm than good. The real question is how bad would the situation now be if there had been no international engagement at all, and no sense at all of any international responsibility to protect Darfur's suffering victims.

And third, and in many ways most important of all, this debate will be an opportunity, if it is approached in the right spirit, to build the foundations for the exercise of political will, which we all know is the ultimate critical ingredient. It is not enough just to have a common conceptual understanding of what we should all be doing, and the practical capacity ready and available to do it, as crucially important as these elements are. There must be the will to act as well. And now is the time to be looking forward, not backward, and building that will.

## 6. Conclusion

The bottom line challenge for all of us in this respect can be very simply stated. Whatever else we mess up in the conduct of our affairs, let us ensure that we never again mess up – as we have so terribly often in the past – when it comes to protecting people from mass atrocity crimes: genocide, ethnic cleansing, other major crimes against humanity and war crimes. Let us get to the point when another Cambodia, or Rwanda, or Bosnia or Darfur looms on the horizon, as it surely will, that our reflex response as an international community is not to say, as states have been saying for centuries, ‘this is none of our business’ but rather to accept immediately that it *is* the business of all of us, and have the debate only about who should do what, when and how.

And let us recognize, above all when we have these debates, that the crucial concern should not be national interest, or ideology, but our common humanity – our obligation simply as human beings not to stand by watching our fellow human beings suffering unbearable, unutterable horrors. That is what the responsibility to protect is all about, that is why it is so important that it be effectively implemented in practice, and that is why the forthcoming General Assembly debate must be about building on the consensus we have already, remarkably, achieved in 2005, looking not backwards, but forwards.

For all that remains to be done in meeting the remaining conceptual, institutional and political challenges that confront the new responsibility to protect norm, the achievement so far remains very significant indeed. We have seen in just a few short years a fundamental shift in attitudes on the scope and limits of state sovereignty. The notion that the state could do no wrong in dealing with its own people has meant that for centuries human rights catastrophes have gone unprevented, unchallenged and even unremarked. The emergence and consolidation of the new norm may not in itself guarantee that the world has seen the end of mass atrocity crimes once and for all. But it gives us a better chance of getting there than we have ever had before.



Hon. Gareth Edwards