

## THE RESPONSIBILITY TO PROTECT AND PROSECUTE?

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()Two of the most significant normative advances since 1945 are the establishment of the International Criminal Court in 1998 and the U.N.s adoption of the responsibility to protect norm in 2005. Discussion and analyses of the protection of civilians and the prosecution of perpetrators have hitherto proceeded along separate lines. In fact they are two sides of the same coin.

()Given the changing nature and victims of armed conflict, the need for clarity, consistency, and reliability in the use of armed force for civilian protection lies at the heart of the U.N.s credibility in the maintenance of peace and security. The need to help and protect civilians at risk of death and displacement caused by armed conflict is now paramount. Diplomats, international organisations, and NGOs alike will be judged on how well they discharge or dishonour their international responsibility to protect. The agenda of the Security Council, the World Bank, inter- and non-governmental humanitarian actors, international criminal justice institutions, and international civil society converge on this point. So too does that of U.N. peace operations.

()The U.N. Charter was never meant to be a tyrants charter of impunity or his constitutional instrument of choice for self-protection. The World Court handles cases between states, not individuals. Without an international criminal court that holds individuals responsible for their actions, acts of genocide and egregious violations of human rights have generally gone unpunished in the last 60 years.

()An international criminal court with universal jurisdiction has been the missing link in the system of international criminal justice. The ICCs permanence, institutionalised identity, and universal jurisdiction will enable an escape from the tyranny of the episodic and attenuate perceptions of politically motivated investigations and selective justice. It should be an efficient and cost-effective alternative to ad hoc tribunals with respect to money, time, and energy, and may also provide sensible alternatives to dubious sanctions and unilateral military retaliation.

Both the responsibility to protect norm and the ICC must be sensitive to some delicate judgment calls. Even when the just cause threshold is crossed of conscience-shocking loss of life or ethnic cleansing, intervention must be guided by the precautionary principles of right intention, last resort, proportional means, and reasonable prospects.

()In both tasks protection of victims and prosecution of perpetrators the application of international mechanisms comes second, only after the domestic mechanisms are either exhausted or powerless. The ICC Statute stipulates that its jurisdiction is activated only when states are unwilling or unable genuinely to investigate or prosecute. Similarly, the responsibility to protect concept expects and requests states first to protect their populations, and triggers international intervention only after governments are either weak and unable, or unwilling (complicit in crimes) to do so.

The problem is the atrocities committed against innocent civilians. The inter-related twin tasks are to protect the victims and punish the perpetrators. Both require substantial derogations of sovereignty, the first with respect to the norm of non-intervention and the second with respect to sovereign impunity up to the level of heads of government and state. At the same time, both require sensitive judgment calls: the use of external military force to protect civilians inside sovereign jurisdiction must first satisfy legitimacy criteria rooted largely in just war theory, while the prosecution of alleged atrocity criminals must be balanced against the consequences for the prospects and process of peace, the need for post-conflict reconciliation, and the fragility of international as well as domestic institutions.

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