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The Responsibility to Protect: Three Pillars and Four Crimes

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The Responsibility to Protect: Three Pillars and Four Crimes

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The adoption of the concept of "Responsibility to Protect" (RtoP) by the Heads of State and Government in the September 2005 United Nations World Summit was a historic landmark which has generated great attention as a potentially powerful instrument to impede humanitarian tragedies. Yet much has been missing, or misinterpreted, in the public discussion of this emerging norm. Some fear that RtoP could be abused by powerful countries to intervene in developing nations alleging altruistic motives, while others believe that RtoP is already a rule of customary international law that should be applied unconditionally and without delay in the face of any humanitarian crisis in the world. To make it workable in real life, the concept must be saved from friends and foes by narrowing its focus and turning RtoP as operational as possible so as to effectively implement it, in line with what global leaders decided in 2005.

The Rocky Road to the Responsibility to Protect

The genocide in Rwanda in 1994, followed by the mass murder of civilians committed in Srebrenica in 1995, shocked world public opinion for the horror of the killings and the lack of action on the part of the international community to impede such crimes against humanity. The United Nations bore the brunt of the criticism for failing to show capacity to act in a timely and effective fashion to stop those massacres; the blame focused on the major powers in the UN Security Council for their political indifference. The UN was created in 1945 to maintain international peace and security by stopping inter-state conflicts, but by the end of the 20th Century most conflicts and peacekeeping operations were actually dealing with civil wars or variations of internal armed conflicts.

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In the opening debate of the 1999 General Assembly, then-UN Secretary General Kofi Annan, frustrated over NATO's intervention to stop ethnic cleansing in Kosovo and the UN's failure to act there, said that the world faced the dilemma of either standing idle in front of unfolding mass atrocities or intervening militarily without a UN mandate to curb gross human rights violations and save lives, in line with a notion of "humanitarian intervention." Annan argued that "State frontiers should no longer be seen as watertight protection for war criminals or mass murderers." He also recalled that the Charter read that "armed force shall not be used, *save in the common interest*" and posed several questions about the nature and means to defend such common interest. The secretary general backed what he perceived as a "developing international norm in favor of intervention to protect civilians from wholesale slaughter."

The proposal was rejected outright by some countries of the South. In parallel, that same year, in April, then-British Prime Minister Tony Blair outlined in a Chicago speech a doctrine of the international community based on the idea of a "just war" aimed at halting or preventing genocide and other gross humanitarian crimes, under certain conditions.

Many world leaders were open to the idea of stopping mass atrocities, including through decisive international action, but rebuffed the stark choice between inaction vs. military intervention in case of a humanitarian crisis. For them, it was necessary to reconcile the morality of legitimacy with international legality.

Such countries felt caught between a rock and a hard place. For example, for nearly two hundred years Latin America suffered *Pax Americana*, preemptive military action and regime change. Mexico, Nicaragua, Cuba, the Dominican Republic, Honduras, Panama, Colombia, Haiti, Guatemala, Grenada and Chile, among others, were invaded or intervened by US administrations alleging altruistic motives. One example was the alleged "preservation of democracy" that led the Richard Nixon administration to destabilize the democratically-elected Chilean government of socialist President Salvador Allende in 1970,

even before it had taken office. Africans and Asians had, on their part, experienced the 19th Century "white man's burden" style of colonialism and imperialism, justified as a noble enterprise supposedly for the benefit of the intervened peoples.

So, the principle of non-intervention became crucial for Latin Americans and other developing nations, but in ways that would respec*t other* principles of the United Nations Charter and regional organizations charters, such as that of the Organization of American States. This was particularly the case in Latin America, where by the late 90s, following two decades of dictatorships, democracy had returned to the region and governments and civil society had become highly sensitive to gross human rights violations.

Latin dictators were not content with committing crimes against humanity at home; they even conspired to assassinate dissidents abroad. The region reached the unpleasant distinction of having given birth to new sorts of abuses then unknown to the modern world, such as the "*desaparecidos.*" The legacy of extrajudicial killings, disappearances of political prisoners, and torture still haunts Latin American societies with its consequences. Therefore, many leaders were eager to find a better alternative than the dilemma of having to choose between *inaction* and *unilateral intervention* to stop humanitarian tragedies.

Africans led the way since they had most suffered humanitarian tragedies. In 2000 the Constitutive Act of the African Union, in Article 4 (b), declared "the right of the Union to intervene in a Member state pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity." The foundations of the RtoP were being laid. In 1996, African diplomat Francis Deng and some of his colleagues at the Brookings Institution had paved the way by introducing the idea of "sovereignty as responsibility." Modern states were seen at the service of the individual, shifting the meaning of sovereignty as control and power to "sovereignty as responsibility."

The Canadian government moved the process forward when, in September 2000, it established the International Commission on Intervention and State Sovereignty which published a report entitled "Responsibility to Protect." The document endorsed the idea of

"sovereignty as responsibility" and conceived *RtoP* as "an emerging norm" entailing three specific responsibilities regarding mass atrocities: to prevent (principally), to react, and to rebuild. The international community, through the Security Council, had a responsibility to act to protect threatened populations if a state proved "unable or unwilling" to do so; but, the use of force, in turn, was contingent upon precautionary measures, including right intention, last resort, proportional means, and reasonable prospects of success.

The UN High-Level Panel on Threats, Challenges and Change, appointed by Kofi Annan in December 2004, followed suit by embracing the Responsibility to Protect notion, later included in Annan's own report "In Larger Freedom" of March 2005, where he urged Heads of State and Government to adopt RtoP as a basis for collective action against the major mass crimes, and agree to act accordingly.

The intergovernmental breakthrough occurred at the September 2005 UN World Summit when leaders declared in the Summit Outcome Document (paragraphs138 and 139), that they accepted the "responsibility to protect" their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from their incitement.

A non-paper by Chile, Mexico and Japan dated May 25, 2005, in the context of the preparation of the 2005 UN Summit, sought to facilitate discussions on the notion of "responsibility to protect," by posing that it should include prevention and international assistance, at the country's request, encompassing development and capacity-building, up to collective action in accordance with the Charter. It was further argued that efforts to prevent genocide and other crimes against humanity had to address root causes such as hatred among ethnic groups and inequality among various groups in a country. And last but not least, it was intended that the United Nations should be entrusted, when appropriate, with the responsibility of acting on behalf of the international community, so as *to avoid unilateral action*, undertaken by a single country or even by an ad-hoc coalition.

Narrowing the Responsibility to Protect

The secretary general's report "Implementing the Responsibility to Protect," dated January 12, 2009, has contributed greatly to turning RtoP into an implementable concept.

The report fine-tuned the discussion on the concept in such a way that it can be summarized in one single phrase: ***three pillars and four crimes***. The pillars are, first, the primacy of State responsibility; second, international assistance; and, third, a timely and decisive response, including by the Security Council. At the same time, the only four crimes comprised in RtoP are: genocide, war crimes, ethnic cleansing, and crimes against humanity. In short, not all humanitarian tragedies or human rights violations can or should activate the RtoP.

The discussion of RtoP has been plagued by misperceptions and myths. This calls for increased knowledge and awareness about it. Approaching RtoP merely in the abstract should be avoided, focusing instead on how the concept would unfold on the ground, "on a case-by-case basis," and on the narrow scope of the four crimes outlined in paragraph 139.

Above all, RtoP is a call addressed to States to deal with serious human rights issues *from within*, and this apparently has not been fully understood. This is the first pillar of RtoP. The Responsibility to Protect refers essentially to the State, which has the duty to protect its populations, whether nationals or not.

This brings us to the question of sovereignty. The concept of sovereignty emerged, along with the State, in the 1500s, as the juridical rationalization of power to ensure domestic peace among the subjects of the sovereign and to unify them to confront foreign enemies. With the passing of time, state sovereignty became a contract whereby the monopoly over the use of force by the state was predicated upon the state's protection of the people within its territory. The modern state assumed explicit responsibilities to protect its populations in the Geneva Conventions, dating back to 1864, in the UN Charter, and in the UN Universal Declaration of Human Rights, as well as in the various conventions dealing with the crimes of genocide, forced disappearances, and torture, among others. In short, the state's responsibility to protect rests on long-standing obligations under international law. As

the secretary general's report asserts, "responsibility to protect is an ally of sovereignty, not an adversary." This is the correct interpretation of article 2.7 of the UN Charter that led the UN to act, not without delay, against the racist regime in South Africa and its apartheid policy.

The notion that the individual State has the primary responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, benefited from the drafting of the International Criminal Court and its principle of *complementarity*. According to this principle, the Court will *complement* national courts so that they retain jurisdiction to try genocide, crimes against humanity and war crimes.

The State itself has the power to set in motion most of the components of RtoP. The State should be alert to the first signs of bigotry, intolerance and human rights violations that could lead to genocide or any of the other three major crimes involved in RtoP. Only if the State is unable to cope with the crisis, should the assistance of the international community be made available. The second pillar is, in this case, international assistance by helping States meet their RtoP or assisting those States before conflicts break out, thus playing "at best a complementary role" as the report rightly interprets paragraph 138 of the Summit Outcome. A preventive approach could include international mediation or good offices, like in the case of post-election violence in Kenya during 2008, consensual military or police deployment, as in the emergency assistance provided in early 2008 by Australia to East Timor after a recurrence of violence, and various initiatives to foster reconciliation.

Encouraging States to meet their obligations, providing them, at their request, with enhanced capacity to protect their populations from the four crimes is fundamental. The emphasis on prevention cannot be overemphasized and, in this respect, the UN Peace Building Commission can play a constructive role in assisting countries emerging from conflict, particularly in the early stages of recovery, to avoid relapse into violence and mass atrocities.

The third pillar is a timely and decisive response by the international community. Evidently, the world leaders in the Summit Outcome were not thinking merely about the use of force --which should always be considered a measure of last resort. Paragraph 139 in this regard is forceful but cautious.

Paragraph 139 refers to peaceful measures that could be undertaken following chapters VI and VIII of the Charter. For example, under article 34 of the Charter, the Security Council could merely send a mission to investigate "any situation which might lead to international friction," as in mass atrocities that have provoked tensions with neighbors, trans-boundary violence, forced migrations, etc. Non-peaceful collective action requires at least two conditions. Here the World Summit Outcome Document took a more precise approach than the Rome Statute of the International Criminal Court, moving beyond the subjective determination if a State is "unwilling or unable" to act, and providing, instead, for more operational conditions, namely the determination to take collective action on a case-by-case basis and only "*should peaceful means be inadequate* ***and*** *national authorities are manifestly failing to protect their populations from genocide*…" In such scenario, Member States "are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII…"

It is clear that the *collective* obligation is not to "intervene," but rather to adopt whatever "timely and decisive" actions the international community deems appropriate, in accordance with the UN Charter. There is no automaticity, triggers, or implicit green lights for coercive action in what the world leaders agreed. Moreover, it may be argued that in the present world scenario, plagued with crises --from financial and food to climate change and terrorism--, there is little appetite to easily activate the coercive components of RtoP

Regional organizations should play a larger role with regard to the third pillar of the "responsibility to protect." In the Outcome Document regional organizations were given a role of cooperating with the UN. Because of geographical proximity, they are better placed to learn first about serious human rights violations. Such distribution of work should

enhance RtoP, in line with Chapter VIII of the UN Charter. The African Union (AU) and the Economic Community of West African States have been playing significant roles in regional peace operations and promoting the transfer of best practices which could help prevent the crimes covered in the RtoP.

Democracy and Responsibility to Protect

Preventing the occurrence of the four crimes covered by the RtoP is a cost-effective investment by the international community. Humanitarian crimes prevention can save lives and put scarce resources to better use in peace-building or combating poverty or disease.

The General Assembly was entrusted by world leaders with the task of continuing consideration of RtoP and its implications. One such consideration would be the development of the second pillar; that is, to discuss a strategy of prevention of the four crimes, through cooperation with countries that so request it. The establishment of "an early warning capability," as the leaders agreed in 2005, would have to be an important component of prevention.

As the 2009 secretary general's report states, "information itself is rarely the missing ingredient" regarding the impending occurrence of genocide and the other three crimes. The point is how that information can be improved, quality-wise, and how it can be shared and assessed by the relevant institutions. More coherence is needed in the sharing of information already available in the UN system so that the competent bodies can adopt timely decisions. A first step has already been suggested by Secretary General Ban Ki-moon when he suggests in his report the convergence of the work of his Special Adviser on the Prevention of Genocide with that of his the Special Adviser on the Responsibility to Protect. Such joint and well-coordinated work would be a first step in the installation of the "early warning capability." The role of global civil society in exercising pressure to address pre-genocide situations can also be an important complement to the early warning capability the world leaders envisioned.

A strategy of preventing the occurrence of the RtoP crimes should contemplate democracy promotion. Democracy is conducive to rooting out some of the causes of those egregious crimes. Democracies, with all their defects, generally do not commit atrocities such as the four crimes covered in the RtoP. Consequently, international mechanisms for the promotion of democracy like the United Nations Democracy Fund (UNDEF), the Rule of Law Coordination and Resource Group, and the UNDP Democratic Governance Program should be strengthened to lend support to countries that so request it. In the long run, the expansion of democracy could be a useful mean to prevent the occurrence of atrocities.

A Cautionary Note

The acceptance of the Responsibility to Protect by the world leaders in 2005 was a major step in the development of international humanitarian law. True, the concept could be abused by the powerful to apply it in line with their national interests to legitimize interventions that have little or nothing to do with the four major crimes. However, cynical misuse should not invalidate what the leaders clearly agreed in 2005: namely state responsibility at the outset, international assistance in a range of peaceful measures, and coercive action only under certain extreme conditions, collectively through the Security Council (or if the Security Council failed to exercise its primary responsibility for the maintenance of peace and security, through the General Assembly, in line with GA Resolution 377 “Uniting for Peace”), and in accordance with the Charter.

Selective application of RtoP is evidently a risk; yet no principle has withstood the test of perfect application and, in any event, principles lose credibility precisely when they are applied in a partisan way. A permanent member of the Security Council indeed could veto a resolution proposing coercive action against a country to safeguard local populations from the four mass atrocities. But, it would be morally and politically wrong to conclude that because the international community cannot act everywhere it, therefore, should act nowhere at all. It would be the equivalent of asserting that since the UN cannot solve all global problems, then it should cease to exist.

The controversy RtoP has generated worldwide suggests caution about the meaning and the limits of the concept. The Responsibility to Protect will gain growing credit and will become a widely accepted norm to the extent it is applied prudently, according to the Charter, and, hopefully, before mass crimes occur thus reconciling the morality of legitimacy with international legality.