

THE RESPONSIBILITY TO PROTECT: A BACKGROUND BRIEFING

WHAT IS THE RESPONSIBILITY TO PROTECT AND WHY DO WE NEED IT?

The Responsibility to Protect (R2P) has many sources: the rise of international humanitarian law starting with the Geneva Conventions in the late nineteenth century and accelerating in the period after World War II; and the profound sense of revulsion at the failure of the international community to act effectively in Rwanda and Bosnia. The need for a broadly accepted new norm to guide the international response to mass atrocity crimes became increasingly apparent.

The United Nations (UN) was established in 1945 to prevent conflicts between states. But with the end of the Cold War, inter-state aggression largely gave way to war and violence inside states. When, during the 1990s, horrific violence broke out inside the borders of such countries as Somalia, Rwanda, and the former Yugoslavia, the world was ill-prepared to act and was paralyzed by disagreement over the limits of national sovereignty.

Throughout the 1990s, the UN was deeply divided between those who insisted on a "right of humanitarian intervention" and those who viewed such a doctrine as an indefensible infringement upon state sovereignty. At the time Secretary-General Kofi Annan warned that the UN risked discrediting itself if it failed to respond to catastrophes such as Rwanda, and he challenged member states to agree on a legal and political framework for action.

In 1999 the failure of the UN Security Council to authorize action to halt "ethnic cleansing" in Kosovo provoked NATO to initiate an aerial bombardment on its own. This deeply divided the international

community, pitting those who denounced the intervention as illegal against others who argued that legality mattered less than the moral imperative to save lives. This deadlock implied a pair of unpalatable choices: either states could passively stand by and let mass killing happen in order to preserve the strict letter of international law, or they could circumvent the UN Charter and unilaterally carry out an act of war on humanitarian grounds.

The 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) formulated the alternative principle of "the responsibility to protect," focusing not on the legal or moral "right" of outsiders to intervene but on the responsibility of all states to protect people at risk. In 2005 the General Assembly for the UN World Summit unanimously accepted their "responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

The Responsibility to Protect concept sought to confront both the Rwanda tragedy and the Kosovo dilemma by stipulating that states have an obligation to protect their citizens from mass atrocity crimes; that the international community will assist them in doing so; and that, should the state be "manifestly failing" in its obligations, the international community is obliged to act.

R2P, as it is commonly abbreviated, seeks to ensure that the international community never again fails to act in the face of genocide, ethnic cleansing, war crimes, and crimes against humanity. By accepting a collective responsibility to protect, the international community has issued a solemn pledge that it cannot lightly ignore.

WHAT FORMS OF HUMAN RIGHTS ABUSE DOES THE RESPONSIBILITY TO PROTECT SEEK TO ADDRESS?

The UN's 2005 World Summit Outcome Document explicitly limits the application of the R2P norm to four types of mass atrocity crimes: genocide, ethnic cleansing, war crimes and crimes against humanity. These terms have been clearly defined in a range of documents, including in the founding statute of the International Criminal Court (ICC).

R2P does not apply to other grave threats to human security, whether from climate change, disease or from many harmful and ruinous state policies, such as the suspension of civil liberties, endemic poverty, mass corruption or coups d'état. Other human rights instruments, legal frameworks and institutions are better suited to address these pressing issues.

WHAT IS A MASS ATROCITY CRIME?

The four types of extreme human rights abuse enumerated in the 2005 UN World Summit Outcome Document are captured by the shorthand, "mass atrocity" or "mass atrocity crime." These crimes are defined with varying degrees of precision in international law.

Genocide is the subject of the 1948 *Convention on Prevention and Punishment of the Crime of Genocide*, which outlaws actions taken "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."

The category of war crimes is the broadest. The founding statute of the ICC lists fifty such acts, including torture, hostage-taking, mistreating prisoners of war, targeting civilians, pillage, rape and sexual slavery, and the intentional use of starvation. R2P applies to such crimes even when they are committed in the course of a civil war or other internal conflict. While it may not be possible to specify an exact threshold, it is clear that the commission of war crimes entailing large-scale killing and mass suffering would give rise to a responsibility to protect.

Crimes against humanity include, according to the ICC statute, extermination, enslavement, deportation, torture, rape, extreme forms of discrimination and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Such acts constitute crimes

against humanity when they are widespread and systematic, and committed as conscious acts of policy.

The term "ethnic cleansing" has recently come into general usage and is the least clearly defined of the four legal categories. It is understood to describe forced removal or displacement of populations, whether by physical expulsion, or by intimidation through killing, acts of terror, rape and the like.

HOW DOES THE RESPONSIBILITY TO PROTECT WORK?

At the heart of the R2P norm is the principle that states, with the aid of the international community, must act to prevent mass atrocity crimes. Central is the idea that concerned outsiders should help states prevent these gross abuses through what the UN document characterizes as "diplomatic, humanitarian and other peaceful means." This includes strengthening state capacity through economic assistance, rule-of-law reform, the building of inclusive political institutions; or, when violence seems imminent, through direct mediation. The intense diplomatic engagement following the disputed election in Kenya (2007), or the work of neighbors and the UN to support the government of Burundi as it addressed ethnic conflict (1995-2005), demonstrate cooperative efforts to prevent atrocities.

Only when such means have been unsuccessful should the international community, acting through the UN Security Council, turn to coercive measures. These could include such measures as sanctions, arms embargoes, or the threat to refer perpetrators to the ICC. Should peaceful means be inadequate and the state be manifestly failing to protect its population, then-and only then-would the Security Council consider the use of military force.

WHEN IS MILITARY FORCE JUSTIFIED?

A timely intervention could have halted, if not prevented, the genocidal horror in Rwanda and perhaps also in Cambodia and elsewhere. The ICISS report and the UN Secretary-General's *In Larger Freedom* document proposed five "precautionary principles" or "criteria of legitimacy" to help guide possible military action.

1. The violence in question must include large-scale actual or threatened loss of life or ethnic cleansing;
2. The purpose of the intervention must be to prevent or halt suffering;

3. Military force must be the last resort;
4. The means must be commensurate with the ends sought;
5. And the intervention must have a reasonable prospect of success.

No formal principles presently exist to guide UN Security Council decision-making on the use of force. These standards can and should, however, continue to inform public debate and deliberations among governments.

HOW DOES THE RESPONSIBILITY TO PROTECT AFFECT THE IDEA OF SOVEREIGNTY?

States have long accepted limits on their conduct, whether towards their own citizens or others. The UN's *Universal Declaration of Human Rights* requires that states protect individual and social rights; the Geneva Conventions and various treaties and covenants prohibiting torture, trafficking in persons, or nuclear proliferation similarly restrict state behavior.

At the same time, there has been a shift in the understanding of sovereignty, spurred both by a growing sensitivity to human rights and by a reaction to mass atrocity crimes perpetrated upon citizens by their own leaders. Sovereignty is increasingly defined, not as a license to control those within one's borders, but rather as a set of obligations towards citizens.

Francis Deng, the former UN Special Adviser on the Prevention of Genocide and the former representative of the Secretary-General on internally displaced persons, developed the concept of "sovereignty as responsibility." Chief among those responsibilities, Deng and others have argued, is the responsibility to protect citizens from genocide, war crimes, ethnic cleansing and crimes against humanity.

IS THE RESPONSIBILITY TO PROTECT A TOOL OF THE POWERFUL AGAINST THE WEAK?

Critics of R2P insist that it will never be applied to major powers, and thus it is undermined by inconsistency. However, R2P imposes obligations on all United Nations member states to prevent mass atrocity crimes.

R2P covers crimes occurring anywhere in the world, regardless of the status or prestige of the perpetrator. Given that the more powerful states have a far greater capacity to extend assistance - and far greater economic,

diplomatic, logistical, and military capacity - their responsibility to respond and react to mass atrocity crimes is arguably greater. R2P is fundamentally about protecting the weak (those subjected to mass atrocity crimes) from unconscionable abuse of power.

WHAT IS THE STANDING OF THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL LAW?

R2P is not yet a rule of customary international law, but it can certainly be described as an international "norm." A norm of international conduct is one that has gained wide acceptance among states - and there could be no better demonstration of that acceptance in the case of R2P than the unanimously adopted language of the 2005 World Summit Outcome Document. Once a norm has gained not only formal acceptance but widespread usage, it can become part of "customary international law."

While R2P has moved rapidly within the international arena, it does not have the degree of acceptance that would justify its description as "law." R2P continues to evolve both politically and legally. It has been formally invoked by the UN Human Rights Council and the Security Council, including through resolutions regarding situations in Côte d'Ivoire, Libya, Mali, South Sudan and Yemen.

WHAT IS THE STANDING OF THE RESPONSIBILITY TO PROTECT IN THE UN?

Since the 2005 World Summit the UN and its member states have aided in the evolution of R2P through actions that encourage wider acceptance of the norm and facilitate its implementation.

The UN General Assembly has held four informal interactive dialogues on R2P between 2009 and 2012. The UN Secretary-General released a report on R2P in advance of each of the interactive dialogues. The Secretary-General's 2009 report, entitled *Implementing the responsibility to protect*, introduced a three pillar strategy for R2P implementation. The three succinctly stated pillars are:

Pillar 1: The primary protective responsibilities of a state

Pillar 2: International assistance and capacity building

Pillar 3: Timely and decisive response

The three pillars have since served as a frame for discussing the different facets of implementation and response in R2P risk situations and have been frequently invoked by member states when addressing R2P.

The Secretary-General's 2010, 2011 and 2012 reports encouraged states to think more extensively about R2P implementation. The 2010 report, entitled *Early warning, assessment and the responsibility to protect*, focused on UN institutions and their capacity to monitor and respond to early warning signals. The 2011 report, entitled *The role of regional and sub-regional arrangements in implementing the responsibility to protect*, addressed the capacities regional organizations possess for mass atrocity prevention and the mechanisms through which states can achieve effective collaboration. The 2012 report, entitled *Timely and decisive response*, focused on the need to clarify coercive dimensions of Pillar 3.

Member states have directly engaged with the R2P dialogue in many ways. Since 2009, 108 states and 5 regional organizations have participated in the interactive dialogues on R2P. In addition, during their statements at the annual opening of the UN General Assembly, 49 states have referred to R2P. States also discuss R2P in other human rights forums, including in debates on the protection of civilians.

As stated by the UN Secretary-General in a 2011 speech on R2P, "this is a critical moment in the life of the responsibility to protect. In the six short years since its endorsement by the World Summit this doctrine has gone from crawling to walking to running....By now it should be clear to all that the responsibility to protect has arrived."

WHERE DO WE GO FROM HERE?

There are three major challenges as we continue to move R2P from theory to practice. The first is conceptual - to ensure that the scope, and limits, of the norm as it has evolved are well understood in all parts of the world, so that misunderstandings (for example that R2P is only about military intervention) do not persist. As new R2P risk situations arise, there needs to be broad international consensus about how to respond.

The second challenge is institutional. There is a need to ensure that governments and intergovernmental organizations have available all the diplomatic, civilian and, as a last resort, military capability needed to ensure effective early warning and timely action. We need

international institutions with a capacity to provide essential assistance to those countries who need it and to people desperately in need of protection.

The third, as always, is political. We need to ensure that when and wherever mass atrocity crimes next occur, the necessary commitment will be there from international decision-makers. This means having consensual international arrangements in place for effective mobilization by both governments and civil society. It also requires that there is consistency in the application of R2P.

Crises threatening human security continue to arise, and with them debates over the most appropriate response. The international community of states will continue to encounter difficult questions about the applicability of R2P. But R2P remains the best hope for those who aspire for a world free from genocide, war crimes, ethnic cleansing and crimes against humanity. R2P represents an end to impunity, injustice and inaction.