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The Responsibility to Protect: Ending mass atrocity crimes once and for all

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There is one very simple message at the heart of what I want to say to you this evening, and have been saying to audiences around the world for the last decade: whatever else we mess up in the conduct of international affairs let us at least ensure that we never again mess up when it comes to protecting people from mass atrocity crimes – more specifically, genocide, ethnic cleansing and other major crimes against humanity and war crimes.

Let us get to the point that when another man-made humanitarian catastrophe like Cambodia, or Rwanda, or Bosnia, or Darfur looms on the horizon, as it surely will, we will never again have to look back after another disastrous failure, asking ourselves -- with a mixture of anger, incomprehension, and shame – how we could possibly have let it happen again. And let us get to the point that -- when the lives of thousands or more of men, women and children are again at risk because a country has shown that it is unable or unwilling to end a man-made humanitarian crisis within its borders -- the reflex response around the world is not to say, as countries have been saying for centuries, that it's 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.

The Birth of the Responsibility to Protect

It is almost impossible to overstate the extent to which there has been an absence of consensus on these issues in the past. In pre-modern – including biblical -- times, mass atrocities seem to have been a matter of indifference to everyone but the victims. With the seventeenth century Treaties of Westphalia and the emergence of the modern system of nation states that indifference simply became institutionalized: sovereign states did not interfere in each others internal affairs. Certainly there were instances in the nineteenth century of European states intervening in various corners of the Ottoman Empire to protect Christian minorities at risk – and the term "humanitarian intervention" was first used in this context. But there was no generally accepted principle in law, morality or state practice to challenge the core notion 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 awful experience of Hitler's Holocaust encouraging the embrace of new legal norms -- the recognition of individual and group human rights in the UN Charter and, more grandly, in the Universal Declaration; the recognition by the Nuremberg Tribunal Charter in 1945 of the concept of 'crimes against humanity', and the signing of the Genocide Convention in 1948 -- things did not fundamentally change. The

overwhelming preoccupation of those who founded the UN was not in fact human rights but the problem of states waging aggressive war against each other. And what actually captured the mood of the time, and the mood that prevailed right through the Cold War years, was, more than any of the human rights provisions, Article 2(7) of the UN Charter: "Nothing should authorise intervention in matters essentially within the domestic jurisdiction of any State".

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 was dominant 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, and the end of the Cold War, the prevailing complacent assumptions about non-intervention did at last come under challenge as never before. *The* quintessential peace and security problem – before 9/11 came along to change the focus to terrorism – became not interstate war, but civil war and internal violence perpetrated on a massive scale. With 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 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.

Then the killing and ethnic cleansing started all over again in Kosovo in 1999. Not everyone, but certainly most people, and governments, accepted quite rapidly that external military intervention was the only way to stop it. But again the Security Council failed to act, this time in the face of a threatened veto by Russia. The action that needed to be taken *was* eventually taken, by a coalition of the willing, but without 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).

Throughout the decade of the 1990s a fierce doctrinal, and essentially ideological, argument raged over these issues. On the one hand, there were advocates, mostly in the global North, of "humanitarian intervention" - the doctrine that there was a "right to intervene" ("*droit d'ingerence"* 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 there were defenders of the traditional prerogatives of state sovereignty, who made the familiar case that internal events were none of the rest of the world's business. It was very much a North-South debate, with the many new states born out of decolonization being very proud of their new won sovereignty, very conscious of their fragility, and 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 their right to do so again, whatever

the circumstances. And it was a very bitter debate, with the trenches dug deep on both sides, and the verbal missiles flowing thick and fast, often in very ugly terms.

This was the environment which led Kofi Annan to issue his now famous challenge to the General Assembly in 1999, and again in 2000: *"*If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?".And it was this challenge to which the Canadian-government responded by appointing the International Commission on Intervention and State Sovereignty (ICISS), which I co-chaired with Mohamed Sahnoun, that came up in 2001 with the idea of 'the responsibility to protect'.

The core idea is very simple. Turn the notion of 'right to intervene' upside down. Talk not about the 'right' of big states to do anything, but the *responsibility* of *all* states to protect their own people from atrocity crimes, and to help others to do so. Talk about the primary responsibility being that of individual states themselves – respecting their sovereignty – but make it absolutely clear that if they cannot meet that responsibility, through either ill-will or incapacity, it then shifts to the wider international community to take the appropriate action. Focus not on the notion of 'intervention' but of *protection*: look at the whole issue from the perspective of the victims, the men being killed, the women being raped, the children dying of starvation; and look at the responsibility in question as being above all a responsibility to *prevent,* with the question of reaction – through diplomatic pressure, through sanctions, through international criminal prosecutions, and ultimately through military action – arising only if prevention failed. And accept coercive military intervention 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.

As many blue-ribbon commissions and panels have discovered over the years, however, it is one thing to labour mightily and produce what looks like a major new contribution to some policy debate, but quite another to get any policymaker to take any notice of it. But the extraordinary thing is that governments *did* take notice of the idea: within four years – after two further reports (by a High Level Panel appointed by the UN Secretary General, and by Secretary-General Annan himself) the responsibility to protect had won unanimous endorsement by the more than 150 heads of state and government meeting as the UN General Assembly at the 2005 World Summit, and within another year had been embraced in a Security Council resolution.

The language of the relevant paragraphs, 138 and 139, of the World Summit Outcome Document, the product of protracted and difficult lead-up negotiations, did contain some changes as compared with the original proposals in the Canadian and other reports which preceded the 2005 Summit, but they were essentially presentational: the core underlying ideas remained unchanged. Probably the most important of them was a tightening, I think sensibly, in the description of the conduct – or feared conduct – necessary to make a case one of responsibility-to-protect concern. Rather than the vague and potentially rather broad concept of 'serious harm' to a population, the focus now was on four specific categories of crime already well established in international law (or, to be more precise, three clearly defined crimes – "genocide", "war crimes" and "crimes against humanity" – plus "ethnic cleansing", which is not itself a legal term of art but involves behaviour which, depending on the context, could readily be subsumed under one of the other three crimes).

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 of 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, and the AU's insistence that the real issue was not 'non-intervention' but 'non-indifference'. And there was certainly a 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.

I do not argue that the responsibility to protect could in 2005, or can now, be properly described at this stage as a new rule of customary international law. It may become one, but 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 General Assembly resolution 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.

Conceptual Challenges

Four years after 2005, and particularly following a long-awaited debate in the UN General Assembly at the end of – on which I will say a little more later – I am confident that the consolidation of the new norm is on course. But it is certainly the case that it continues to face challenges, of three kinds – conceptual, institutional and political.

The main conceptual challenge is to ensure that the scope and limits of the norm are universally understood, that it is seen to be not about conflict generally or human rights generally or, even more grandly and broadly, human security generally, but about a narrow subset of extreme cases, involving the commission – or likely commission -- of mass atrocity crimes, with crimes against humanity at the core.

Looked at this way there are probably no more than ten or fifteen cases at any given time where it is appropriate for the political and policy debate to be conducted in responsibility to protect terms – because large scale atrocity crimes are being committed, seem imminently about to be committed, or are on a path to being committed in the reasonably near term if appropriate remedial action is not taken, by the state itself or others assisting it. By contrast, there are likely to be 70 or 100 or more country or regional situations where at any given time it is appropriate to talk about conflict prevention or resolution strategies, responses to human rights abuses of various kinds, or reactions to other kinds of human security concerns.

There also remain conceptual challenges in explaining, in an environment where there is still considerable dissimulation going on as well as genuine uncertainty, which particular cases are properly characterised as responsibility to protect situations and which are not.

We need to explain why it is, for example, to take those cases most debated in recent times, that the coalition invasion of Iraq in 2003 and Russia's invasion of Georgia in 2008 were *not* justified in responsibility to protect terms; that the Burma-Myanmar cyclone in 2008 was not a responsibility to protect case, but could have been if the generals' behaviour had been characterisable as so recklessly indifferent to human life

as to amount to a crime against humanity, which in the event it was not; that Somalia and the Congo for many years, Darfur since 2003, and Sri Lanka in this year's military endgame, have been properly characterised as responsibility to protect cases, albeit ones where the international community's response has been, for one reason or another, unhappily inadequate; and that Kenya in early 2008 is the clearest case we have had of an exploding situation being widely, and properly, characterised as a responsibility to protect one, and one where the international community's response – in this case diplomatic mediation – did in fact prove to be adequate to bring it under control.

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 should have been. That's just one of the many regrettable facts of international life, and 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, to take one particularly egregious example, the commanders on the ground have been for two years arguing that they need to be effective 22 military helicopters, but none have been forthcoming, despite the fact that there are over 11,800 such aircraft in the global military inventory! But that said, international engagement has clearly improved since the worst Darfur horror period in 2003–04, and for all the new problems produced by the International Criminal Court's arrest warrant issued against President Bashir in March 2009, that action does seem to have been 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, by 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 of any international responsibility to protect Darfur's suffering victims.

Institutional Challenges

In addition to the conceptual challenges, there certainly remain institutional ones, in ensuring for a start that well-intentioned states facing atrocity crime problems get in practice all the assistance they need – and which the 2005 UN resolution clearly encourages other states to give them – in terms of capacity building, effective policy formulation and delivery and, if things get rough and they call for it, the necessary security support.

It means also putting in place worldwide the early warning and response capability, the diplomatic and civilian response capability, the legal response mechanisms and – for extreme cases – the coercive military capability to ensure that the international community, if it has the will, can deliver the appropriate response to whatever new atrocity crime situation that comes along demanding its engagement, again as clearly authorised by the 2005 UN resolution.

One issue that arises in this context is whether, when it comes to putting in place appropriate legal response mechanisms, it is necessary or desirable for the responsibility to protect norm itself, or at least some of its key elements, to be given some more formal legal status. One form this debate is taking is in the context of a move initiated by the Washington University School of Law under the guidance among others of Richard Goldstone, and which has involved a workshop at The Hague in which I

recently participated, to draft and secure the ultimate adoption of a new Convention on Crimes Against Humanity.

The idea of this is to fill a gap which has become apparent in the array of legal instruments available to deal with atrocity crimes, notwithstanding the emergence of the International Criminal Court, the aim being for national courts around the world to have clear-cut jurisdiction to deal with these cases, and for there to be in place mechanisms to enable effective international cooperation in the investigation and punishment of perpetrators.

In its present draft form the convention is focused on individual criminal responsibility, and limits state responsibility essentially to introducing the necessary legislative and other measures to make that real. But a specific question has arisen as to whether it would be useful to seek to inclusion, as David Scheffer for one has suggested, of some explicit *state* responsibility provisions, expressly prohibiting the commission of crimes against humanity by any state-party entity itself, and requiring state-parties to act, as a matter of legal obligation, in accordance with the 2005 UN resolution..

My own reaction, for what it is worth, is that such an exercise would certainly give new weight and prominence to the responsibility to protect norm, and anything that reinforced the obligations of states to act constructively and not destructively in relation atrocity crimes would on the face of it be hugely welcome. But, and this is for me a show-stopping "but", the risks probably outweigh the benefits. It would be nightmarishly difficult to get states to sign up to direct legal liability of the kind proposed, be a major distraction that would work against them signing up to anything else, and would in any event not make a great deal of practical difference since any enforcement action against a state itself would have to be a matter for the Security Council, and if the 2005 UN Resolution is to be taken seriously it already has that role.

Political Challenges

In addition to the conceptual and institutional challenges I have described, proponents of the responsibility to protect will always face a political challenge – to activate the real world response that is actually required to avert or halt an atrocity crime catastrophe. That means having in place mechanisms and strategies to ensure both peer group pressure, by government friends of the responsibility to protect, to energise the highest levels of governmental and intergovernmental decision-making, and bottom up grass roots action to kick the decision makers into action if they are showing signs of hesitation.

Mobilising political will in any policy context whatever, national or international, requires the coming together of good information, good organization and good arguments. As to the last, it is helpful that 'national interest' is now a much broader concept than it used to be. It's not quite as easy now as it was for Chamberlain in the 1930s to talk of faraway countries with people of whom we know nothing: we do know now that states that cannot or will not stop internal atrocity crimes are the kind of states that cannot or will not stop terrorism, weapons proliferation, drug and people trafficking, the spread of health pandemics and other global risks that every country in the world has a stake in ending.

There is still a long way to go before we can be confident that the automatic consensual reflex of which I spoke earlier will cut in at the time it should and in the way it should in every new case that arises, and longer still before we can credibly claim that the responsibility to protect principle in all its dimensions has evolved into a rule of

customary international law. But the evidence, particularly over the last year or so, is of advance rather than reverse.

Exhibit 1 is the international response to the explosive violence in Kenya early in 2008 – immediate, deeply concerned, committed and effective, in spectacular contrast to the lamentable abdication of responsibility in Rwanda 14 years earlier.

Exhibit 2: some important states who were among the very last to join the 2005 consensus, and who dragged their feet for a long time subsequently, have now very definitely changed course, with India's Foreign Minister Pranab Mukherjee, for example, saying publicly in April this year that the Government of Sri Lanka had a clear 'responsibility to protect' its civilians at extreme risk in the final operations of the military against the Tamil Tigers.

And Exhibit 3, the most persuasive of all, the outcome of the debate on the subject in the UN General Assembly at the end of July (for which I was something of a warm-up act, debating my old nemesis Noam Chomsky before the assembled delegates in the Trusteeship Council chamber). In that debate, of the 94 delegates who spoke (representing between them some 180 member states, because some of the presentations were on behalf of regional or other groups), there were only four – the very familiar suspects Venezuela, Cuba, Nicaragua and Sudan – who sought to directly roll back, in the interests of unqualified state sovereignty. Others had reservations and qualifications, mainly to do with the Security Council and the double standards inherent, here as elsewhere, in the Permanent Five's veto rights, when it came to implementing the coercive elements of the doctrine, but UN members from all regions were overwhelmingly positive and supportive of its basic elements. The fears expressed in articles in *The Economist* and elsewhere before this debate that the responsibility to protect might be an idea whose time had come – and gone -- were proved utterly unfounded.

The Imperative of Optimism

Maybe my confidence about the future of the responsibility to protect is still a little premature, but one of the things that has most sustained me over forty years of public life, more than twenty of them working in international affairs, is a fairly unquenchable sense of optimism: a belief that even the most horrible and intractable problems are soluble; that rational solutions for which there are good, principled arguments do eventually prevail; and that good people, good governments, and good governance will eventually prevail over bad.

When it comes to international relations, and in particular the great issues of war and peace, violence, and catastrophic human rights violations with which we are concerned here, there is a well-established view that anyone who approaches things in this kind of generally optimistic frame of mind must be plain ignorant, incorrigibly naïve, or outright demented.

Certainly, in the case of genocide and atrocity crimes—either directly committed by a government against its own people, or allowed to happen by a government unable or unwilling to stop it—it is hard for even the incorrigibly naïve to remain optimistic.

In this world we inhabit—full of cynicism, double standards, crude assertions of national interest, high-level realpolitik, and low-level manoeuvring for political advantage—it is very easy to believe that ideas, and ideals, do not matter very much. But I believe as

passionately now as I ever have in my long career—starting and finishing in the world of nongovernmental organizations, but with much time between in politics and government—that ideas matter enormously, for good and for ill, and that it is tremendously important to sustain one's idealism, and one's energy for the cause of ideas that can really change the world for the better.

For all the difficulties of acceptance and application that lie ahead, there are —I have come optimistically, but firmly, to believe—not many ideas that have the potential to matter more for good, not only in theory but in practice, than that of the responsibility to protect.

To give us heart in meeting the challenges still ahead it is important to emphasise, and this is my last word, the significance of what has been achieved. 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 responsibility to protect norm may not in itself guarantee that the world has seen the end of mass atrocity crimes once and for all. But it is not unreasonable to claim that it certainly gives us a better chance of getting there than we have ever had before.