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INTRODUCTION

The Responsible Sovereign and the Responsibility to Protect

By

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Over its first sixty plus years, the United Nations has been a ceaseless builder and promoter of international principles and norms. Moving from decolonization to development, from disarmament to environmental degradation, and from de-mining to democracy, the world body has endeavored to turn the bold principles and purposes of its Charter into frameworks and agreements to guide behavior both among and within its Member States. Its normative contributions, as a result, have arguably left a deeper and more enduring mark on the way the world conducts its business than have its operational and programmatic ones.

The intricate interplay between the normative and operational dimensions of the UN's work can be seen most vividly in the core realm of human rights and humanitarian affairs. The implementation of these path-breaking norms, first forged in a period of acute East-West tension, has been anything but sure, consistent, or quick. But the ongoing struggle for human decency has, in subtle and dramatic ways, profoundly shaped the global geo-political landscape, as well as the evolving relationship between states and peoples. The latest chapter in this unfolding drama, the 2005 World Summit declaration of the responsibility to protect (RtoP), has proven every bit as contentious and potentially consequential as the earlier normative milestones on which it builds. This Introduction addresses the scope and content of what was agreed at the 2005 Summit, the implications of RtoP for notions of state sovereignty, and some of the conceptual, architectural, and policy challenges facing UN Secretary-General Ban Ki-moon's bold commitment to "operationalizing" the responsibility to protect and translating it "from words to deeds."[1]

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[1] See, for example, his speeches to the Center for Strategic and International Studies in Washington, DC on 16 January 2007 and to the Royal Institute of International Affairs in London on 11 July 2007, as well as his annual address to the General Assembly of 25 September 2007 (U.N. documents SG/SM/10842, SG/SM/11094, and SG/SM/11182, respectively).

What Has, and Has not, Been Agreed

The 2005 Summit, the largest gathering ever of heads of state and government, agreed that states have the responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. They unambiguously declared that they "accept this responsibility and will act in accordance with it."[2] For its part, the international community agreed to encourage, help, and assist states in meeting these obligations. The Member States further underscored their responsibility, through the United Nations, "to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations" from these four violations. When "peaceful means be inadequate and national authorities manifestly fail" to provide such protection, the world leaders pledged "to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate."

Widely viewed as the cardinal achievement of the Summit, the commitments contained in paragraphs 138 and 139 of the Summit's Outcome Document have been hailed by both UN Secretaries-General Kofi Annan and Ban Ki-moon as a "historic breakthrough."[3] Several Member States, alluding to the nuanced and caveated language of those passages, including paragraph 139's call for the General Assembly "to continue consideration" of RtoP matters, have drawn attention to the continuing differences over the rules for and legitimacy of military intervention or other coercive action for humanitarian purposes.[4]

Both sides of the debate have a point. The assembled heads of state and government in 2005 did not consent to a new norm of armed humanitarian intervention outside of the well established – though too frequently ignored – provisions of the UN Charter concerning the use of force. Indeed, paragraph 139 underscores the importance of utilizing the inter-governmental and Security Council-centered decision-making procedures laid out in the Charter.

Nor is there a consensus on whether RtoP qualifies, at this stage, as an existing or even emerging norm. Six months before the Summit, Secretary-General Kofi Annan, in his *In Larger Freedom* report, endorsed the view of his High-level Panel on Threats, Challenges and Change

[2] U.N. document A/60/L.1, 15 September 2005, p. 31, para. 138. As Louise Arbour, the UN High Commissioner for Human Rights, has underlined, whereas the so-called "right of humanitarian intervention by definition is discretionary," RtoP carries a positive obligation or responsibility for all states. See "Preventing Mass Atrocities: A Conversation with Louise Arbour," Council on Foreign Relations, Washington, DC, 8 June 2007, and her speech, "The Responsibility to Protect as a Duty of Care in International Law and Practice," Trinity College, Dublin, 23 November 2007.

[3] U.N. documents SG/SM/10161 of 12 October 2005 and SG/SM/10842, op. cit.

[4] See, for instance, the interventions of Algeria, Brazil, China, Egypt, and the Russian Federation in the December 2005 Security Council debate on the protection of civilians in armed conflict. None of them refuted the concept of a responsibility to protect, though all called for further discussion of its scope and policy implications. The United States joined a number of other Member States in stressing "that the primary responsibility for protecting civilians lies with States and their Governments and that international efforts should complement Government efforts rather than assume responsibility for them." UN document S/PV.5319 and Resumption 1, 9 December 2005.

and the earlier Canadian-initiated International Commission on Intervention and State Sovereignty (ICISS) that there is an "emerging norm that there is a collective responsibility to protect."[5] Secretary-General Ban Ki-moon, on the other hand, has been a bit more deliberate in his choice of terminology than his predecessor, generally referring to RtoP as a "concept" not as a norm.[6] In legal terms, this is an important distinction. Given how contentious the debate over what was agreed in the Outcome Document remains as of this writing, it would be hard to argue that RtoP has yet reached the status of an international norm. However, over time, UN principles have a way of becoming norms. In essence, the Guiding Principles on Internal Displacement followed a similar, if lower profile, course.[7] This could well be RtoP's path in the future, but for now its strength derives largely from the quite extraordinary political commitment embodied in paragraphs 138 and 139 and from the enhancements in policy and procedure they may promise. This, in itself, represents a major step forward. Proponents would do well at this point to consolidate their gains, reinforcing political support for what has been agreed on paper, as well as translating these advances in principle into durable innovations in policy, doctrine, and practice.

Conceptually, RtoP seeks to build bridges. One place where this is needed, as noted above, concerns the well-entrenched notion that there is an inevitable dichotomy between human rights and state sovereignty. To Secretary-General Boutros Boutros-Ghali, there was a need "to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[8] As Secretary-General Kofi Annan confided, on the publication of the path-breaking 2001 ICISS report, in his efforts to spur debate on humanitarian intervention he had "sought to develop the idea of two notions of sovereignty: one for States, another for individuals . . . . What is clear is that when the sovereignty of States and the sovereignty of individuals come into conflict, we as an international community need to think hard about how far we will go to defend the former over the latter."[9] RtoP, he later suggested, had produced a new equation, with "human life, human dignity, human rights raised above even the entrenched concept of State sovereignty."[10] Yet, upon further reflection, it seems that RtoP aims to integrate sovereignty and human rights, not to have one triumph over the other. As the continuing concerns of some Member States attest, this marriage of rights and responsibilities remains a troubling and largely theoretical one for some, and it will not be fully consummated without

[5] Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. document A/59/2005, 21 March 2005, p. 35, para. 135.

[6] U.N. documents SG/SM/10842, SG/SM/11094, and SG/SM/11182, op. cit.

[7] See Addendum to the Report of the Representative of the Secretary-General Francis M. Deng to the Human Rights Commission, U.N. document E/CN.4/1998/53/Add.2, 11 February 1998, noted in Commission on Human Rights Resolution 1998/50.

[8] *An Agenda for Peace*, A/47/277, S/24111, 17 June 1992, p. 5, para. 17.

[9] Secretary-General Addresses International Peace Academy Seminar on the Responsibility to Protect, U.N. document SG/SM/8125, 15 February 2002.

[10] World Summit Achieved Concrete, Significant Gains in Human Rights, Rule of Law, Secretary-General Says in Address to Universidade Nova de Lisboa, U.N. document SG/SM/10161, 12 October 2005.

more extensive consultations with the Member States, as well as further discussions with the UN Secretariat, independent experts, and NGOs. As a first step, commentators could usefully devote more attention to what the Outcome Document actually says about the content and scope of RtoP, rather than to what they hoped or feared it might say. As a carefully negotiated multilateral agreement, the words and provisions of paragraphs 138 and 139 already reflect the results of a hard-fought political bridge-building endeavor and should be respected as such.

The 2001 ICISS report, by enunciating and popularizing the notion of a responsibility to protect, provided a singular service by finessing the stale and polarized debate over humanitarian intervention. The latter came to a head at the September 1999 General Assembly debate sparked by a series of provocative speeches by Secretary-General Kofi Annan, who pushed the Member States to find a better alternative to standing by when mass atrocities were unfolding in places like Rwanda, Srebrenica, and Kosovo but divisions within the Security Council were preventing the authorization of effective responsive action.[11] By taking the concept of "sovereignty as responsibility," as developed in the mid-1990s by Francis Deng and his colleagues at the Brookings Institution, a step further,[12] the ICISS panel placed the onus where it properly belongs – on the state itself – with the international community bearing the parallel responsibility of helping the state to meet its abiding responsibilities to the population on its territory, whether citizens, immigrants, or refugees. Like the Outcome Document four years later, the ICISS report recognized that, for both states and the international community, protection begins with prevention.[13] Preventing atrocities in the first place – not responding after the fact militarily – is the far preferable option for both ethical and policy reasons. In this case, what is right and what is feasible happen to coincide.

Unfortunately, however, with little high-level guidance, the post-Summit debate about RtoP lost sight of the actual provisions of paragraphs 138 and 139, unhelpfully drifting back into the familiar, if unproductive and stilted, arguments about humanitarian intervention, Security Council reform, rules for the use of force, and how to organize a military response. While valid and important questions, the over-emphasis on this least likely scenario has largely precluded any sustained public or expert discussion of how to assist states so that they are less likely to start down the path of genocide, war crimes, ethnic cleansing, and crimes against humanity, including through capacity-building efforts implemented by the UN, regional or sub-regional arrangements, or ad hoc groups of well-meaning Member States. Paragraphs 138 and 139 speak of the responsibility of the international community to "encourage," "help," and "assist" states to meet their RtoP obligations, but offer no clue about how to accomplish such feats. Likewise, no blueprints are provided for the call in paragraph 138 for establishing a UN "early warning

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[11] For a handy compilation of his key speeches, see *The Question of Intervention: Statements by the Secretary-General* (New York: United Nations, December 1999). It contains, among others, "Reflections on Intervention," Ditchley Park, United Kingdom, 26 June 1998 and "Two Concepts of Sovereignty," Address to the 54th Session of the UN General Assembly, 20 September 1999.

[12] Francis M. Deng, Sadikiel, Kimaro, Terrence Lyons, Donald Rothschild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: The Brookings Institution, 1996).

[13] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001).

capability," nor for how timely information generated by the UN's far-flung and multi-layered field presence should be collated, assessed, and channeled to the Secretary-General and, through him or her, to the Security Council and other inter-governmental organs.

For the UN and its Member States, the principle of a responsibility to protect is what is contained in paragraphs 138 and 139 of the Outcome Document, nothing more and nothing less. Some advocates dismiss these provisions as RtoP-lite, because of their caveats about the more muscular options, such as sanctions and military enforcement. Yet, when the largest gathering ever of heads of state and government not only endorses a principle, but also agrees on its scope and content in such detail, then the UN Secretariat, Member State governments, and independent experts and NGOs best give some thought – as Secretary-General Ban Ki-moon has repeatedly urged – to how to give policy and institutional life to those provisions. Otherwise, as he has warned, the UN could once again stand accused of hypocrisy, of being far better at articulating grand ideas than at acting to implement them.[14] Words, once again, would trump deeds.

The Responsible Sovereign

It is often posited, indeed assumed, that there is a deep, inherent, and irreconcilable tension between the notion of a responsibility to protect and the full exercise of sovereignty at the nation state level. Indeed, those most resistant to this new chapter in the evolution in human rights and humanitarian norms are apt to characterize it as an assault on traditional conceptions of state sovereignty. While understandable, such reactions are based on an incomplete understanding both of the contemporary exercise of sovereignty and of the scope and purpose of RtoP. Properly construed, and as expressed in the Outcome Document, RtoP envisions the protection both of vulnerable individuals and groups and of the legitimate sovereignty of the nation state.

The rights of peoples and the prerogatives of the state should be viewed not only as compatible, but as mutually reinforcing in the kind of world envisioned by the UN Charter. The Preamble sees no contradiction in reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." While sovereign equality is the first principle enunciated in the Charter (Article 2 (1)), the record of the founding conference in San Francisco suggests that this was to be understood as a legal not political or decision-making term. It was to encompass not only juridical equality and respect for sovereignty among states, but also that each state "should, under international order, comply faithfully with its international duties and obligations."[15] The latter soon were to include a raft of human rights obligations under the Genocide Convention and the Universal Declaration of Human Rights, as subsequently elaborated in binding form in the two covenants.

[14] Ban Ki-moon, Acceptance Speech on Appointment as the Eighth Secretary-General of the United Nations, 13 October 2006, http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=58#.

[15] Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945* (Washington, DC: Brookings Institution Press, 1959), p. 672 and Edward C. Luck, *UN Security Council: Practice and Promise* (London, Routledge, 2006), p. 20.

Article 2(7) on the one hand denies the world body authorization "to intervene in matters which are essentially within the domestic jurisdiction of any state" and yet on the other goes on to assert that "this principle shall not prejudice the application of enforcement measures under Chapter VII." As Article 34 underlines, the Security Council's powers of investigation extend to "any dispute, or any situation which might lead to international friction or give rise to a dispute," even if there is no evidence of an immediate threat to international peace and security. The purposes of the Organization include "respect for the principle of equal rights and self-determination of peoples," "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion," and serving as "a centre for harmonizing the action of nations in the attainment of these common ends" (Article 1(2) (3) and (4)). As UN Secretary-General Ban Ki-moon has emphasized, "we need competent and responsible states to meet the needs of 'we the peoples' for whom the UN was created."[16]

Strong states are both capable and willing to protect the populations on their territories from genocide, war crimes, ethnic cleansing and crimes against humanity. As the Outcome Document underscores, the first and foremost role of the international community in fulfilling the RtoP promise is to help them to do so. States, after all, were formed, in large part, to protect their people from external threats and internal disorder, from the chaotic time, according to Thomas Hobbes, "wherein men live without other security, than what their own strength, and their own inventions shall furnish them withal."[17] Such a "miserable condition," in his famous words, provides "no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short." To escape the dire circumstances of chaos, individuals and groups – whether clustered in tribes, clans, or city states – ceded, in an unwritten contract, a portion of their individual and group sovereignty to larger communities in return for some sense of collective security.

Though the greater sovereign generally enjoyed a monopoly on the legitimate use of force – as nation states do today – even groups brought into the fold through conquest enjoyed some level of rights, as well as responsibilities, in the larger society. As Neil MacFarlane and Yuen Foong Khong point out, the "contract" in Hobbes' world would be voided either "if the sovereign threatened the individual with death" or "could no longer fulfill the function for which he or she was given power."[18] In the latter case, according to Hobbes, the sovereign authority "is no longer owed obedience, is no longer indeed a sovereign."[19] Far from Europe and western political traditions, similar views of authority and responsibility, of limits on the arbitrary use of sovereign power, and of the relationship between the individual and the sovereign could be found in Islamic thought, in the practices of the Ottoman Empire, and in Confucianism.[20] The

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[16] Ban Ki-moon, Acceptance Speech on Appointment as the Eighth Secretary-General of the United Nations, op. cit.

[17] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998), p. 84.

[18] S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Bloomington, Indiana: Indiana University Press, 2006), p. 39.

[19] Quoted in ibid.

[20] See, for example, Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), pp. 76-77 and MacFarlane and Khong, op. cit., pp. 30-33.

notion that sovereignty is less than absolute, therefore, is neither new nor the product of a single culture or region. In calling for "an integrated approach to human security," Secretary-General Boutros Boutros-Ghali bluntly noted in his 1992 *Agenda for Peace* report that:

> The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.[21]

These are the words, it is worth recalling, of the first Secretary-General to come from Africa or the Arab world. In a similar vein, Alpha Oumar Konare, the Chairperson of the African Union Commission, has championed the principle of "non-indifference" to humanitarian tragedies on the continent.[22]

With sovereignty comes responsibility, with the exercise of that responsibility comes legitimacy, and with legitimacy comes the confidence and sustainability of strong, viable, and modern states. Some states are rich and others poor, some large and others small, some socialist and others capitalist, but they all face this same equation in relation both to their populations and to the international community. As Francis Deng et al. wrote in a prescient 1996 volume, *Security as Responsibility: Conflict Management in Africa*, "living up to the responsibilities of sovereignty becomes in effect the best guarantee of sovereignty."[23] In their view, "by effectively discharging its responsibility for good governance, a state can legitimately claim protection for its national sovereignty."[24] For centuries before the phrase "responsibility to protect" was coined, it was widely recognized that massive violations of human rights in one country could send political ripples across borders.[25] Indeed, the danger of one state intervening in another when it perceives its nationals to be threatened as a vulnerable minority in a neighboring state has been the subject of international agreements and arrangements at least since the sixteenth century.[26] This concern was prominent in the design of the Versailles Treaty and the League of Nations machinery, as well. More recently, in 2000 – more than five years before the World Summit – the African Union asserted in its Constitutive Act (Article 4 (h)) "the right of the

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[21] *An Agenda for Peace*, op. cit., para. 17, p. 5.

[22] See, for example, African Union Press Release on the "Arche de Zoe Affair," Addis Ababa, 7 November 2007 and Said Ida Hassan, "AU Calls for 'Fair' EU/African Economic Agreements," APA, Lisbon, 8 December 2007. In his address at the event launching the AU's Peace and Security Council on 25 May 2004, he called for linking "legality with legitimacy, in the name of the principle of 'non-indifference.'"

[23] Deng, Kimaro, Lyons, Rothschild, and Zartman, *Sovereignty as Responsibility*, op. cit., p. 15.

[24] Ibid., p. 1.

[25] Simon Chesterman, for instance, cites more than four centuries of legal scholarship on wars to assist the oppressed in other countries. See his *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), pp. 13-16.

[26] Friedrich Kratochwil, "Sovereignty as *Dominium*, Is There a Right of Humanitarian Intervention?," in Gene M. Lyons and Michael Mastanduno, eds., *Beyond Westphalia?: State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995), pp. 30-33 and Krasner, op. cit., pp. 103-104.

Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."[27]

So history tells us that when a state commits violations of international human rights and humanitarian norms of the magnitude of those listed in paragraphs 138 and 139 of the Outcome Document (particularly in this age of instantaneous global communications), there are likely to be international repercussions of some sort. At the very least, there will be reputational consequences. Though one should not exaggerate the extent to which repressive leaders have been or would be deterred by reputational concerns, it is remarkable how quick states are to deny or cover-up such atrocities, whether or not they need fear condemnatory resolutions by inter-governmental bodies or the imposition of material sanctions by such groups or individual states.[28] Intrusive and potentially embarrassing monitoring missions are likely to be undertaken by the United Nations, regional bodies, or ad hoc mechanisms under the provisions of conventions and other international agreements to which the state is party. If the transgressions of international norms are widespread, persistent, and aimed at particular ethnic, religious, immigrant, or refugee communities, then popular passions are likely to be raised in neighboring countries, exacerbating relations and posing the risk of increasing tensions and even conflict.

In our inter-connected world, sovereignty cannot equal autarky. All states, even the most isolated ones, choose to engage in a range of ties with neighbors, trading partners, and international institutions. These arrangements necessarily entail some range of promises, commitments, and expectations on all sides. In theory, sovereignty may entail maximizing one's ability to choose, but in real life states decide, again and again, to limit their own freedom of action in order to gain international agreement on various things that matter to them. Today, isolation is neither a rational nor feasible choice for any society. As a result, the 1990s witnessed a historic surge in the quantity and quality of international agreements and institutions, covering any number of sectors of public policy.[29] Some of these were initiated by the developed countries of the North, some by the developing countries of the South, but most reflected a common understanding that the efficient and effective exercise of domestic governance requires growing international cooperation on many fronts at once. It is hard to think of a single important area of national policy in which the exercise of sovereignty does not require a substantial degree of tacit or formal cooperation with other states, whether related to

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[27] http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm. Like the responsibility to protect, the AU clause eschews any assumed linkage between the intervening state(s) and the nationality of those being abused.

[28] For a candid discussion of reputational efforts on behavior, see George W. Downs and Andrea W. Trento, "Conceptual Issues Surrounding the Compliance Gap," in Edward C. Luck and Michael W. Doyle, eds., *International Law and Organization: Closing the Compliance Gap* (Lanham, MD: Rowman and Littlefield, 2004), pp. 21-26.

[29] With this surge in norms and conventions, however, came enormous and continuing compliance shortfalls, in part because of unreliable, missing, or inadequate international monitoring, assessment, and enforcement machinery. See, for example, Edward C. Luck, "Conclusion: Gaps, Commitments, and the Compliance Challenge," James R. Katalikawe, Henry M. Onoria, and Baker G. Williams, "Crises and Conflicts in the African Great Lakes Region: The Problem of Noncompliance with Humanitarian Law," and Jeffrey Herbst, "International Law of War and the African Child: Norms, Compliance, and Sovereignty," in Luck and Doyle, op. cit., pp. 303-330, 121-152, and 185-201, respectively.

development, trade, security, environment, health, education, or welfare. More than two decades ago, some of us coined the term “sovereignty gap” to capture this growing reality of contemporary governance.[30] As Stephen Krasner has pointed out, today “while loss of interdependence sovereignty does not necessarily imply anything about domestic sovereignty understood as the organization of authoritative decision making, it does undermine domestic sovereignty comprehended simply as control.”[31] On the other hand, he notes, “a state with very limited effective domestic control could still have complete international legal sovereignty. It could still be recognized as a juridical equal by other states, and its representatives could still exercise their full voting rights in international organizations.”[32]

If the responsibility to protect is to be considered a challenge to more traditional conceptions of sovereignty, it is hardly alone among UN principles, purposes, and programs. Surely its preventive, capacity-building, and early warning aspects – as discussed above – are no more, and probably less, intrusive than those of international development, environment, trade, or peace-building arrangements. Unlike those other engagements, RtoP does not seek to remodel core national institutions or policy choices; rather, it simply seeks to bolster a state’s capacity to avoid the downward slide to anarchy and mass repression. It addresses only the most egregious violations of human rights and humanitarian norms, the kinds of abuses that states consistently deny are either the intent or consequence of their public policies. Even the Outcome Document’s references to Chapter VII and possible collective measures are well-embedded in Charter provisions and UN practice, as also noted above. RtoP, therefore, hardly qualifies as a conceptual or strategic revolution in the thinking or practice of contemporary international society. It does qualify as a notable, even historic, political pronouncement because of the global commitments undertaken by Member States in the Outcome Document. But in normative terms this historic step is better described as evolutionary than as revolutionary. The mark it leaves on state and international practice will depend heavily on how successful UN Secretary-General Ban Ki-moon is in his quest to give it a durable policy, doctrinal, and institutional expression. As the next section underscores, this will not be an easy task.

Conceptual, Institutional, and Policy Challenges

The World Summit Outcome Document represented a major stride toward the achievement of conceptual clarity for the notion of a responsibility to protect. It underlined that RtoP is well grounded in the existing framework of international law, including the ongoing obligations of Member States under international humanitarian and human rights law, refugee law, and international criminal law. Its scope is to be limited to prevention and protection of populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, rather than seeking to encompass all threats to human dignity and welfare. It is essential that proponents of RtoP resist the sirens’ call to stretch the concept beyond recognition or policy

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[30] Report of the International Panel on UN Management and Decision-Making, United Nations Association of the USA (UNA-USA), in Peter J. Fromuth, ed., *A Successor Vision: The United Nations of Tomorrow* (Lanham, MD: University Press of America for UNA-USA, 1988), pp. 32-33.

[31] Krasner, *Sovereignty: Organized Hypocrisy*, op. cit., p. 13.

[32] Ibid., p. 12.

utility, as has happened with such disturbing regularity to so many other terms and notions around the UN in years past. If efforts to operationalize RtoP are to have any chance of making a difference to the human condition, their focus must remain narrow and deep. RtoP, it needs to be repeatedly stressed, is not a more palatable term for military intervention or for the North to meddle in the affairs of the South. Its broad appeal stems from its universal quality, its recognition that both individual states and the international community have explicit responsibilities in this realm, and that sorting through how these obligations can best be carried out in a mutually supportive fashion represents one of the prime conceptual, institutional, and policy challenges of our time.

For instance, should RtoP standards and expectations apply only to UN Member States and inter-governmental institutions? In a formal sense, of course, the answer must be affirmative, as states are parties to the conventions on which RtoP is largely based, as well as signing onto the Outcome Document itself. Generally, as well, atrocities of the scale to be addressed by RtoP are undertaken by or with the complicity of governments. Yet terrorists and armed groups may also, at times, aspire to wreak similar havoc on innocent civilians. And states are prone to citing security concerns to explain pronounced declines in their human rights practices, especially given the degree of instability in a number of regions these days. As the UN has long recognized, it is immensely difficult to resolve security problems and humanitarian emergencies without parallel progress on the political dynamics that have fuelled and sustained them. As of this writing, Darfur and Somalia are prime and sorry cases in point. What lessons can be derived from such hard cases? And has the Outcome Document language made a difference in the way states and international organizations are responding to such situations?

From Nuernberg to the International Criminal Court, it has long been accepted that individuals, not just governments, bear responsibility for the international crimes in which they knowingly and willingly participate. Eliminating impunity has, for more than a decade now, been a key plank in the UN's strategy for prevention and deterrence, as well as for reconciliation after particularly violent conflicts. The UN High Commissioner for Human Rights, Louise Arbour, has suggested that "the responsibility to punish" be added to the ICISS trilogy of the "responsibility to prevent, react, and rebuild."[33] Taking a different tack, non-governmental groups are seeking to organize international networks of individuals pledged not only to refrain from participating in any of the four kinds of violations proscribed by the Outcome Document but also to report on activities that could incite or help organize such acts. Transnational civil society could also play a critical role in helping to turn societies away from such a course, whether through publicity, consciousness-raising, local organizing, or legal action. To date, individuals and NGOs have carried much of the political weight of sustaining support for the concept. So, while the focus of RtoP will remain on governments, the involvement of individuals and groups could prove to be a critical factor in the Secretary-General's efforts to operationalize the concept.

As discussed above, RtoP was not the next step on the humanitarian intervention track laid out so boldly by Kofi Annan in the late 1990s. Its fundamental assumptions were derived, instead, from the path-breaking work on sovereignty as responsibility by Francis Deng and his colleagues earlier in that decade. This second track has three distinct dimensions. The first --

[33] "A Conversation with Louise Arbour," Council on Foreign Relations, op. cit.

that respect for peoples should be seen as an integral part of sovereignty, not as an opposing value – was addressed at length earlier. Second, the international community should assist states in the fulfillment of their responsibilities from the earliest stages, not simply to rush in when all else fails. Indeed, the primary responsibility was to help states succeed, not to react once they fail. The failure-reaction cycle featured in humanitarian intervention models was to be replaced, as it was based on the failure of prevention efforts and posed untenable choices for the international community. Third, military intervention should be a secondary option at best, not the centerpiece of the enterprise. While all three points are clearly embodied in the Outcome Document, the second and third raise a series of policy and doctrinal dilemmas that are not easily resolved.

The ethical, legal, political, and policy arguments for proceeding upstream toward early, non-coercive intervention are compelling. Yet there is a risk of widening the scope of inquiry to unmanageable proportions, as such a prevention strategy implies attempting to deal with the lesser and more loosely defined precursors of the four proscribed violations. Incitement, mentioned in paragraph 138, is relatively straightforward. There are no hard and fast rules, however, about which kinds of behavior are most likely to lead down such a destructive path. Nor are the lessons from one case so readily and assuredly applied to the next society. How would prevention for RtoP purposes look different from the efforts at conflict prevention already being pursued by the UN and numerous other actors? The good news, of course, is that such early and non-coercive interventions bear relatively low costs and risks for the UN, its partners, or the Member States. The bad news, however, is that it tends to be hard to assemble political will for such efforts before there are any press or public reports of conscience-shocking atrocities. Capacity-building within states, drawing on best practices domestically and elsewhere as well as on lessons learned from past failures, is a very appealing part of the puzzle. But, again, the knowledge and experiential base for such endeavors remains remarkably thin at this point.

No matter how one tries to recast the terms of the RtoP debate, whether, how, and when to use military force remains a highly contentious issue. To the ICISS panel, military intervention was to be a "last resort," only "justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded."[34] Kofi Annan likewise interpreted the Outcome Document as also consigning the use of force to a last resort.[35] As noted at the outset of this essay, however, paragraph 139 is actually much more nuanced on the subject, eschewing the "last resort" language. Instead, it emphasizes the provisions of Chapter VII of the Charter, which give the Security Council wide latitude in making such momentous decisions. There are sound political and policy reasons for taking the rather flexible stance the Summit chose. One, neither at Dumbarton Oaks, San Francisco, or at any point since have the members of the Security Council, especially the permanent ones, accepted any guidelines, principles, or limitations on their freedom to make political judgments on a case-by-case basis, as long as they

[34] Second Precautionary Principle, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, op. cit., p. xii.

[35] U.N. document SG/SM/10161, op. cit.

are seen as acting within the purposes and principles of the Charter (Article 24 (2)).[36] Two, it makes little policy sense to restrict the Council to any set progression of when it could employ any of the policy tools at its disposal. For example, preventive deployments or an early show of multilateral force might help to dissuade a state from pursuing a destructive course of action. In some cases, the deployment of mixed peacekeeping and humanitarian units, with the even reluctant consent of the host government, might be helpful in enhancing order in an increasingly chaotic situation or in keeping smaller abuses from becoming larger ones.

The Outcome Document quite properly points to the need for a more effective UN early warning system, as well as closer partnerships for the world body with regional and sub-regional organizations. Indeed, more creative thinking ought to be applied to the place of regional and sub-regional arrangements in efforts to monitor and assess local developments – positive or negative – and to mediate problems as they arise. Transnational preventive and capacity-building efforts might also be undertaken, in some cases, on a regional or sub-regional basis. Whether information and assessment sharing can take place on a more regular and candid basis between the global and regional levels remains to be seen. The answer would no doubt vary from place to place and organization to organization, but both the generic and specific questions are certainly worth exploring. The UN itself has enormous information resources, especially in parts of the world experiencing instability and conflict. Getting that information to the Secretary-General, the Security Council, and other relevant inter-governmental organs in a timely and forthcoming fashion has been problematic in the past. A more chronic problem has been the assessment and analysis of the information that is on hand. Over the past two decades, one proposal after another in this regard has grounded on the shoals of inadequate Member State support or, less often, bureaucratic resistance. The Outcome Document offers a fresh basis on which to try once again to give the Secretary-General and the Security Council the kind of world-class analytical support they deserve and the issue demands.

Finally, when all is said and done, the attitude and policies of the Member States will do more to sustain or derail the responsibility to protect than any doctrines or architectural adjustments espoused by the Secretary-General. In this regard, it is worth recalling that decisions of the General Assembly, including of its World Summit, are not binding on the Member States. The Outcome Document does not have the legal status of a negotiated convention or treaty. Yet it may have, and hopefully already is having, a political effect on the way leaders of Member States think about these matters. The political costs of doing nothing when genocide or mass atrocities unfold may be rising, though the process is likely to be slow and uncertain. In Darfur, unlike Rwanda, the Council did not look the other way. Yet its members still failed to find agreement on an effective and timely course of action. The ICISS panel urged the five permanent members of the Security Council to "agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is

[36] For a historical and political analysis of this phenomenon, see Edward C. Luck, "A Council for All Seasons: The Creation of the Security Council and Its Relevance Today," in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum, eds., *The UN Security Council and War: Evolution of Thought and Practice Since 1945* (Oxford University Press, 2008).

otherwise majority support."[37] Louise Arbour, the High Commissioner for Human Rights, recently went much further, raising the prospect of legal consequences "when the exercise or threat of a veto would block action that is deemed necessary by other members to avert genocide, or crimes against humanity."[38] Though the thought of holding Member States legally accountable for the way they choose to vote in inter-governmental bodies seems far-fetched at this point, public pressures and the endorsement of RtoP in the Outcome Document may be raising the political costs for casting a veto in such situations.

By UN standards, RtoP remains in its conceptual and programmatic infancy. Its growth trajectory is uncertain, as its recent articulation by the World Summit has elicited wariness and uncertainty in some quarters along with unbridled enthusiasm in others. Its advocates will need discipline and patience, its detractors a willingness to focus on what has been agreed, not on what they fear the doctrine could become. Fortunately, RtoP's most resilient and realistic supporter is also the best placed: UN Secretary-General Ban Ki-moon. He appears to understand that there is no easy or quick path to operationalizing the responsibility to protect, given the policy dilemmas addressed here. As with so many issues at the UN, the slow, steady path is also the most promising. RtoP, there is reason to believe, is on the right side of history. Now, the trick is to come up with policy initiatives that will help history move a little faster and a little surer.

[37] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, op. cit., p. xiii.

[38] Louise Arbour, Trinity College, op. cit.