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The "Responsibility to Protect" and the New Moral Minimum

Michael Doyle

On March 17, 2011, the United Nations Security Council authorized "all necessary means" — the U.N. code words for armed intervention — against Gadhafi's Libya[1]. The intervention may have been legal (authorized by the U.N. Security Council), but this was hardly justifiable as a classical humanitarian intervention. There was no massacre of the scale that any well-meaning state would have the right, and perhaps duty, to stop by overriding the nonintervention norm. It was more preventive than reactive. It was also proactive and dependent on multilateral, procedural legitimacy. It was, instead, something new, an application of the Responsibility to Protect (R2P or RtoP)[2] — a new norm for humanitarian military intervention and a newly legitimate moral minimum of global order. This U.N.-authorized protection replaces, under special circumstances, the massacre standard underlying traditional humanitarian intervention.

Where did this new norm come from? This paper traces the roots of RtoP in international law and

1 This essay draws on ideas developed in *The Question of Intervention: John Stuart Mill and the Responsibility to Protect* (Yale, 2015) and "The Politics of Global Humanitarianism: The Responsibility to Protect before and after Libya," International Politics 53, no. 1 (January 2016): 14–31.

2 R2P is the acronym of the International Commission on Intervention and State Sovereignty, and RtoP is the acronym adopted by the U.N. ("2" as "to" does not register across languages); both are discussed below.

international ethics. RtoP is in tension with established Charter law on the use of force, but it may be beginning to change the law. It is, on the other hand, deeply familiar to international ethics, a widening of the circumstances that allow for overriding nonintervention. It evolved out of the failures to protect the populations of Rwanda (1994) and Bosnia (1992–95) and NATO's decision to intervene in Kosovo (1999). RtoP has been invoked, explicitly and implicitly, successfully and unsuccessfully, in cases ranging from Myanmar and Kenya in 2008, to Guinea in 2009, and then recently, and controversially, to Libya in 2011. And the last may have severe negative consequences for international protection for Syrians since 2011.

The distinctive feature of RtoP is that it is both a license for and a leash on forcible intervention. As such, it has contributed to the increasing pluralism, contested and contestable, of the normative architecture of world politics. But this confusion may reduce as RtoP norms become better institutionalized in the U.N., reshape the discourse of international ethics, and are accumulated in customary law. In any case, where the alternative to pluralism is a clarity that either abandons vulnerable populations or imposes unrealistic expectations of enforced human rights, contestation is a step forward. RtoP can now be a resource for responsible policy, and it is the best we are likely to get if we continue to care about both vulnerable populations and national sovereignty.

Significantly, Responsibility to Protect now constitutes a floor limit to global pluralism. States should respect and attempt to further the full range of human rights as expressed in the two covenants of civil and political rights, and economic, social, and cultural rights. But what they now must do, or be liable to enforcement action, is to protect their populations from genocide, crimes against humanity, war crimes, and ethnic cleansing.[3] The meaning of sovereignty has changed. States are still sovereign, independent in their domestic affairs, but they are no longer free to commit one of those four crimes without risk of legitimate international constraint.

A global commission chaired by Gareth Evans, the former foreign minister of Australia, and Mohammed Sahnoun, a prominent former Algerian diplomat, proposed that the international community widen the legitimate grounds for international protection to include protecting populations from serious and irreparable harm. In 2005, the U.N. General Assembly narrowed those protections to genocide, war crimes, crimes against humanity, and ethnic cleansing, but restricted the enforcement of these principles to authorization by the U.N. Security Council in order to preclude unilateral interventions. In other words, they created a new global governance norm, a norm that was both a substantive license to protect more and a procedural leash to avoid intervening too much.

Responsibility to Protect was articulated as part of the World Summit Outcome Document, which expressed the consensus of all 192 members of the U.N. at its 2005 Summit.[4] Responsibility to Protect's core commitments are expressed in two key paragraphs, which are worth quoting:

> ***Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity***
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> ***138.*** *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it …*
>
> ***139.*** *The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared 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*

3 These crimes are defined in detail in the Rome Statute of the International Criminal Court. Genocide is the killing or other severe harms intended to destroy a national, ethnical, racial, or religious group in whole or in part (Article 6). Crimes against humanity are widespread murder, enslavement, torture, rape, etc., against a civilian population (Article 7). War crimes are grave breaches of the Geneva Convention against, e.g., noncombatants, or mistreatments of prisoners of war, etc. (Article 8). Ethnic cleansing is deportation or forcible transfer of an ethnic population (specified in Article 7.d).

4 GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

U.N. peacekeepers stand at attention in Lebanon during a March 2018 ceremony commemorating the peacekeeping forces' 41st anniversary ceremony. (Getty Images)

> *relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity …*

The paragraphs identify what have been called three "pillars."[5] The first is the responsibility of each state to protect its own population. The second is the responsibility of the international community to assist states. The third, the most striking, is the residual responsibility of the Security Council to take timely and decisive action if a state fails to protect its own population from war crimes, crimes against humanity, ethnic cleansing, or genocide.

These paragraphs appear revolutionary. They have created much controversy. Indeed, the Pillar Three responsibility of the doctrine of RtoP overturns established international law that was designed to maintain national jurisdiction free from external intervention.

International Law & RtoP

Pillars One and Two are legally uncontroversial. The International Covenants on Human Rights, the Genocide Convention (1948), and Common Article 3 of the Geneva Conventions make it clear that states are prohibited from inflicting those crimes on their populations. Other states and international organizations have the right to assist countries at the request of the countries assisted in any internationally legal activity.

But Pillar Three, enforcement by the Security Council, is legally ambiguous. The council remains highly protective of the domestic jurisdiction of states. U.N. Charter Article 2(7) specifies, "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." The exception is "enforcement measures under Chapter VII," which in turn are formally limited in Article 39 to measures the Security Council finds appropriate "in order to maintain or restore international peace and security." Domestic abuses generally do not — in black-letter Charter law — qualify as "international" threats. The outcome document articulating RtoP is a General Assembly resolution, and as such it is a recommendation,[6] not a binding international obligation on the Security Council. And while the Security Council established tribunals for the former Yugoslavia and Rwanda in order to punish genocide and war crimes authorized by reference to international peace and security, the Security Council is neither a global legislature nor a global court. It does not set general legal precedents. Instead, it addresses specific cases according to its discretion.

Thus, international law is contested. The strict legality of RtoP as a new basis for Security Council action supplementing global "international" peace and security thus has not yet been established formally. The Security Council may have the legal authority and states can exercise their obligation to prevent and punish genocide through the U.N.[7] But the Security

5 U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (January 12, 2009). RtoP Special Adviser Edward Luck, who did much during his mandate to refine the RtoP doctrine, authored this report.
6 Charter of the United Nations (San Francisco, 1945), 1 UNTS XVI, Article 10.
7 Common Article 1 of the Geneva Conventions imposes obligations, but they are less distinct. It requires that all states "undertake to respect and ensure respect for the present Convention." L. B. de Chazournes and L. Condarelli, "Common Article 1 of the Geneva Conventions," *International Review of the Red Cross* 857 (2000): 67–87.

Council so far has neither the authority, nor the legal obligation, to prevent or stop the four RtoP crimes unless it determines that international peace and security are threatened. Given the supremacy of the charter over all treaties (Article 103), a charter revision would be needed to formally incorporate RtoP as cause for international enforcement. Short of that, RtoP will remain legally contested.

The Origins and Evolution of the RtoP Doctrine

Humanitarian intervention is also contested in international ethics: it pits the protection of global humanitarian rights against national self-determination and sovereignty. Its recent evolution as the international legitimacy norm of RtoP both reflects those tensions and helps to reconcile them. RtoP builds on but narrows humanitarian doctrine in ways that expand international legitimacy and address many, but not all, skeptics of humanitarian intervention.

The Kosovo crisis was a watershed event in the reformulation of the doctrine of intervention. When the U.N. did not protect the Kosovars, NATO did. U.S. President Bill Clinton, echoing earlier promises by British Prime Minister Tony Blair, announced a "Clinton Doctrine" to the assembled NATO peacekeeping (KFOR) troops on June 22, 1999, following their successful, though belated, occupation of Kosovo:

> *[N]ever forget if we can do this here, and if we can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background, or their religion, and it's within our power to stop it, we will stop it.*[8]

U.N. Secretary-General Kofi Annan three months later also endorsed the principle of humanitarian intervention, but highlighted a problem: the requirements of international law — consent by a state, individual or collective self-defense, or Security Council authorization — were missing in the Kosovo campaign. The imperative of "halting gross and systematic violations of human rights" had clashed with "dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances."[9] Both the Blair-Clinton doctrine and the Annan equivocation alarmed developing states of the "South," who feared that humanitarian concern might be used as a pretext for imperial intervention.[10] The G77 (132 states of the South) condemned "the so-called right of humanitarian intervention" in paragraph 69 of their Ministerial Declaration of September 24, 1999, three months after the NATO intervention.[11] The Non-Aligned Movement (114 countries of the South) was deeply divided, with Islamic countries overwhelmingly supportive of the NATO intervention, and non-Islamic countries (led by Cuba, Belarus, and India) opposed.[12]

The Kosovo Commission was then asked to write an objective, international, and nongovernmental report to assess the intervention. It famously concluded that the intervention was "illegal but legitimate." It was not an act of self-defense, and it lacked the needed Security Council approval under Article 39, but it was a legitimate humanitarian rescue in the eyes of the commission of notables. In making the judgment, they defined what they saw as relevant "threshold principles" for a genuine "humanitarian intervention":

The first is severe violations of international human rights or humanitarian law on a sustained basis. The second is the subjection of a civilian society to great suffering and risk due to the "failure" of their state, which entails the breakdown of governance at the level of the territorial sovereign state.[13]

The principles still were noticeably wide ("international human rights or humanitarian law") and they allowed for action if the Security Council would not act, albeit as a last resort. The commission did not assuage the concerns of the South.

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8 W. J. Clinton, "Remarks by the President to the KFOR Troops," Skopje (Washington, DC: Office of the White House Press Secretary).
9 K. Annan, "Reflections on Intervention," Ditchley Park, UK (June 26, 1998), in Kofi Annan, The Question of Intervention (United Nations, 1999), 4.
10 A. J. Bellamy, "Kosovo and the Advent of Sovereignty as Responsibility," *Journal of Intervention and Statebuilding* 3, no. 2 (2009): 163–84. For a valuable survey of the roots of the concept of limited sovereignty, see Anne Orford, *International Authority and the Responsibility to Protect* (London: Cambridge University Press).
11 See discussion in Ian Brownlie, *Principles of Public International Law* 712 (2003).
12 Thalif Deen, "Third World Nations Split over Kosovo," *Third World Network*, http://www.twnside.org.sg/title/kosovo-cn.htm.
13 Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000).

Sudanese demonstrators set fire to barricades in Khartoum following the killing of seven anti-coup demonstrators, on Jan. 18, 2022. Rallies followed a coup that derailed Sudan's democratic transition. (Getty Images)

In an effort to include more viewpoints from the global South (and more representation from former government officials), Canada supported a new and more ambitious commission, one co-chaired by Mohammed Sahnoun and Gareth Evans. The International Commission on Intervention and State Sovereignty (ICISS) reframed the debate as "Responsibility to Protect" rather than a "right" to intervene and, by dint of numerous meetings at the regional level around the world, built a multilateral coalition. Building on former Sudanese Foreign Minister Francis Deng's articulation of a "responsibility to protect" for internally displaced persons, they identified a dual responsibility: that of governments to protect their own inhabitants and then, should governments fail to do so, a residual international responsibility.[14] International responsibility had three parts: to prevent, to react, and to rebuild.

Compared to the Kosovo Report, they narrowed the triggers for action to the threat of or presence of "large scale loss of life," whether by action or inaction of states, and "large scale ethnic cleansing." Building on classic just war doctrine underlying humanitarian intervention, they specified "right intention," "just cause," "proportionality," and "right authority" as further qualifiers on when international force could be used if states failed to meet their responsibility to protect their own populations. "Right authority," furthermore, should be the U.N. Security Council. "No better or more appropriate" authority could be found, but at the same time, it was not the last word. In "shocking situations … concerned states … may not rule out other measures" if the Security Council does not act. And "the Security Council should take note." The ICISS had narrowed the triggers and the authority, but in 2001 much of the global South was still alarmed. Secretary-General Annan personally welcomed the report, but no U.N. venue would host its formal New York presentation in 2001.[15] (The commission unveiled its report in a hotel across the street from the U.N.)

This record reveals the significance of the 2005 Summit Outcome Document paragraphs (quoted in the introduction to the chapter) that won the unanimous assent of the 192 member states. Paragraphs 138–39 reflected four additional years of assiduous lobbying and doctrinal adjustment, overcoming the significant

14 Francis M. Deng, et al., *Sovereignty as Responsibility* (Washington: Brookings, 1996).

15 At SG Kofi Annan's request, I approached the president of the General Assembly to see if a room could be found. His then-chief of staff, Ban Ki-moon, after checking with the group heads, determined that a U.N. venue could not be allocated for something so controversial.

distrust of the international community to any intervention following the 2003 invasion of Iraq.

The two paragraphs broadened the norm of legitimate intervention beyond the limited authority outlined in customary international law and the U.N. Charter's authorization to avert "threats to international peace and security." They greatly narrowed the norms emerging in U.N. Security Council practice of the 1990s. They also narrowed the triggers for RtoP from "international human rights" or "large scale killings" (the triggers specified by the Kosovo and ICISS commissions) to four specific elements: "genocide, war crimes, ethnic cleansing and crimes against humanity." To emphasize the point, these four specific elements are repeated five times in the original two paragraphs. In addition, the assembled states removed the ambiguity in authorization found in the earlier reports and clearly restricted "right authority" to use coercive means to the Security Council when it contemplates: "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. …" (Paragraph 139). The U.N. reaffirms the importance of state responsibility and the triad of prevention, reaction, and rebuilding, and importantly, that RtoP is a "responsibility" — though only undertaken on a "case-by-case," hence discretionary, basis.

Implications for Law and Ethics

The U.N. Charter is a "living constitution," and the U.N. members are nothing if not fluid in their commitments. So RtoP continues to evolve. The Security Council reaffirmed RtoP in Resolution 1674,[16] and operationally made the protection of civilians in ongoing peace operations an important commitment. In 2009, the secretary-general presented a valuable report outlining what the U.N. could and should do to help prevent and rebuild with the consent of the affected state.[17] It identified three pillars. The first reaffirmed national responsibility; the second covered measures of assistance the international community could and should offer to assist states in meeting their national responsibilities; and the third covered international responsibility, including the variety of measures the U.N. could and should take to ensure protection. By emphasizing prevention and rebuilding, the report further distanced RtoP from a focus on coercive intervention.

In the summer of 2009, the General Assembly considered the secretary-general's report and RtoP more generally at a special meeting organized by General Assembly president and strong RtoP critic Miguel d'Escoto-Brockmann, a former Sandinista comandante and Nicaraguan foreign minister. Highlighted by an invitation to Professor Noam Chomsky to address the General Assembly, the session in d'Escoto-Brockmann's plan was designed to roast the doctrine.

Instead, a considerable majority of states — both developing and developed — reaffirmed their commitment. But many also warned of abuses that might follow from it. On behalf of the 118 member states of the Non-Aligned Movement, Ambassador Abdelaziz, while condemning the four crimes covered by RtoP, expressed concern that the doctrine could be abused by opening up the possibility of unilateral intervention or extending its triggers beyond the four elements, attempting thus to legitimize "intervention in the internal affairs of states."[18]

Only a handful of states, including Venezuela, Cuba, North Korea, and a few others, acknowledged sufficient "buyer's remorse" and pushed to outright reject the commitment made in 2005. Most southern states shared the concerns the Non-Aligned Movement expressed, and China, for example, averred: "The concept of 'RtoP' applies only to the four international crimes of 'genocide, war crimes, ethnic cleansing, and crimes against humanity.' No state should expand on the concept or make arbitrary interpretations."[19] Not authorizing an intervention in Myanmar implicitly excluded health, climate, and natural disasters as

16 SC Res. 1674, U.N. Doc. S/Res/1674 (April 28, 2006). Protecting civilians during an established and authorized peacekeeping operation is not, however, the same as legislating intervention whenever a government harms or threatens to harm its own nationals.
17 U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (January 12, 2009).
18 A. M. Abdelaziz, "Statement by the Permanent Representative of Egypt on Behalf of the Non-Aligned Movement," (New York: Permanent Mission of the Arab Republic of Egypt, 2009).
19 Liu Z., "Statement of Ambassador Liu Zhenmin at the Plenary Session of GA Debate on Responsibility to Protect" (New York: Permanent Mission of China, 2009).

appropriate triggers for RtoP.[20] Thus, when it came to a consensus endorsement of the secretary-general's report, the best that could be achieved was a tepid "takes note" rather than the more full-throated "approves" or "endorses" that traditionally signal approval in U.N. jargon.[21]

From the standpoint of international law, the commitment to RtoP was not legislative — not equivalent to either a charter amendment of Chapter VII or an international treaty. But it was part of a twofold process bending the meaning of "international threats to the peace" as defined by the council under Chapter VII.

First, while far from settled, RtoP is beginning to build the record of general practice supplementing the sense of obligation that builds customary international law. The RtoP norm does not quite qualify as *opinio juris vel necessitatis* — acting on the basis of legal obligation — that is required for the formation of customary international law,[22] but the repeated use of "responsibility" is approaching the normative commitment that evidences obligation.

Second, it is important to recognize that the vast majority of states in 2009 were explicitly and implicitly endorsing the RtoP elements of genocide, war crimes, crimes against humanity, and ethnic cleansing as legitimate causes for the Security Council (when necessary) to authorize coercive force.

They were attempting to transcend the national, unilateral standards that had informed past practice of humanitarian intervention.[23] The United Nations has set standards by both broadening the principles and narrowing practice. Since General Assembly resolutions are not binding measures that could amend the U.N. Charter, states in effect were trying to redefine and broaden the standard that does authorize force, Chapter VII's "international peace and security." At the same time, these states were also denying the Security Council the discretion it had exercised so often in the 1990s to auto-interpret "international peace and security" seemingly without restraint or credible attention to "international." Will this new assertion of an authoritative, interpretive role by the General Assembly create a lasting precedent?[24]

RtoP could not claim clear legality, but it could claim "legitimacy" after the 2005 Summit Outcome. In this light, it is worth recalling that Security Council action during the Rwandan genocide was in part stymied by claims from Rwanda (then on the council) and its few supporters on the council that the crisis was a domestic issue, not one subject to international authority.[25] Ironically, the increasing power of the norm is reflected in the way in which the U.S. invoked humanitarian concerns generally and the way in which Russia invoked RtoP explicitly to try to justify their interventions in Iraq (2003) and Georgia (2008). But the experience of Libya and now Syria will prove decisive in strengthening or weakening the doctrine.[26]

This has implications for international ethics. On its face, it defines and limits acceptable communitarian standards from an international point of view. The principle of sovereignty can protect states from a wide range of international interferences, but no longer from proportional, Security Council–endorsed

20 K. Z. M. U, "Statement of the Deputy Permanent Representative of the Union of Myanmar to the United Nations on Agenda Item 44 and 107" (New York: Permanent Mission of Myanmar, 2009).

21 Department of Public Information, "Delegates Weigh Legal Merits of RtoP Concept," GA/10850, July 28, 2009, un.org/News/Press/docs/2009/ga10850.doc.htm.

22 The standards from the *North Sea Continental Shelf Cases* (Ger. v. Den. & Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 45 ¶ 77.

23 I have discussed these standards and practices in *The Question of Intervention: John Stuart Mill and the Responsibility to Protect* (Yale, 2015).

24 The charter has been informally amended before, as when states chose to define Security Council abstentions not to have the effect of permanent member vetoes despite Article 27's provision that substantive decisions of the Security Council have the "affirming" and "concurring votes" of the five permanent members. This process of deliberation and interpretation is well covered in Ian Johnstone's *The Power of Deliberation* (Oxford: Oxford University Press, 2011).

25 See the important personal account by the former Czech permanent representative to the U.N. and then–Security Council member Karel Kovanda. K. Kovanda, "The Czech Republic on the U.N. Security Council," *Journal of Genocide Studies and Prevention* (2010).

26 For a well-argued brief in favor of U.S. support for RtoP, see Matthew C. Waxman, *Intervention to Stop Genocide and Mass Atrocities*, Council Special Report No. 49 (New York: Council on Foreign Relations, 2009). For the latest presidential commitment, see Sophie Quinton, "Obama Highlights Efforts to Prevent Genocide," *National Journal*, April 23, 2012. And Global Centre for the Responsibility to Protect, "Policy Brief," January 2010; Security Council Report, "Update Report," January 11, 2010, no. 3.

actions to prevent or stop the four harms outlined in the RtoP doctrine.

It also clarifies the question of just authority. The Security Council has that legal authority to act against international threats. It also now has the legitimacy to address domestic crimes against humanity, war crimes, ethnic cleansing, and genocide. We should not assume that it will resolve the most important issue of political will: getting states to take these principles seriously, abide by them, and be willing, where justified, to enforce them.[27] Nor does RtoP resolve debates in moral philosophy. Much of the value of ethical thinking is that it constantly questions received standards in the name of security, solidarity, and human welfare, and RtoP should not be immune from this critique. ☐

27 At a special, unofficial meeting, a "retreat of the Security Council" at Pocantico in May 2001, all the permanent representatives of the fifteen members were prepared to acknowledge that R2P was a legitimate cause of action for SC enforcement, but none were prepared to publicly issue a statement that it constituted a general responsibility to act. The case-by-case language of paragraphs 138–39 reaffirmed in 2005 this reluctance.

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