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Responsibility to Protect

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A. Definition

1 Responsibility to protect, as a legal notion, entered the vocabulary of modern international law in 2001. The term 'responsibility to protect' rests on two basic considerations, which it combines and operationalizes. These considerations have been laid down as basic principles by the authors of the term as follows: '(1) State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself; (2) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect' (Report of the International Commission on Intervention and State Sovereignty XI). → *Intervention, Prohibition of*; → *Sovereignty*) In order to determine the circumstances in which the responsibility of the State concerned might yield to an international responsibility, the new concept spells out criteria for assessing whether or not an intervention is justified. If all criteria are fulfilled, the → *international community* shall have a duty to protect under international law.

2 The term 'responsibility to protect' is used in a general, non-legal sense, ie responsibility in this context should not be equated with → *State responsibility* as used, for example, in the Articles on State Responsibility ('ILC Articles') of the → *International Law Commission (ILC)*. The core function of the notion of responsibility to protect is to fix a clear set of rules, procedures, and criteria, with whose assistance it can be determined whether the community of States as an organized whole has a responsibility to intervene. In order to view the issue more from the perspective of those needing protection, the authors of the notion decided to shift the discussion from a subjective *right to intervene* to the more objective *concept of a responsibility to protect*. The international community bears this responsibility if the criteria in question are met and the territorial State does not discharge its responsibility to protect its own citizens. Where serious → *human rights* violations covered by the notion of responsibility to protect are committed, it is not difficult to discern an obligation imposed by international law within the meaning of the ILC Articles (Part 2 Chapter 3 ILC Articles). This does not, however, say anything about the responsibility of the community of States as an organized whole. Misgivings about the new concept have been expressed by two groups. On the one hand, developing countries are worried the concept could permit interventions that infringe on their sovereignty. On the other hand, the permanent members of the UN Security Council (→ *United Nations, Security Council*) are concerned that their discretion to adopt or veto measures under Chapter VII→ *United Nations Charter* will be limited and subjected to predetermined rules—so-called guidelines.

3 Numerous issues relating to the responsibility to protect have been discussed for decades as part of the divisive debate on the permissibility under international law of → *humanitarian intervention*. Of course this debate about the responsibility to protect cannot be understood without looking at the historical evolution of the protection of human rights in international law: its further development through international human rights instruments, the recognition of → *obligations erga omnes*, and the associated restriction of national sovereignty. These issues will not be examined here. Nor will this article cover the more political dimensions of the responsibility to protect, namely responsibility to prevent (to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk), responsibility to react (to respond to situations of compelling human need with appropriate measures), and responsibility to rebuild (to provide, particularly after a military intervention, full assistance). Nor will it examine the

role played by the media as an increasingly vociferous invoker of human rights. (see also → *Mass Media, Influence on International Relations)*

B. Evolution of the Notion

4 The very notion of the responsibility to protect was first developed by the International Commission on Intervention and State Sovereignty ('ICISS'), which was established by Canadian Foreign Minister Lloyd Axworthy on 14 September 2000 and co-chaired by Gareth Evans (Australia) and Muhamed Sahnoun (Algeria). Ten more Commissioners were drawn from around the globe. A high-level advisory board provided further guidance. On 30 September 2001, the ICISS published its report entitled 'The Responsibility to Protect', which was accompanied by a comprehensive supplementary volume of valuable research material.

5 The ICISS identified four basic criteria for military intervention for human protection purposes: (1) the threshold of large-scale loss of life or large-scale → *ethnic cleansing*; (2) the precautionary principles of right intention, last resort, proportional means, and reasonable prospects (→ *Proportionality)*; (3) the requirement of right authority; and (4) sound operational principles: clear mandate, unity of command, protection of a population as the prime objective, appropriate rules of engagement, and maximum possible co-ordination with humanitarian organizations (Report of the ICISS, paras 4.19 and 4.20). With respect to the third criterion, the report called the Security Council the best and most appropriate body to authorize military intervention, and said that its authorization should be sought in all cases. According to the ICISS, the Security Council would have to deal promptly with any requests for authority and seek rapid verification of facts. The permanent members should not use their → *veto* when the Security Council is called upon to vote on such actions. If the Security Council fails to act within a reasonable time, one option would be to discuss the issue at an emergency special session of the UN General Assembly; another possible alternative would be action taken by a regional or sub-regional organization (→ *International Organizations or Institutions, Regional Groups*). The Security Council must also, in the words of the report, be aware that the 'concerned states' will not 'rule out other means and forms of action' if it remains inactive (at para. 6.39).

C. Adoption and Modification of the Concept

1. United Nations Secretary-General Kofi Annan

6 The ICISS report had been preceded in September 1999 by a keynote address of Kofi Annan to the General Assembly, in which the UN Secretary-General (→ *United Nations Secretary-General*) had advocated a new understanding of sovereignty. He had been moved to review the concept following the intervention in → *Kosovo*, a conflict he termed a tragedy. In particular, Annan called on States to forge unity behind the principle that → *gross and systematic human rights violations* should not be allowed to stand (UNGA [20 September 1999] UN Doc A/54/PV.4). Even earlier, in June 1998, Kofi Annan had stressed in a speech at Ditchley Park that: 'The Charter protects the sovereignty of peoples. It was never meant as a licence for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power' (UNSG [26 June 1998] UN Doc SG/SM/6613/Rev.1, 3). In April 2000 he returned to the issue again in New York in his Millennium Report on the role of the United Nations in the 21st century:

> 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 affect every precept of our common humanity? We confront a real dilemma. (At 48)

2. ‘A More Secure World’: The Report of the High-Level Panel on Threats, Challenges and Change

7 The High-level Panel on Threats, Challenges and Change (‘High-level Panel’), created by Kofi Annan in December 2003 in the aftermath of the Iraq-United States War (→ *Iraq, Invasion of [2003]*), published its final report, ‘A More Secure World: Our Shared Responsibility’ on 2 December 2004. In its comments on Chapter VII of the UN Charter, the High-level Panel endorsed ‘the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent’ (Final Report of the High-level Panel para. 53).

8 The High-level Panel provided considerable substantiation of this norm and also referred to the Convention on the Prevention and Punishment of the Crime of Genocide. It mentioned the humanitarian disasters in Somalia (→ *Somalia, Conflict*), → *Bosnia-Herzegovina*, → *Rwanda*, → *Kosovo*, and Darfur (→ *Sudan*) as examples of the growing recognition ‘that the issue is not the “right to intervene” of any state, but the “responsibility to protect” of every state when it comes to people suffering from avoidable catastrophes’, such as mass murder and rape, ethnic cleansing by forcible expulsion or terror, and deliberate starvation and exposure to disease (at para. 201). The High-level Panel also noted that the Security Council has so far neither been very consistent nor very effective in dealing with such cases, very often acting too late, too hesitantly, or not at all. However, the panel continued:

> the Council and the wider international community have step by step come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, not especially difficult when breaches of international law are involved. (At para. 202)

According to the High-level Panel, it is critical that the Security Council’s:

> most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be. (At paras. 205)

New guidelines would not, the panel said, produce agreed conclusions with push-button predictability. Nor would they guarantee that the objectively best outcome would always prevail. They should rather maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force, and also maximize international support for whatever the Security Council decides and minimize the possibility of individual Member States bypassing the Security Council.

9 The High-level Panel praised and re-evaluated the sub-criteria developed by the ICISS (see para. 5 above) and in its report named five specific criteria of its own that should always be used to determine whether an intervention is justified: (1) The seriousness of the threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing, or serious violations of international humanitarian law, actual or imminently apprehended? (2) Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved? (3) Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed? (4) Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question? (5) Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

10 The role of the Security Council (right authority) is restated as follows:

> In considering whether to authorize or endorse the use of military force, the Security Council should always address—whatever other considerations it may take into account—at least [these] five basic criteria of legitimacy. (At paras 56, 207; → *Legitimacy*)

The introduction of the words ‘at least’ and ‘other considerations’ clearly lessens the significance of the criteria, and thereby reduces the objectivity of the test. This would seem to be a concession to the permanent members, all of whom were represented on the High-level Panel although its members were acting in their individual capacity. The High-level Panel was, like the ICISS, composed of respected personalities from around the world, among them ICISS co-chair Gareth Evans (para. 4 above), and was chaired by Anand Panyarachun (Thailand).

3. ‘In Larger Freedom’: The Report of United Nations Secretary-General Kofi Annan

11 The next voice advocating responsibility to protect was (once again) that of Secretary-General Annan in his report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ of 21 March 2005. He wrote:

> The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force. (At para. 126)

12 In the report, Kofi Annan looked at the rules on the use of force (→ *Use of Force, Prohibition of*) in general before drawing the following conclusions on humanitarian protection:

> We must also move towards embracing and acting on the 'responsibility to protect' potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less … The International Commission on Intervention and State Sovereignty and more recently the High-level Panel, with its 16 members from all around the world, endorsed what they described as an 'emerging norm that there is a collective responsibility to protect'. While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian, and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required. (At paras 132, 135)

D. State Practice

13 As of 2010, responsibility to protect has not really become accepted → *State practice*, and there has in particular been no agreement on a set of criteria or the transfer of responsibility to the international community as a whole. The most significant expression of a (partial) recognition of the notion is—alongside the aforementioned reports—the World Summit Outcome Document adopted by the General Assembly of October 2005 at the level of Heads of State and Government. This document could represent a first step towards the development of a new State practice in this field. It affirms the responsibility to protect populations from → *genocide*, → *war crimes*, ethnic cleansing, and → *crimes against humanity*. This is significant in that it explicitly imposes responsibility on States, thus affirming at least one of the two basic considerations underlying the notion (see para. 1 above). The international community is referred to the extent that the → *United Nations (UN)* Member States declare that they are prepared to take collective action if national authorities are manifestly failing to protect their populations from the specified threats. The wording of the relevant passages of the document is clearly the outcome of a hard-won compromise. Since then, the Security Council has reaffirmed on several occasions the relevant provisions 138 and 139 of the Outcome Document. Examples are the preambular part (→ *Preamble*) of UN Resolution 1706 (2006) of 31 August 2006 concerning the situation in Sudan, UN Resolution 1769 (2007) of 31 July 2007 concerning the deployment of → *peacekeeping* troops to Darfur, and UN Resolution 1894 (2009) of 11 November 2009 concerning the protection of civilians. The General Assembly has reaffirmed its commitment to the notion in Resolution 308 (2009) of 14 September 2009.

> Responsibility to protect related activities at the UN included an open debate at the General Assembly in July 2009, an informal interactive dialogue on early warning and assessment as relates to responsibility to protect on 9 August 2010 and the creation of the position of a special adviser to the Secretary-General with a focus on

the responsibility to protect. Two reports of the Secretary-General dealt specifically with the responsibility to protect: in 2009 Implementing

the Responsibility to Protect and in 2010 Early Warning, Assessment and the Responsibility to Protect.

14 Above and beyond this, the ICISS had recommended that: *a*) the General Assembly adopt a draft declaratory resolution embodying the basic principles of the responsibility to protect; *b*) the members of the Security Council should consider and seek to reach agreement on a set of guidelines, embracing principles for military intervention for human protection purposes; *c*) the five permanent members of the Security Council should consider and seek to reach agreement not to apply their veto power to obstruct the passage of resolutions authorizing military intervention for human protection purposes; and *d*) the Secretary-General should give consideration as to how the substance can best be advanced in the General Assembly and the Security Council and by its own further action.

15 In 2004, the High-level Panel had recommended that guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly; it also thought it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them. In 2005 Secretary-General Annan himself had recommended that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force (see para. 11 above). With the exception of the steps proposed by the Secretary-General, none of these recommendations had yet been fulfilled as of 2010.

E. Bearers, Scope, and Legal Nature of the Responsibility to Protect

1. Bearers

16 The ICISS and Secretary-General Annan left no doubt that the responsibility to protect civilians is first and foremost incumbent on each individual State with respect to its own population. That goes without saying. It is, however, insufficient of itself, should individual States be unable (or unwilling) to live up to this responsibility—whether intentionally or unintentionally. In such cases, eg → *failing States*, responsibility is said to shift to the international community. It is a recognized fact that the international community as such may have responsibilities. It has its instruments through which it can act, above all the Security Council. This is the community organ upon which a duty to act should be imposed. The shift in focus is clear: we are no longer talking about a *right* to intervene, but rather about the *responsibility* to act in discharge of a duty. This change in focus is also supported by Art. 24 (1) and (2) UN Charter, which refers to the primary responsibility of the Security Council and the discharge of its duties.

17 The responsibility will assume a more concrete form if the decision as to whether the Security Council must intervene to discharge its responsibility in any particular case is not left to its discretion, but must be taken in accordance with objective criteria. It takes little imagination to realize that most permanent members of the Security Council are not overly enthusiastic about limiting their options in this way. A well-defined responsibility to protect would make it harder for the international community to find excuses when a situation cries out for action. However, the difficulty of applying criteria such as proper purpose or right intention objectively in concrete cases remains a weakness of the concept. The concept, moreover, fails to answer the question of who should be entitled to determine authoritatively that protection is indeed required in cases where the Security Council fails to act. The only way currently provided out of this dilemma is the option of post facto review by the → *International Court of Justice (ICJ)*. If this problem is to be circumvented,

we must make it easier for the Security Council to take decisions in advance of any intervention. A declaratory Security Council resolution as recommended by the panel and Secretary-General Annan should perhaps be considered. Such a declaratory resolution could, if necessary, be taken by majority vote as a decision on a procedural matter relating to the ways and means of adopting decisions under Chapter VII.

18 No definitive answer has been given to the question of whether inaction by the Security Council opens the way for action by a third party. All statements so far have been made on the premise that it is still the Security Council that must act or mandate others to act. This is stated particularly clearly by the ICISS, whose criteria go into great detail about the role of the Security Council. However, if a public debate concludes that a certain situation meets the criteria developed by the ICISS—ie serious threat, right intention, last resort, proportional means, reasonable prospects—and thus deduces that there is objectively sufficient reason to intervene, it is undeniable that inaction by the Security Council could inspire other actors, who might see themselves as being legitimized by the fulfilled criteria, to seize the initiative. In such cases, the ICISS expressly mentioned action by the General Assembly as an option, in the form of an Emergency Special Session under the 'Uniting for Peace' procedure or alternatively by regional or sub-regional organizations within their areas of jurisdiction and → *regional co-operation*.

19 Individual States that are considering intervention may likewise be tempted to invoke a responsibility to protect that they believe to be given in a particular case. The clear reservations expressed in particular by a number of developing countries about interventions that are not sufficiently legitimized by the UN or that can no longer be blocked by individual permanent members of the Security Council, are most definitely pertinent here.

2. Scope

20 The responsibility to provide protection is a concept that stems from the endeavour to improve the predictability and speed of interventions by the international community in cases of objectively intolerable human rights violations. This interpretation is supported by all criteria so far developed, in particular that of the seriousness of the threat (large-scale killing, genocide). Debates on this issue must be held quickly and transparently and must be understandable. The rules that lead to the transfer of a far-reaching responsibility to protect to the international community—and possibly regional organizations—must only permit such a transfer in cases where humanitarian protection is required. Regime change, democratization, and such like are not covered by the concept of responsibility to protect. This limitation is inherent in the concept of responsibility to protect.

21 The further dimensions of the responsibility to protect (see para. 3 above: to prevent, to react, to rebuild) seem at present to be embedded more in the political than the legal sphere.

3. Legal Nature

22 The High-level Panel and Secretary-General Annan have repeatedly referred to the responsibility to protect as an emerging norm. In the absence of pertinent international conventions, this norm must be viewed as an emerging norm of → *customary international law*. Art. 38 (1) (b) ICJ Statue specifies 'international custom, as evidence of a general practice accepted as law' as a source of law. While there is not yet a general practice, an *opinio iuris* is gaining ground which at least explicitly permits a military response in cases of serious human rights violations covered by the concept of responsibility to protect. The notion of responsibility to protect builds on this and seeks to solidify this option into an international responsibility, at all events in cases where well-defined criteria are fulfilled.

What ultimately lies behind this is the consideration that has been aptly expressed by Christian Tomuschat:

> This, indeed, is the decisive test: must the international community stand idly by while millions of human beings are being massacred just because in the Security Council a permanent member holds its protective hand over the culprit? Must national sovereignty be understood as the paramount rule of international law that overrides any other value? Giving an affirmative response to these two questions would totally deprive international law of its essential value content. (At 224)

New evidence of this *opinio iuris* can be found in the important reports on responsibility to protect mentioned above. However, for it to cover the entire concept, in particular the proposed set of criteria and the imposition of a responsibility on the international community as a whole, the further steps proposed by the ICISS need to be taken by the General Assembly and the Security Council (see para. 14 above). To date little action has been taken on these matters. Responsibility to protect can—by these standards—not yet be considered a norm of customary law. Thus much will depend on future State practice. It is possible that the peerless documents relating to the concept of responsibility to protect, and the fact that those involved in their drafting included top international jurists and UN experts from all cultures, will then win new significance. These documents could then be drawn on as → *teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute)*, thus constituting subsidiary means for the determination of rules of law.

F. Outlook

23 Lending objectivity to the debate on interventions for the purpose of humanitarian protection based on a responsibility to protect is an appropriate way of resolving the dilemma between a duty to intervene for humanitarian reasons and respect for State sovereignty. Above all, it could provide urgently needed guidelines that would make assessments of precarious human rights situations more objective. It is to be expected that the legal content already acquired by the concept will be further consolidated as the debate continues, as well as by future State practice. It is to be noted that the concept has continued to be intensively discussed in a number of UN reports and fora since its introduction in 2005.

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