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Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields

Follow-up to the outcome of the Millennium Summit

Concept note on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

Note by the President of the General Assembly

1. The President of the sixty-third session of the General Assembly has the honour to transmit to Member States as a document of the General Assembly the concept note on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (see annex).

2. Member States will recall that this concept note was circulated as an input for the Interactive Thematic Dialogue of the United Nations General Assembly on the Responsibility to Protect, held on 23 July 2009, and subsequent plenary discussion of the report of the Secretary-General (A/63/677) on the subject held on 23 and 24 July 2009.

3. Four highly distinguished panellists of great intellectual ability — Noam Chomsky (United States of America), Jean Bricmont (Belgium), Gareth Evans (Australia) and Ngugi wa Thiong'o (Kenya) — graced the General Assembly with their insights and analysis and contributed to a rich exchange between the panellists and among the Member States.

4. To facilitate the dialogue between Member States and guest speakers in the interactive dialogue, the four distinguished panellists were encouraged to consider the following four benchmark questions to determine whether and when Member States and our system of collective security should begin to implement the responsibility to protect:

- Do the rules apply in principle, and is it likely that they will be applied in practice equally to all nation-States?

- Will adoption of the responsibility to protect principle in the practice of collective security more likely enhance or undermine respect for international law?
- Is the doctrine of responsibility to protect necessary and, conversely, does it guarantee that States will intervene to prevent another Rwanda?
- Do we have the capacity to enforce accountability upon those who might abuse the right that the responsibility to protect would give nation-States to resort to the use of force against other States?

5. These benchmark questions have provided Member States with a useful framework for examining the multiple and complex challenges we face in improving our system of collective security.

6. Statements by Member States and panellists at the interactive thematic dialogue on the responsibility to protect are available on the website of the President of the General Assembly.

Annex

Concept note on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

The five main documents in which responsibility to protect has been articulated are the High Level Panel's "Report on Threats, Challenges and Change"; the Secretary-General's report "In Larger Freedom"; the Outcome Document of the World Summit 2005; United Nations Security Council Resolution 1674; Secretary-General's report on "Implementing the Responsibility to Protect". None of these documents can be considered as a source of binding international law in terms of Article 38 of the Statute of the International Court of Justice which lists the classic sources of international law.

At the negotiations on the World Summit Outcome Document, the then United States Permanent Representative John Bolton stated accurately that the commitment made in the Document was "not of a legal character". The Document is carefully nuanced to convey the intentions of the member States. Paragraph 138 when it deals with the individual State's responsibility to its own people is clear in its commitment. When it comes to the international community helping States, the phrase used is a general appeal — "should as appropriate". Paragraph 139 continues this nuanced approach. The language is clear and unconditional when it speaks of the "international community through the UN" having the "responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VIII of the Charter". The Document is very cautious when it comes to responsibility to take action through the United Nations Security Council under Chapter VII. Paragraph 139 uses at least four qualifiers. Firstly, the Heads of State merely reaffirm that they "are prepared" to take action, implying a voluntary, rather than mandatory, engagement. Secondly, they are prepared to do this only "on a case by case basis", which precludes a systematic responsibility. Thirdly, even this has to be "in cooperation with regional organizations as appropriate". Fourthly, this should be "in accordance with the Charter" (which covers only immediate threats to international peace and security). Finally, the Heads of State emphasize "the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law (emphases ours). It is therefore, amply clear, that there is no legally binding commitment and the General Assembly is charged, in terms of its responsibility under the Charter to develop and elaborate a legal basis.

It is the great anti-colonial struggles and the anti-apartheid struggles that restored the human rights of populations across the developing world and therefore were the greatest application of responsibility to protect in world history. Their success probably led to more humane governance in Europe and thereby, at least indirectly, increased the protection of European populations also. Colonialism and interventionism used responsibility to protect arguments. National sovereignty in developing countries is a necessary condition for stable access to political, social and economic rights and it took enormous sacrifices to recover this sovereignty and ensure these rights for their populations. As the U.S. Declaration of Independence says, the people have the right to get rid of their government when it oppresses them

and has thereby failed in its responsibility to them. The people have inalienable rights and are sovereign. The concept of sovereignty as responsibility either means this and therefore means nothing new or it means something without any foundation in international law, namely that a foreign agency can exercise this responsibility. It should not become a "jemmy in the door of national sovereignty". The concept of responsibility to protect is a sovereign's obligation and, if it is exercised by an external agency, sovereignty passes from the people of the target country to it. The people to be protected are transformed from bearers of rights to wards of this agency.

The international community cannot remain silent in the face of genocide, ethnic cleansing, war crimes, and crimes against humanity. But the United Nations response should be predictable, sustainable and effective without undermining the United Nations credibility based on consecrated cornerstone values enshrined in the United Nations Charter. Therefore, it is the preventive aspects of responsibility to protect that are both important and practicable but these need both precise understanding and political will. Genuine economic cooperation in an enabling international environment would do much to prevent situations calling for responsibility to protect. This requires an urgent reform of international economic governance, specifically of the Bretton Woods Institutions with their pro-cyclical advice, including shifting to cash crops and eliminating subsidies. Political will is needed for coordinated international action focused on development in order to implement the Monterrey Consensus, the Millennium Development Goals and the consensus Outcome of the High Level United Nations Conference on the World Financial and Economic Crisis and its impact on development. In the Human Rights Council and the Peacebuilding Commission we possess important instruments for capacity-building and prevention.

On the other hand the elements of a so called timely and decisive response are far more problematic. Articles 2.4 and 2.7 of the Charter prohibit the use of force. Article 24 confers on the United Nations Security Council responsibility to maintain peace and Article 39 to determine any threat, breach of peace or aggression and measures to restore peace. Article 41 spells out breaking diplomatic relations, sanctions, and embargoes. If these fail Article 42 empowers force. None of these would cover responsibility to protect unless the situation is a threat to international peace and security. The Security Council's powers are not directed even against violations of international legal obligations but against an immediate threat to international peace and security. Collective security is a specialized instrument for dealing with threats to international peace and security and not an enforcement mechanism for international human rights law and international humanitarian law. The discretion given to the Security Council to decide a threat to international peace and security implies a variable commitment totally different from the consistent alleviation of suffering embodied in the responsibility to protect. The Security Council has not been willing to relinquish to the International Criminal Court its power to determine crimes of aggression.

In case a responsibility to protect type of situation becomes a threat to international peace and security, the question of the veto will arise. The veto ensures that any breach committed by a permanent member or by a member state under its protection would escape action. Member states, therefore, need to decide whether "a mutual understanding" among permanent members "to refrain from employing or threatening to employ the veto" in responsibility to protect situations is adequate or

whether an amendment of the Charter is necessary. A "mutual understanding" implies no enduring obligation and therefore has no legal force. The problem is that if a veto has been cast, the General Assembly cannot overturn it; even without it, the General Assembly cannot take up a matter that is on the agenda of the Security Council. The International Law Commissions draft Articles and the Third Report on responsibility of International Organizations states that internal rules provide no excuse for failing to discharge its obligations. If internal rules and the Charter [Article 27 (3) on the veto] prevent exercising any future responsibility to protect then should the veto go in such cases or should the responsibility be abdicated? The existence of the veto and the erosion of globalization strengthen the Westphalia paradigm as against the individual rights centered paradigm of responsibility to protect. Neither do the Councils procedures have any provision for due process of law nor are its decisions subject to judicial review. Moreover member States need to consider whether, as Secretary General Kofi Annan used to say, the political basis for Security Council decision making is far too narrow. The provisions of the Genocide Convention provide for a State to approach the appropriate organs of the United Nations to take action to prevent and suppress genocide, as well as actions in preparation thereof. It is the veto and the lack of United Nations Security Council reform rather than the absence of a responsibility to protect legal norm that are the real obstacles to effective action (in an article on the Rwanda genocide Under-Secretary-General Ibrahim Gambari reached a similar conclusion).

Similarly, is it enough to simply ask member States to become parties to the Rome Statute of the International Criminal Court? Is it not also essential to have a definition of aggression under the Rome Statute in order to deter adventurism before the responsibility to protect can be developed? Moreover, the International Criminal Court remains accountable to the Security Council in the sense that the Council has the power to delay consideration of a case by a year and then another year, indefinitely.

In case peremptory norms are breached, the International Law Commission's draft Articles on State Responsibility specify two sets of consequences: (1) a positive obligation of States "to cooperate to bring the serious breach to an end through lawful means" [Article 41 (i)] and (2) not to recognize as lawful a situation created by the breach and not to render aid in maintaining that situation [Article 41 (ii)]. The use of military force is expressly excluded from the realm of possible counter measures. Article 50 (i) (a) categorically says that counter-measures shall not affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations". It is for member States to consider if responsibility to protect in its non-coercive dimensions adds anything to the International Law Commission's Articles or to the provisions of international human rights law and international humanitarian law.

The International Court of Justice has rules that "where human rights are protected by International Conventions, that protection takes the form of such arrangements for monitoring or ensuring the respect for human rights as are provided for in the Conventions themselves. The use of force could not be the appropriate method to monitor or ensure such respect". Can any troops wage a war for human rights without causing more harm than the violations they set out to correct? In terms of the suffering of the population would this also not be true of sanctions that cause the deaths of the most vulnerable — women and children —

from malnutrition and lack of medicines? Will not an association with the use of force also compromise and weaken international humanitarian law?

In terms of the actual resource situation when there are not enough troops available even for vital peacekeeping, would there be any capacity for rapid deployment or preventive deployment?

His Holiness Pope Benedict XVI spoke of responsibility to protect in the General Assembly in April 2008 but he emphasized that the "juridical means" employed should be those "provided in the UN Charter and in other international instruments". These do not include the use of military force. The Pope also said that "the principles under girding the international order" must be respected. These principles include sovereignty and exclude the use of force. Jesus' emphasis on redistribution of wealth to the poor and on non-violence reinforces the right perspective on responsibility to protect.

On any early warning mechanism, apart from United Nations Secretariat accountability and General Assembly oversight, member States would need to consider whether the Secretariat should take any action at all before the United Nations General Assembly has developed the concept and elaborated its legal basis.

Finally any decision taken by the General Assembly would need to ensure that it does not inadvertently or even remotely, in the words of Jurgen Habermas, "break the civilizing bounds which the Charter of the United Nations placed with good reason upon the process of goal-realization".