



THE RESPONSIBILITY TO PROTECT AT 10: THE CHALLENGE OF PROTECTING THE WORLD'S MOST VULNERABLE POPULATIONS

Responsibility to Protect – a Right of Self-Defense for All States against Atrocities
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The aim of this essay is to make a case for the international community's right of self-defense against atrocities, through its members, and to refer briefly to the challenge of implementing such a right. The essay includes two parts. The first deals with the idea of such a right – namely, the need for it and its justification, against whom it may be directed, and a discussion of the counterarguments. The second part of the essay deals with ways to implement the proposed approach.

A Case for self-defense, or the prevention of crimes of atrocity

Self-defense by the international community through its members

Atrocities such as genocide, acts of mass killings of civilians, and ethnic cleansing are forms of illegal attack on the international community as a whole. In fact, it is difficult to imagine more severe attacks on the international community. Such atrocities undermine the fundamentals of the international legal order more than an attack by one state against another state, aiming to take over a scarcely populated piece of land. As an attack on the international community as a whole, it is, at the same time, an attack on each of the state members of that community. Each member

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is therefore entitled to take measures to forcibly stop an atrocity, in order to prevent an imminent attack or to avert an actual one.

The idea that crimes against humanity are crimes against the international community as a whole, and against each of its members, is not novel. It serves as the rationale for empowering all states to bring suspects to justice before domestic courts. As will be elaborated below, prevention of crimes should have priority over punishing them after the fact. It is a definitional component of self-defense that it is directed against an illegal attack, and the severity of the attack increases the scope of the permissible use of force used to stop or avert the attack. Stopping the mass killings of civilians is an extremely worthy cause to justify the use of force against the attacker.

This is different from the approach in which the rationale of the doctrine of the responsibility or duty to protect is exclusively focused on saving human lives, in the same way that such rescue efforts take place in the context of a catastrophe, whether natural or industrial. What is being attacked, and thus protected, under the approach we are proposing here is not only human lives, but the international legal order at its core. A similar aspect of the definition of self-defense is the reason that, in domestic law, self-defense in most legal systems entitles anyone to defend the victim, not only the victim herself. Moreover, it is permissible to do more in averting an illegal attack than in acting under necessity (where the cause of danger is not an illegal attacker) – for instance, to cause more harm than the harm expected.

A somewhat similar approach is based on the analogy of the prevention of crime as the role of police legal systems. Having committed itself to the prevention of the most heinous crimes, the international community cannot exhaust its commitment solely through punishment. It has a duty to prevent these crimes. Since it has not established a permanent police power, it is assumed to delegate police power to each member state, in a similar way that universal jurisdiction has been established, enabling all states to enforce the norms of universal crimes

As will be shown, the fact that an attack can be carried out by a government against its own citizens does not deprive it of its quality as an attack on the international community.

Prevention has priority over punishment

When prohibition of a crime is being established, the main aim is to prevent that crime. Punishment after the fact is meant to validate the violated norm, and to enhance its preventive potential. It is clear that the real success of the prohibition is when there is no need to make use of punishment. From the point of view of victims, there is often literally a hell of a difference between prevention of a crime and its punishment; for their purposes, punishment is far too late. From the deterrence perspective, the expectation of forcible prevention is much more convincing than the expectation of being punished after having committed the crime, being captured, and being brought to justice.

This is the reason for establishing a legal obligation for individuals in various legal systems to report or prevent the perpetration of serious crimes. The timely enforcement of international criminal law through prevention of crimes is similarly required in order to strengthen the impact of international norms concerning crimes against humanity. The commission of atrocities without an effort to prevent them undermines the public's trust in the norms against such atrocities. In a sense, such prevention is a barometer of the seriousness of the international community's attitude towards crimes against humanity, the actual existence of an international legal order, and the international community's commitment to protecting human rights against their most severe violations. It is easy to see the compelling nature of recognizing the right to stop atrocities through examining the implication of its absence.

A world without such a right

In the absence of such a recognized right, an intrusion into the sovereignty of the state where atrocities are being committed, without authorization by the UN Security Council, would itself be considered an act of aggression, as would activities within that state aimed at stopping the atrocities. This renders in the wrong the state that is intervening and trying to protect potential victims, and makes the state allowing such atrocities in the right, entitled to defend itself against an aggressor. What a distortion of justice and morality! Let us think of the message sent about the meaning and validity of the notion of crimes against humanity. By failing to allow state agents to act to prevent such crimes, the international legal system privileges the murderers by creating a de facto immunity zone for them to commit their atrocities. This creates an

extremely powerful disincentive for states against intervention to prevent atrocities; law-abiding states would not intervene.

Some find consolation in the international public legitimacy that is often granted for such intervention, as distinct from formal legality. This is insufficient and unsatisfactory: insufficient because the formal violation of the law will haunt and cast a shadow on any extra-legal legitimacy; unsatisfactory because it is a characteristic of a weak legal system when an illegal act is ignored and considered legitimate. Such a gap invites a wake-up call for the legal system to change.

On the other hand, when atrocities are committed with no intervention, this condemns the victims to total alienation and extreme helplessness, as if they were entirely expelled from the realm of humanity itself. Nothing could be more welcome for the perpetrators, who are left to continue performing their barbarous acts with no interruption. From their perspective, this is an encouragement to continue. And future mass murderers are not blind or unimpressed; they draw confidence for their future atrocities. The international audience cannot escape observing the most fundamental norms of the international community being trashed in their shameful weakness.

Before turning to counter arguments, it is necessary to examine against whom self-defense can be directed – in other words, who is an illegal attacker?

Who is an illegal attacker?

In self-defense, the acts aimed at stopping the illegal attack have to be directed towards the aggressor (the illegal attacker). Who should be considered an illegal attacker? It is not only those who are directly and indirectly involved in the atrocities. The state in which the atrocities take place may also have the role of an attacker.

An analysis of the involvement of a state in crimes against humanity leads to three possibilities:

- It is the state itself that is committing the crimes, i.e. the inspiration comes from the leadership and it is the state apparatus that commits or directs the commission of the crimes. A related case is where the state is taking part in perpetration of the crimes together with a non-state organization. Both of these are cases of direct involvement of the state as a perpetrator of the crimes.

- In the second case, the state is not directly involved, but it does not act to prevent the perpetration of the crimes because it is unwilling to stop them. Complicity in the crimes may take shape as a failure to act when there is, as here, a duty to prevent. Thus, the state is an accomplice to the crimes.
- The third case is similar to the second, but the non-intervention of the state is due to its inability to prevent the crimes rather than its unwillingness to do so. Does it mean that such a state is off the hook and may claim itself blameless? No – in such circumstances, it is the duty of the state to initiate interference from others, or at very least to accept that other states will interfere in its place. If the state refuses such a course of action, it makes itself an accomplice to the crimes due to its failure to enable their prevention through others.

Counter arguments

1) Is the idea of self-defense compatible with the principle of state sovereignty? Why is state A. entitled to use force against state B. because of acts done within state B. against its own citizens?

State sovereignty cannot and should not be an obstacle. In a world committed to the protection of human rights, sovereignty must be understood as functional and conditional. An analogy can be drawn from the autonomy of a person in her/his home and the related immunity of personal residence. This immunity is not absolute and not unconditional; it is conditional upon obedience to the law. When there is reasonable suspicion that criminal activity is being conducted in the house, even by the owner, such immunity is lifted. The state is, first and foremost, its citizens and not its regime. The citizens are the sovereigns, and they have priority over territorial integrity.

Sovereignty of a state is the sovereignty of its people, not of the regime. To the extent that the state is attacking its own citizens, or even failing to protect the lives of its civilian population, it loses its sovereignty as a shield from external intervention. Sovereignty is not meant to enable atrocities and to provide a “safe haven” for committing them. A regime involved – in the broad sense described above – loses its legitimacy and its authority to represent the state. This is an extreme case that justifies extreme measures aimed to stop the atrocities, whether through rebellion against the regime from within or external force from the outside.

2) Is the mechanism that enables the Security Council to decide on taking action an alternative and preferable solution to the problem?

No. The power of the Security Council is limited to what is necessary for international peace and security. It is not at all clear that all atrocities or even “typical” atrocities endanger international peace and security. As long as the power of the Council is held hostage to the veto power of its permanent members (and a change of the system is not in the cards), it is extremely irresponsible to leave the fate of countless victims to the rare possibility of a unanimous agreement. That is a gamble that puts human lives under an unreasonable risk of being destroyed with no possibility of rescue. We cannot and should not escape the question: What is to be done in cases of international paralysis? Are the victims to be abandoned and the killers encouraged to go on?

3) Is the above-described approach a wild horse inviting badly motivated riders to abuse the right of self-defense?

To the extent that such a risk exists, it should not be exaggerated. The incentive for intervention in such messy circumstances is low; is unlikely that a state could emerge unharmed from an unjustified intervention. What could reduce the risk even more is a credible and efficient tool, with wide international support, for the fact-finding of atrocities that are taking place or are imminent. Two requirements should be imposed on a state willing to intervene: to articulate to the international community, before the intervention, the case for intervention; and to make an effort to join forces with other states as an indicator of support for its bona fide motivations. It makes sense that the burden of fighting in the name of humanity will be carried jointly by many, or at least some. This is also a reason to demand that the private sector contribute to funding such a military effort, as well as to helping the survivors and bringing back normalcy and prosperity after mass killings and devastation. The real challenge, to be discussed below, is in fact in the opposite direction: how to create incentives for intervention when it is needed. I will now turn to some of the challenges of implementing this approach.

The challenges of implementation

Prevention

As mentioned above, prevention of atrocities before they take place should have priority. This requires a warning system, a constant effort to detect and analyze information that may indicate an imminent outburst of atrocities. When enough evidence has been accumulated to show a concrete plan of atrocities, steps should be taken to paralyze the murderous potential of the state or the involved non-state organizations, through a boycott on weapons and oil and the freezing of financial assets, taking care to minimize the effects of such steps on the local population. Personal threats of economical, legal, and political sanctions have to be issued to those in charge of the planning and implementation of the plan to commit atrocities.

The role of the people: the local population

Since the atrocities are directed against the population of the same state, it is important that not all citizens become implicated – through action or omission – in the atrocities. The rebellion of citizens against such a regime should be encouraged, provided that there is a continuous resolve to help the opposition in different ways, such as arms, training, partnership, and support in military activities. Actions of the opposition should be endowed with strong legitimization; its manifestations are context dependent and may include political recognition, protection, shelter, asylum, naturalization, etc.

A special kind of war: a war of nobility

Although the state itself bears responsibility for the atrocities, personal accountability should not be neglected, but rather emphasized. Counter-activities should be directed against those involved in the atrocities who hold leadership and command positions; they should be personally warned, evidence against them should be exposed, and they should be invited to rebut the evidence, even without appearance. If these efforts are futile, leaders and commanders should be treated as high-priority military targets. Special care should be invested to minimize the toll on uninvolved citizens. Infrastructure that serves the atrocities should be neutralized. It is essential that leadership and military command be replaced by an interim regime committed to

stopping the atrocities; otherwise, a vacuum in leadership leading to chaos might ensue.

Such pinpointed actions are more just, more effective, and more acceptable from the perspective of the local population. It is also relatively lifesaving and less demanding from the perspective of the intervening state than a full-scale military confrontation. It is based on lifting the veil, and on a distinction between a regime or a government and the general population. To the extent possible, the noble character of such a “war of rescue” should be maintained and adhered to zealously. This is aimed at paralleling the noble purpose of the war with a lifesaving approach in selecting the means aimed at best achieving the purpose. It is essential that this nature of the war and the warriors be articulated and internalized. This is a small token of appreciation and reward to those required to risk their lives, not for their own country’s sake or the sake of its people, but in order to save the lives of “others,” fighting for mankind as such, for the cause of humanity. Framing this kind of war as a noble war may help in overcoming the lack of motivation for a non self-serving war.