PENSAMIENTO PROPIO

PUBLICACION TRILINGÜE DE CIENCIAS SOCIALES DE AMERICA LATINA Y EL CARIBE

Latin America and the Responsibility to Protect: Divergent Views from the South?

Andrés Serbin and Andrei Serbin Pont (Editors)

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SPECIAL ISSUE – 10 YEARS OF THE RESPONSIBILITY TO PROTECT

41

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† In memoriam

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En portada / Cover: Fragmento de *Perro*, acrílico sobre tela, de Rafael Coronel, 1973. Del libro Rafael Coronel. Retrofutura, México.

Message from the Director

Dear friends:

This special issue of *Pensamiento Propio,* aimed at presenting Latin American contributions and insights regarding the Responsibility to Protect and their impact on a global level, is a first attempt to disseminate a regional debate to broader audiences. This is why we made a special effort to have as many contributions in English as possible, even if the authors were not English native speakers, with the purpose of reaching a group of readers which usually do not access Latin American academic publications in Spanish. Originally conceived as a collective volume on this topic, a series of non-anticipated last minute difficulties and delays, forced us to reframe the original project and to prepare instead a second special issue of our journal dedicated to the subject, following the one published in 2012. However, one of the chapters and the Dossier on El Salvador are included in this issue in Spanish.

Besides the language issue, we also made an effort to thoroughly edit and review every chapter of this volume.

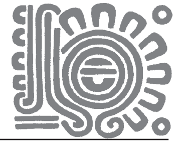
In this regard, I would like to specially thank Andrei Serbin Pont both for writing with me the introductory chapter and the one on Brazil, and in working jointly in editing this volume, as this was a challenging

but pleasant journey of mutual collaboration. Also I would like to thank Ana Bourse from CRIES for preparing and introducing the Dossier on El Salvador and Isabella Shraiman for her volunteer work in editing several chapters in this volume. I also would like to thank the commitment and the patience of most of the contributors, some of whom accepted to review and to go through their original manuscripts in several occasions, positively and creatively reacting to our comments and suggestions. A special thanks to the Ford Foundation for the support for the publication of this volume. Without the support of all of them this issue would not have been possible.

Finally, I would like to add that this Special Issue of *Pensamiento Propio,* does not include the usual sections on reviews and publications in order to adapt to a format of a collective volume.

Until next issue,

Andrés Serbin



Introduction

Latin America and the Responsibility to Protect: Divergent Views from the South?

Andrés Serbin and Andrei Serbin Pont

The changing international landscape and the Responsibility to Protect

In the last two decades, the international system underwent significant changes. The most important issue in current international relations relates to the nature of the change from a uni-polar world to a multi-polar structure after the end of the Cold War. In addition to the economic and political rise of China, recent years have seen an increasingly proactive and nationalistic Russia as well as growing assertiveness by major regional powers (Laskaris and Kreutz, 2015), as a diverse group of formerly peripheral states became increasingly empowered: not just

China, India and Brazil, but also South Africa, Indonesia and others that are commonly referred to as 'emerging powers'.

As a result, some analysts argued that the "West" was confronting the "rise of the rest" (Zacharia, 2008; Hiro, 2010), and that North-South traditional relations begin to be transformed with the emergence of a more assertive Global South.

The recent rise of the South challenges the common ideas behind North-South relations. A new approach for understanding North-South relations is emerging. This approach moves beyond the traditional concepts of domination and modernization and stresses a more independent and proactive Global South. Most importantly, the South is challenging the post–World War II world order. Both Brazil and India are demanding permanent seats on the UN Security Council and several countries, including Germany, are asking for a reform of the UN. Additionally, a number of Southern countries such as South Africa, Turkey, Brazil, México and Argentina now sit at the influential G-20 summit meetings (i.e., the world's most powerful economies) to make an impact on global policy (Ripley, 2014: 149-150).

Emerging powers are increasing their influence in international affairs, both as individual actors, as members of multilateral institutions or as participants of Global South blocs such as the BRICS (Brazil, Russia, India, China, South Africa), IBSA (India, Brazil, South Africa) or MIKTA (México, Indonesia, South Corea, Turkey, Australia). This reconfiguration also created the conditions for a new geopolitical landscape in the Americas, with the establishment of organizations such as ALBA (Bolivarian Alliance of the Americas), UNASUR (Union of South American States,), CELAC (Community of Latin American and Caribbean States) or the Pacific Alliance, some of them with strong focus on South-South cooperation and increasing autonomy from the United States, while the previously established OAS (Organization of American States) and other groups linking the North with South are still persistent.

Within this framework, "Western" values and norms, which traditionally permeated the debate on the global agenda began to be reviewed or contested by the new emerging actors. Simultaneously with other global processes, the diffusion of norms and particular normative con-

ceptions from the Global South, moved the discipline of international relations from "international relations" toward the study of global governance (Sikkink, 2015: 350; Serbin, 2013: 181), which includes a broad array of state and non-states actors involved in global power dynamics.

In this regard, the end of World War II and the establishment of the United Nations carried important implications for state sovereignty. These events ushered in a wave of decolonization resulting in the creation of new formally sovereign states over the next several decades, drastically altering the international landscape. Furthermore, states in the Global South have, at least in the wake of decolonization, been more enthusiastic in their promotion of strict sovereignty than their Northern counterparts (Coe, 2015: 275). As pointed out by Rotmann and al. (2014: 256), decolonization made them equal members of the global order in name only: the rules of the game were set long ago by Europe and the United States. As seen from Beijing, Brasilia or Delhi, 'resistance to the West required urgent adaptation to Western ideas of […] the nation-state'. From this perspective, state sovereignty and non-interference were among the most relevant aspects of a global normative order emerging powers had never been able to shape. However, after the Second World War, Western notions of sovereignty associated with the Westphalian understanding of the role of the State in the international system were gradually embedded in the emerging worldviews from the South, while through the process of decolonization that developed after the Second World War, the principle of non-intervention was also closely associated to the notion of national sovereignty (Serbin, 2010).

These changes also affected the process of globalization of human rights (Coicaud, Doyle and Gardener, 2003), as understood by Western major powers, raising the question of who sets the global human rights agenda and the norms associated to it in the international system, and how those norms were associated with a diffusion from the North or with its vernacular adaptation on a national and local level by the South.[1] In this regard, Acharya (2004, 2011) introduced the concept of "localization" arguing that local actors actively reconstruct global norms "to create a fit between those norms and prior local norms", and the notion of norm "subsidiarity" (or "norm protagonism", according to Sikkink), whereby states and regional actors create new norms or

new understandings of existing global norms (Sikkink, 2015: 350). The diffusion of global norms also involves "norms entrepreneurs" that can shape them in a different form. Dominguez (2008) has stressed in this regard, that Latin American organizations have been "international rule innovators", particularly in the 20th century and even previous to the process of decolonization, showing how Latin American states pioneered the defense of sovereignty and non-intervention, but also modified later such doctrines to permit international intervention on behalf of democracy. Following this observation, Sikkink argues "that Latin American states, regional organizations, and social movements were much more than passive recipients of an international human rights regime imposed from outside" and greater attention should be payed to the "protagonist" role of states and social actors outside the global North "despite important structural inequality in the international system" (Sikkink, 2015: 350).

However, the post-Cold War era witnessed not only the globalization of human rights and the related subsequent norms approved and promoted by the UN and by several regional organizations, according to different interpretations and priorities, but also an increasing (and general) concern, particularly after the crisis in Bosnia and Rwanda, about the prevention of mass atrocities and how the international community should be dealing with them and the arising humanitarian crisis, in a gradual transition from the concept of "humanitarian intervention" to the notion of the "Responsibility to Protect" (RtoP) in the event of mass atrocities against civilians (Evans, 2006).

The debate about a Responsibility to Protect people from mass atrocities – even if they are perpetrated by its own State - goes to the core of current changes in the world. Coinciding with the shift of power and influence away from the West, its evolution as a norm has become a crucial arena in which fundamental conflicts about the future global order play out. The nascent evolution of a responsibility to protect 'from idea to norm', as its supporters put it, has been accompanied by growing controversy. From its first global endorsement at the UN General Assembly in 2005 to the fallout over the military intervention in Libya in 2011, the issue has become heavily contested. However, in spite of the criticism and the contestation, the misuse of the RtoP language suggests a paradox: this norm is better understood and more

broadly accepted than often believed (Bradescu and Weiss, 2014:16). Indeed, the debates around a Responsibility to Protect provide a unique opportunity to analyze the changing global order in a way that focuses on fundamental conflicts over sovereignty and responsibility (Rotmann, Kurtz and Brockheimer, 2014: 357).

The RtoP concept, formalized by the 2005 United Nations (UN) World Summit (UN General Assembly, 2005) and the 2009 Report of the Secretary-General (UN Secretary-General, 2009) may face renewed scrutiny in a future multilateral system.[2] While RtoP was not imposed only by the West, the view of human rights as an important concern for international relations has been promoted by democratic, particularly European, states. Thus, this specific issue-area provides a suitable setting to explore whether rising powers may adapt to or seek reforms or even removal of existing international norms and agreements (Laskaris and Kreutz, 2015: 150).

While institutionalized discussions about RtoP first began in the 1990s, the promotion of human rights through military interventions and sanctions, aid allocation and supranational institutions had previously been mentioned in the foreign policy goals in Europe and the USA. However, while the concern for humanitarian suffering influenced the practice of the UN and other powers, the norm only became formalized in the early 2000s.

As aptly described by Alex Bellamy in his chapter, the principles of the Responsibility to Protect are based on three pillars. First, that the responsibility lies on the State to protect its population from mass atrocities. Second, that the international community has a responsibility to assist the State to fulfill this duty. Third, if the State is manifestly failing to protect its population from mass atrocities, then the international community must be prepared to take collective action to protect the people by proportional means ranging from peaceful to coercive in accordance with the UN Charter. As with most broad policy documents, these pillars are open to interpretation with regards to when and how they should be applied. This is particularly the case for the first and second pillars which generally receive a consensual support from both the Western countries and the Global South, especially represented by the BRICS group (Stuenkel, 2014). The third pillar is the subject of most of the divergent views by the UN member states, and creates

a division between the West and the rest regarding the use of force as the mechanism to be implemented by the international community in nations suffering from the incapacity of the State to deal with mass atrocities within its borders. As noted by Arredondo in his chapter in this volume:

> "The third pillar, which upholds the necessity of a "timely and decisive response," is clearly the most controversial one as it opens the possibility of the use of force within the framework of Chapter VII of the UN Charter. In this regard, it should be noted that there remains some sensitivity to the potential risks of abuse arising from the application of the concept in practice, which proved truthful after NATO's actions in Libya in 2011".

However, while the use of force has been the most fiercely debated option within the RtoP framework as an instrument of external intervention in domestic affairs, it is by no means the only measure through which the international community can contribute to the protection of civilians (Laskaris and Kreutz, 2015:150-151).

When addressing those issues, the conventional interpretation of national sovereignty contrasts with the idea of a "responsible or conditioned sovereignty", as the "responsibility for good governance" and the "accountability to national constituencies and the international community". These principles were the precursors of the concept of "Responsibility to Protect" (RtoP), particularly when moving from the concept of the control of the State to its responsibility *vis á vis* its citizens (Deng, 2000). Divergent views on national sovereignty and its reach translate into different perceptions and interpretations of RtoP and the use of force as a last resort, and this divide is a source of important controversy. Similarly, the rest of the world addresses the issue of human rights and democracy through its own lens, developing particular interpretations according to their own values and worldviews.

In this regard, the most transformative aspect of the human rights regime for the international system is found not in its growth in scope, instruments, implementation, and players but in its impact on a fundamental principle of international relations: state sovereignty. By granting rights to individuals, the conception of human rights limits

state sovereignty, as a state´s legitimacy is tied to proper treatment of its citizens (Doyle and Gardner, 2003: 3). Therefore, one of the basic existing tensions is between the traditional/conventional principles of national sovereignty and non-intervention, and the defense of human rights which reaches its peak when dealing with the four crimes addressed by RtoP.

It is along this background, that several questions could be raised regarding the emergence of RtoP as a new norm and its assimilation or reformulation by the diverse countries and regions of the Global South. Latin America in particular, represents a cauldron of different ways of processing and reacting to the new norm and this special issue of the journal attempts to address the existing regional divergences from this perspective, following previous issues on the applicability of RtoP in the region and the reform of the Inter-American Human Rights System (Anaya and Saltalamacchia, 2013).

Within this framework, the main questions to be answered is if the different positions adopted by Latin American countries regarding RtoP make a substantial difference in its global acceptance and if those countries still keep a certain role as international rules innovators when dealing with the norm. A second question that also begs for a response relates the reach of certain Latin American nations with global aspirations to became norm entrepreneurs and to introduce substantial modifications to the globally discussed norms.

Nonetheless, before moving to the discussion on RtoP in Latin America, we should note two important issues related to the development of this norm in the global sphere.

First of all, RtoP is still a contested norm within the international system, even if, as noted by Badescu and Weiss (2010), "as expected during the early stages of a norm spiraling toward socialization, backlash, and contestation dominate much of public diplomacy; but backlash and contestation also can serve as boundary-defining exercises that clarify the actual meaning and limits of the norm" (2010:16). Therefore, this norm is better understood and more broadly accepted than often believed, as norms can advance through contestation and conceptual clarification (ibidem).

Secondly, as Rotmann et al (2014) shows "while relevant on a few occasions that made headlines, none of the neat splits between 'North' and 'South', 'Western' and 'non-Western', 'emerging' and 'established', 'democratic' and 'authoritarian' is helpful on its own in analyzing evolving views on global order through the prism of a responsibility to protect." Even if the norm is still under discussion, there are reiterated and clear changes of positions of the different countries within each bloc regarding RtoP.

Both observations apply to the analysis of the process of regional assimilation of the norm in Latin America, within a changing landscape of priorities, positions and initiatives by the countries of the region with regards to it.

Latin America and the Responsibility to Protect: Champions, spoilers and rule innovators

The previously presented approaches are particularly useful for explaining the process of introduction, assimilation and reaction to a new global norm such as the "Responsibility to Protect" (RtoP) in Latin America and the subsequent debate on its recognition and implementation, between those nations that support the norm and those who are reluctant to accept it - what we call the "champions" and the "skeptics", respectively.

The debate about a responsibility to protect people from mass atrocities goes to the heart of current changes in the world. Coinciding with the shift of power and influence away from the West, its nascent and contested evolution as a norm has become a crucial arena in which fundamental conflicts about the future global order play out (Rotmann, Kurtz and Brockmeier, 2014), as part of the evolving tension and balance between the normative order of human rights and the modern international system. In Latin America, as in other parts of the world, the debate is clearly intertwined with the sovereignty and non-intervention doctrines which are historically embedded in its diplomatic and juridical tradition, and the also historically consolidated trend of juridical thought regarding human rights and democracy, within a sophisticated and highly developed system of regional international

law and institutions (Kacowicz, 2005: 10). The debate also shows the ambivalent frontiers existing between the main positions regarding the norm, a lack of a distinctive and clear differentiation between both currents and the existence of an ambiguous "grey zone". The apparent dichotomy between "champions" and "skeptics" is often blurred by slides and displacements by their respective leading voices to ambivalent and, sometimes, contradictory positions. A situation which perhaps raises the question on the validity of this dichotomy *vis a vis* the predominance and eventual broadening of the "grey zone".

In this regard, in Latin America, reactions to the norms originated from the West are not monolithic. They are diverse and heterogeneous in the framework of eventually divergent strategic cultures in the region and show diverse capacities - from a full assimilation and support to the norm as approved by the UN[3] to its rejection basically in terms of the defense of national sovereignty and the principle of non-intervention[4] to the development of initiatives to adapt or improve the norm.[5] In all the three cases, Latin America evidences that there is an effort to channel both the existing historical cultural and juridical background and the national interests and aspirations reflecting the principles of national sovereignty and non-intervention, including the efforts to become "norm entrepreneurs" or "rule innovators" as part of the new array of global players.

Many analysts argue that Latin America as a region with its own diplomatic and well developed juridical system is comparatively more peaceful than any other region in the world, and that for this reason it discloses particular difficulties in the full acceptance and implementation of RtoP. However, there are several other factors that partially explain the reasons for this situation.

First of all, after the 1980s, most Latin American countries engaged in a series of democratization processes, where the consolidation and strengthening of human rights, democracy and the rule of law became an important component of the post-military regimes domestic agenda. As noted by Muñoz (2009), democracy and the rule of law are also part of a regional agenda related to RtoP, dealing with true commissions processes and the consolidation of democratic institutions that preserve the memories of past human rights violations and prevent against the emergence of massive human rights abuses.

Notwithstanding these recent changes, well-embedded principles of national sovereignty, non-intervention and peaceful settlement of conflicts are an important part of the juridical legacy of these countries, acting historically as a shield against any external intervention (Kacowicz, 2005; Arredondo, 2009). Latin American states were in the vanguard of the struggle to export pluralistic understanding of European international society to the non-European world, playing a particularly central role in the struggle for equal sovereignty, but also developing a tradition that anchored such norms as strict non-intervention; increasingly tight restrictions on the use of force; territoriality and the pragmatic use of *uti possidetis* to stabilize borders (Engstrom and Hurrell, 2010:30).

A significant record of external interventions in Latin America and the Caribbean, since their independence in the early 19th century, generated the conditions for the development of a strong reluctance, from governments and civil society, to accept any possible threat to national sovereignty or any attempt of external interference, usually labeled as colonialist or imperialist, and the external use of force to intervene in domestic affairs. Thanks to the European colonial powers first, and the US hegemony in the hemisphere later, external intervention became one of the most feared threats to national sovereignty in Latin America. Accordingly, these principles were strongly rooted in the regional diplomatic and legal cultures, as well as in popular beliefs and public opinion, and have become an important part of LAC contribution to the development of international law (Rodrigues, 2009).

Secondly, those principles are the cornerstones of most of the recent Constitutions in Latin America and, particularly, the South American countries, approved in the last two decades. These Constitutions also assert that human rights and fundamental rights are essential for the states, linking them to the development of international and humanitarian law (Serbin, 2010).

Thirdly, Latin American countries have been strong advocates of the principles of national sovereignty (in the Westphalian sense), non-intervention and self-determination since the creation of the UN in 1945, but also committed promoters of human rights, even within the context of a strong record of political instability and military coups and regimes in the region (Arredondo, 2009). In this regard, the Latin American countries have been key players in the approval of the Univer-

sal Declaration of Human Rights and its inclusion in the UN Charter, as incipient "norm entrepreneurs" or "international rule innovators". However, the norms associated to the principles of sovereignty and non-intervention developed in parallel with those of democracy and human rights, "often leading to institutional and political tensions", even if traditionally these tensions have been resolved in favor of state sovereignty (Ergstrom and Hurrel, 2010: 31).

Fourthly, currently there are no imminent threats of massive human rights abuses or atrocity crimes in the region, which is, *per se*, an extraordinarily positive sign (Arredondo, 2009), although some would argue that the growing tensions in the Dominican Republic regarding Haitian immigration and Dominican born Haitians is a textbook case of phases previous to mass human rights violations as it exemplifies acts of racial violence, systematic discrimination of an ethnic group and a growing trends toward the suppression of the legal status of a minority group. Overall the Dominican Republic would be a possible exception in a region where we find little to no signs possible mass human rights violations (Serbin Pont, 2014).

This is a result of strenuous efforts on the part of Latin American civil society to remember and condone past human rights abuses, but it is also the consequence of efforts by both governments and intergovernmental organizations to strengthening the rule of law and democracy, particularly in the case the Organization of American States (OAS) and the Inter-American system. The American Declaration of the Rights and Duties of Man, signed along with the Charter of the Organization of American States in 1948, was the very first international human rights instrument, predating the Universal Declaration of Human Rights (UDHR) by six months (Turner and Popovski, 2010: 230). The consequently emerging Inter-American system has played a key role in addressing and dealing with human rights violations in Latin America throughout a triple and interconnected institutional structure: the Inter-American Commission on Human Rights based in Washington, D.C., the Inter-American Court on Human Rights and the Inter-American Human Rights Institute located in San Jose, Costa Rica. These institutions also offered, probably for the first time, the opportunity for Latin American civil society organizations to play an outstanding role in preventing and denouncing human rights abuses,

particularly during the prevalence of military regimes, often linking those initiatives to the existing mechanisms of the international system of human rights. In this regard, civil society organizations and movements – mainly human rights NGOs – played a key role in the presentation and defense of successful appeals to the Inter-American Commission on Human Rights, where the possibility of accepting individual petitions exists (Cançado Trinidade, 2007). As a result, the Inter-American Human Rights System (IAHRS), along with its European and African counterparts, constitutes one of the world´s principal regional human rights systems (Cardenas, 2010: 87).

As a fifth distinctive feature, the regional experience shows that there is a clear preference, in extreme cases, to accept a role for the OAS, regional or sub-regional inter-governmental organizations, or "groups of friends", in the process of influencing a peaceful outcome for the regional conflicts – both inter-state and intrastate - , being the UN the last resort for solving inter-state disputes and tensions, even if in some cases, long-standing disputes (particularly border and territorial disputes and bi-lateral conflicts) tend to be derived to the International Court of Justice in The Hague, as a way of looking for a juridical solution which usually is accepted by both parties (Sotomayor, 2008). However, although Latin American governments have been leaders in creating new regional and sub-regional arrangements –including the Inter-American Democratic Charter (IADC) at the OAS and several Democratic clauses at different recently created regional and sub-regional organizations such as UNASUR and MERCOSUR, these organizations do not have strongly embedded mass atrocity prevention mechanisms (Pace, 2012: 20).

On the other hand, the role of the Contadora group (which later became the Río Group) in the case of the Central American crisis in the 80´s, the role of the "group of friends" in the case of the Peru-Ecuador border conflict in the 90´s, the presence of the OAS in polarized and conflicted electoral processes such as in Venezuela, and the role of UNASUR in the Pando crisis in Bolivia (and the Colombia vs. Ecuador/Venezuela tensions) (Serbin, 2010b) illustrate a clear recent trend to avoid external actors' intervention, with the probable exception of the case of Haiti.[6] However previously, in the 80s and 90s, the role of UN missions in the process of peace negotiations and its implementation was also crucial in Central America, as shown in the chapter by Aguilera on Guatemala.

Within this context, several Latin American countries are increasingly supportive of RtoP, basically accepting the pre-eminence of human rights and the protection of their citizen´s over the principles of national sovereignty and non-intervention. In this regard, as one of the authors argued in a recent paper, the globalization of human rights, international and humanitarian law, and the rule of law, linked to the historical development and legacy of human rights in the region are becoming pre-eminent to those principles, even within several recently approved Constitutions (Serbin, 2010). It is important to note, in this regard, that particularly after the demise of military regimes in the region the human rights regime evolved in the context of changing concepts of the State and had lasting impact upon the traditional conception of state sovereignty. Additionally to that, as argued by some analysts, "State policies were increasingly subjected to normative, political and legal constraints that challenged conventional understandings of sovereignty and consolidated the growing consensus that human rights are matters not only of domestic jurisdiction but also of concern to the international community, particularly when large-scale violations take place" (Turner and Popovski, 2010: 232).

In fact, the combination of an accumulative experience of human rights government policies and civil society organizations initiatives, and the endorsement of the RtoP principle by several Latin American and Caribbean governments, prove that there is a gradual tendency to accept an eventual intervention of the international community either in cases of humanitarian crisis or of natural disasters, particularly if it is lead or promoted by regional organizations such as the OAS or UNASUR and it stays short of the use of force.

During the recent development of a phase of new regionalism – "post-neoliberal" or "post-hegemonic" (Serbin, Martinez and Ramanzini, 2012), with a strengthened state-centric emphasis, these two approaches within the regional juridical tradition oppose the role of the state against the rights of the citizens (Wolff, 2013), and affect the performance and development of a vibrant civil society. Nevertheless the existence of this opposition does not impede the emergence of an important debate that "shapes the adaptation of the new norm in the region" (Rotmann, Kurtz and Brockmier, 2014).

While the “skeptics” of RtoP in the region can be associated with governments that maintain a strong anti-US rhetoric as well as with proponents of more state centric and protectionist conceptions of regional integration that emphasize sovereignty and non-intervention doctrines, this does not apply to all the cases. Argentina being a prime example, as its government since 2003 has been confrontational with US policy in the region while assuming a leadership role in supporting regional integration initiatives such as UNASUR, yet has eventually positioned itself as a “champion” – with some qualifications and contradictions as shown by Arredondo in this volume - in matters of promoting and supporting the principle of RtoP. In some cases, this is in part associated with a long standing history of cooperation with the UN, participation in international peacekeeping operations, but also a strong emphasis in promoting the respect for human rights both internally as well as externally. Another example is Ecuador that, according to Dolores Bermeo contribution to this volume, while ideologically associated with Venezuela and Cuba as a member of ALBA, has maintained a moderate position towards RtoP in contrast with its ALBA partners. These two cases, question the idea that opposition or support for RtoP is solely based on the government´s current ideology, as it is rather due to the confluence of diverse internal and external factors associated with a history of human rights violations, the positioning in global affairs, the interpretation of international norms, and the traditions in the foreign policy development of these countries.

In this context, it is key to understand that Brazil´s 2011 proposal on Responsibility While Protecting is not merely a response to the Responsibility to Protect as it emerged in 2001 or the use of the norm in the Libyan crisis, but rather represents a culmination of Brazil´s engagement with questions of international intervention and normative manifestation as part of its expanding efforts to position itself globally by integrating to the central debate on international policy making. However, as shown in our own chapter on the issue, Brazilian aspirations to become a “norm entrepreneur” on a global level didn´t build on a regional consensus (and, on the contrary, avoided any regional consultation notwithstanding the widespread support it received after launching RwP as shown in most of the country cases presented in this volume), and didn´t achieve the full support of other Global South nations (Stuenkel, 2014). Additionally, Brazil´s lack of follow up

elaboration regarding RwP stalled its impact in the global debate that witnessed no further discussion after 2012. Once Brazil left its seat at the UN Security Council the initiative tended to lose momentum in the international debate and relevance within Brazilian foreign policy being displaced by other priorities (Stuenkel, 2013).

Interestingly enough, a country of more restricted international reach and with far less ambitious global aspirations, Costa Rica, has been more consistent in its contributions to the principle of RtoP and has been perceived as one of the most fervent supporters, or "champions" in regards to advocacy efforts for the advancement of the principle. Its emphasis on The Arms Trade Treaty as a key element in reinforcing preventive capabilities of RtoP, as pointed out by Cordero and Harmon in this issue, can be considered a much more profound contribution to the normative development of RtoP, therefore positioning the country on the short list of Latin American norm entrepreneurs.

Nevertheless, the three general tendencies profiled regarding the Responsibility to Protect in Latin America help us outline regional positions towards the principle, yet they do not function as a categorization mechanism in which we can conglomerate the hows and whys of these positions. Further analysis is critical to understand the position of Latin American countries, and this is why we aim at providing deeper insights into the development of policies towards the Responsibly to Protect and the assimilation or rejection of the norm in the cases of Argentina, Brazil, Chile, Costa Rica, Cuba, Ecuador, Guatemala, and Venezuela. By understanding the complexity of country positions towards RtoP within the regional and global context, we can have a better picture of the role of Latin America regarding the debate on RtoP and particularly, the reach of Global South nation's efforts to become norm setters and innovators within the new global order.

The structure of this volume

In a previous special issue of this journal dedicated to the applicability of RtoP in Latin America,[7] several researchers made an effort to introduce the issue in the regional academic debate, focusing on the general presentation of the evolution of the norm, its reach, the role

of civil society, and the main governments involved, both on a global and on a regional level. This issue attempts to reorient the debate towards the different (and sometimes changing) positions of several Latin American countries with regards to RtoP, and their contribution to the global debate on the norm.

This approach is introduced in the first chapter by Alex Bellamy, setting the basic traits and characteristics of the evolution of the norm on the global level, particularly with reference to the UN debates, and addressing the reach and limits of the Brazilian proposition of the Responsibility while Protecting as a contribution to the debate, especially with regards to the limits of the suggested sequencing of the three pillars of RtoP.

Following this chapter, a first section is dedicated to the countries we consider "champions" of RtoP in the region: Argentina, Costa Rica, Chile and Guatemala – all members of the "Group of Friends of RtoP" at the UN – whose foreign policies are strongly rooted in the defense of human rights particularly after suffering periods of military dictatorship and political turmoil as in the cases of Argentina, Chile and Guatemala or because they historically had been supporters of global norms and treaties that favor the interest of peace as in the case of Costa Rica. While two of the first chapters clearly refer in a supportive way to the Brazilian initiative of the Responsibility while Protecting (RwP), the chapter on Costa Rica links the debate on RtoP with the Arms Trade Treaty (ATT) as a crucial tool to prevent violence and promote peace and, from our perspective, positions Costa Rica amongst the few current norm innovators in the region.

A second section is dedicated to the "grey zone", the countries that combine their positive historical record on human rights with a sometimes contradictory contestation of the norm mostly because of a perceived threat of external intervention that would benefit major Western powers interests and affect national sovereignty. Indeed this perception permeates not only these two chapters, on Brazil and its initiative of RwP and on Ecuador and its apparently, according to Dolores Bermeo, ambiguous position within the most strident group of regional skeptics – the Bolivarian ALBA member states, but also is present and transverses the positions of both the champions and the skeptics in the region. This section is particularly relevant because of

the attempt of Brazil to become a global player introducing modifications in the conceptualization and operationalization of the global norm, without building support, as already noted, from the region or from the BRICS as emerging players in the international system. Also, it shows how domestic constraints and changing priorities in foreign policy can abort or derail these initiatives.

A third section is dedicated to the Bolivarian skeptics: Venezuela and Cuba, historically hostile to the norm.[8] However, it is interesting to note that additionally to the recurrent concern regarding national sovereignty, non-intervention and the threat of a regime change as the implicit reason for rejecting any external interference, Venezuela´s position is closely related, at some point, with the support of RwP, while the chapter on Cuba ignores the Brazilian initiative and focuses on its own foreign policy consistent rejection of RtoP as an external intervention tool that is not related to humanitarian interests.

Finally, we close this volume with a *Dossier* with two papers in Spanish on the situation of human rights and mass atrocities in El Salvador, as a potential test case for the implications of RtoP in Latin America, as part of a current project developed by CRIES. As already noted, prevention mechanisms for mass atrocities are absent from the already established and the recently emerging regional organizations. However, this is not an impediment to the potential emergence of crisis that could develop beyond the individual human rights abuses to situations of massive crimes. Even if this is not currently the case in El Salvador, the two papers show, from a civil society perspective, that there are reasons for concern in this regard.

All in all, this special issue dedicated to the Latin American positions, even if not covering all the main regional actors, reflects the current debate in the region, its capacity and its limits of influencing the global debate on RtoP, particularly through the positions expressed by national representatives at the UN.

NOTES

1. According to Coe (2015:277) "norm" is a "standard of appropriate behavior for actors with a given identity." It is not only a pattern of behavior but a "prescribed pattern of behavior which gives rise to normative expectations as to what ought to be done." From a constructivist approach, norms at both cultural and political levels are an important part of shaping international politics, and while the state may remain the most important actor, norms create identity for the states themselves.
2. As our chapter in this issue on Brazil and the Responsibility of Protecting shows.
3. It should be noted that among the Latin American countries members of the UN Group of Friends of Responsibility to Protect, that consistently supported the norm are included Argentina, Chile, Costa Rica, Guatemala, México, Panamá, and Uruguay.
4. As in the most evident cases of Venezuela and Cuba.
5. As in the case of Brazil and its initiative to promote the "Responsibility while Protecting" (RwP), or, on a global scale, China´s initiative of "Protection Responsibility".
6. Which is still under critical scrutiny by several Latin American governments (even if some of them are involved in the UN peace-building and post-conflict reconstruction operation – MINUSTAH, after the 1.559 resolution of the UN Security Council in 2004) (Brigagão, 2006), and by most of Latin American civil society organizations and networks (Jácome, Milet and Serbin, 2005).
7. *Pensamiento Propio,* 17, No. 35, January-June 2012, Special issue on "La Responsabilidad de Proteger y su aplicabilidad en América Latina". Available at: www.cries.org
8. Both were among the four countries that contested it during the 2005 Summit jointly with another Bolivarian member state – Nicaragua, and Sudan.

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The Three Pillars of the Responsibility to Protect

Alex J. Bellamy

Agreed by Heads of State and Government at the 2005 World Summit, the Responsibility to Protect (RtoP) principle has come a long way in a short space of time. The principle was employed by the United Nations Security Council in response to crises in Darfur, Cote d'Ivoire, Central African Republic, Yemen, South Sudan and Mali, Syria and, most controversially in Libya. It has also been employed by the United Nations Secretary-General, other senior UN officials and several member states in relation to these crises and those in the Democratic Republic of Congo (DRC), Kenya, Kyrgyzstan, and Guinea. Through RtoP, international society has come to view emerging crises through the prisms of atrocity prevention and response – focusing increasingly on what the world can do to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Inevitably, however, as the principle has come into widespread diplomatic use it has aroused controversy and debate, not least in relation to the use of military force (as in the case of

Libya) and the use of the veto to block decisive action through the UN Security Council (as in the case of Syria). Focusing on the three pillars of RtoP, this chapter attempts to provide context for the other contributions to this volume by outlining the emergence of RtoP, clarifying the meaning and scope of its three pillars, and examining debates about the relationship between them.

Emergence

Although the phrase 'responsibility to protect' was first coined only in 2001, the concept is the product of long-standing efforts to identify and define crimes that have 'shocked the conscience of mankind' and to protect populations from them. As the UN Secretary-General has argued, RtoP is a political concept based on existing international law. The story of the principle's emergence therefore begins with international law.

In 1947, in the shadow of the Holocaust, the newly formed UN General Assembly approved the Genocide Convention, which prohibited the crime of genocide, created a universal responsibility to prevent that crime, and required the punishment of perpetrators.[1] In *Bosnia vs. Serbia* (2007), the International Court of Justice (ICJ) found that states have a legal responsibility to do what they can, within existing law, to prevent genocide. Specifically, the court found that states had a responsibility to take positive action to prevent genocide when they have prior knowledge about its likely commission and the capacity to influence the suspected would-be perpetrators. The four Geneva Conventions (1949) and subsequent Protocols (1977) established the immunity of all non-combatants in armed conflicts, whether in international or non-international, from the intentional use of force against them and required that Parties cooperate with one another to prevent violations of the law. The Rome Statute of the International Criminal Court (ICC) (1998) extended some of these provisions to contexts outside of armed conflict under the rubric of 'crimes against humanity', whilst the International Criminal Tribunal for Yugoslavia (ICTY) confirmed that the practice of 'ethnic cleansing' constituted one such crime. When states committed to the RtoP concept in 2005, therefore, they were effectively acknowledging the legal obligations

that they already had and committing themselves to ensuring that this existing law be upheld everywhere, all the time.

During the 1990s, however, the gap between these international legal responsibilities and realities on the ground became glaringly obvious. Genocide in Rwanda and Srebrenica; mass killing and ethnic cleansing in Angola, Bosnia, Burundi, Croatia, East Timor, Kosovo, Liberia, Sierra Leone, Zaire/DRC; state repression in northern and southern Iraq; and acute state fragility and civil war leading to mass human suffering in Somalia exposed the hollowness of legal responsibilities in the face of governments and armed groups willing and able to use mass civilian suffering to achieve their objectives. International society was initially ill-prepared to respond. UN peacekeepers recoiled in the face of the *genocidaires* in Rwanda and stood aside as Security Council mandated 'safe areas' collapsed in Bosnia. US forces were hounded out of Mogadishu, taking UN peacekeepers with them. Political and diplomatic efforts proved insufficient to stop Angola's slide back into war and the mass violence that greeted East Timor's vote for independence. These, and other, crises exposed the weaknesses of international society's capacity and willingness to protect populations. They also created a global crisis of internal displacement, as up to twenty million people were forced from the homes but left unable to claim the protections afforded by International Refugee Law because they had not crossed an international border.

Gradually, international agencies began to learn the lessons of these failures and to develop new concepts such as the 'protection of civilians' and 'sovereignty as responsibility'. First, Francis Deng and Roberta Cohen developed initial ideas about 'sovereignty as responsibility' in the context of the crisis of displacement in the mid-1990s. Deng was appointed as the UN Secretary-General's Special Representative on Internally Displaced Persons (IDPs) in 1993. Deng and Cohen developed the concept of sovereignty as responsibility as a diplomatic and moral tool to persuade states to allow IDPs access to humanitarian assistance and protect their human rights (Cohen and Deng 1998). This concept rested on the idea that sovereignty entailed responsibilities as well as rights and that chief among those responsibilities was the state's duty to protect populations in

its care. When states are unable to exercise this duty, they should request international assistance. If they do not, then they should be held accountable (Deng and al. 1996:1). From this, RtoP derived its focus on 'responsibility', the notion that the primary responsibility to protect rests with the sovereign states, and the idea that the purpose of external action should be to assist states to fulfill their obligations and, failing that, to provide protection to vulnerable populations.

Second, there a range of regional initiatives sought to respond to the humanitarian challenge: A number of regional organizations established their own initiatives that contributed to the emergence of RtoP. Most notably, Article 4(H) of the Constitutive Act of the African Union (AU), adopted in 2000, gave the organization a right to intervene in the affairs of its Member States in matters relating to genocide and crimes against humanity. The AU also developed its own peacekeeping capacities and adopted a protection mandate in Darfur (2003). The EU established and deployed high readiness brigades in response to protection crises and in the mid-1990s the OSCE established its High Commissioner for National Minorities to assist states under stress. NATO also incorporated the protection of civilians into its crisis management work (MacFarlane and Foong 2006:174).

Third, many humanitarian agencies identified protection as a core goal. Often caught on the frontline of emergencies caused by armed conflict, natural disasters and poverty, humanitarian relief agencies increasingly recognized the limits of traditional approaches that distributed aid on the basis of need and neutrality without regard for the underlying politics. Sometimes, this approach created the phenomenon of the 'well fed dead' - civilians given food, housing and medical relief by humanitarians only to be killed or displaced again by armed conflicts. Sometimes, humanitarians inadvertently made matters worse by aiding *genocidaires* and unwittingly providing bases for armed groups, as happened in eastern DRC after the Rwandan genocide (Terry 2002). In response, many humanitarian organizations, including Oxfam and CARE, adopted 'protection' as one of their core goals, promoting the idea that the protection of people from egregious crimes ought to be core business for humanitarians.[2]

Fourth, the theory and practice of peacekeeping evolved so that protection moved from the periphery to the centre. High profile peacekeeping failures in Rwanda and Bosnia prompted fresh thinking about the protection roles and responsibilities of UN peacekeepers. In 2000, the UN's Panel on Peace Operations (so-called 'Brahimi report') argued that peacekeepers that witnessed violence against civilians should be 'presumed to be authorized to stop it, within their means'. Starting in 1999, with the UN Mission in Sierra Leone (UNAMSIL), the Security Council has with increasing regularity employed Chapter VII of the UN Charter to authorize peacekeepers to use 'all necessary means' to protect civilians. Today, most UN peacekeeping operations have a protection mandate (Holt and Berkman, 2006).

Fifth, the UN Security Council adopted a thematic agenda on the protection of civilians in armed conflict. In 1998, at the request of Canada, which was then a non-permanent member, the Security Council requested a report from the Secretary-General on how the UN might improve the protection of civilians in armed conflict. The following year, it adopted Resolution 1265 expressing its 'willingness' to consider 'appropriate measures' in response to 'situations of armed conflict where civilians are being targeted or where humanitarian assistance to civilians is being deliberately obstructed'. Periodic reports of the Secretary-General on the protection of civilians in armed conflict have become a recurrent feature of the Council's work and through this it has, among other things, pledged to work towards an end to impunity, requested that Member States ratify key human rights treaties, adopted an *aide memoire* on protection, and demanded humanitarian access in crisis situations.

These, and other, initiatives allowed the then UN Secretary-General, Kofi Annan, to declare in 1999 that 'state sovereignty, in its most basic sense, is being redefined…States are now widely understood to be the servants of their people, not vice versa'.[3] This emerging conception of sovereignty as entailing responsibilities clashed, however, with more traditional ways of understanding it. Since 1945 at least, sovereignty had been commonly understood as entailing a right to non-interference, a right reflected in Article 2(7) of the UN Charter. This raised the difficult question of how the international community should respond to situations in which the state failed

to protect its own population from conscience-shocking crimes or when the state itself was among the principal perpetrators of such crimes. These questions were brought into sharp focus by the crisis in Kosovo in 1998-1999. When international negotiations, sanctions and observers failed to stem the tide of violence, which included the systematic ethnic cleansing of Kosovar Albanians by Yugoslav government forces, NATO decided to intervene militarily despite not having a UN Security Council mandate to do so. The intervention triggered a major debate on the circumstances in which the use of force for human protection purposes might be justifiable, the intricacies of which were reflected in the findings of an international commission on the issue which found that NATO's actions were 'illegal but legitimate'.[4]

At issue was the relationship between the state and its own population, the credibility of the international community's commitment to very basic standards of human rights and the role of the UN in the twenty-first century. The dilemmas were set out succinctly by Kofi Annan in his 1999 Address to the General Assembly:

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask…in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?
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> To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?[5]

It was in part to find answers to these questions that Canada decided to establish an International Commission on Intervention and State Sovereignty (ICISS), chaired by Gareth Evans and Mohammed

Sahnoun, in 2000. The commission's report, entitled *Responsibility to Protect*, was released in December 2001 and endorsed by Annan, who described it as 'the most comprehensive and carefully thought-out response we have seen to date'.[6] The ICISS argued that states had a responsibility to protect their citizens from genocide, mass killing and ethnic cleansing and that when states proved either unwilling or unable to fulfil this duty, residual responsibility was transferred to the international community. From this perspective, RtoP comprised three interrelated sets of responsibilities: to prevent, react and rebuild.[7] The Commission identified proposals designed to strengthen the international community's effectiveness in each of these areas, including a prevention toolkit, decision-making criteria for the use of force, and a hierarchy of international authority in situations where the Security Council was divided.

RtoP would not have enjoyed such a rapid rise without the endorsement of Kofi Annan and his decision, taken in the wake of the oil-for-food scandal, to summon a world summit to consider proposals for UN reform. In preparation for summit, Annan commissioned a High Level Panel to examine the challenges confronting the organization and make recommendations as to how it might meet them. In its final report, the Panel (which included Gareth Evans) endorsed 'the emerging norm that there is a responsibility to protect', supported the ICISS proposal for criteria to guide decisions about the use of force, and called for the permanent members of the Security Council to exercise restraint in their use of veto in situations involving large-scale violence against civilians.[8] Annan adopted most of these recommendations in his own blueprint for reform, *In Larger Freedom.*[9] This put RtoP squarely on the international agenda at the 2005 World Summit.

In summary, RtoP emerged out of the failure to protect populations from genocide and mass atrocities in the 1990s. Developments in a range of fields – including peacekeeping, refugee and displacement work, humanitarian relief, international diplomacy, and regional action – in response to these failures focused international attention on the protection of human life in situations of conscience-shocking inhumanity. The crises in Rwanda and Kosovo exposed critical challenges relating to the political will to act (Rwanda) and the

authority on which action may be taken (Kosovo). The ICISS was established in response to these challenges and its report coined the phrase 'responsibility to protect', developing earlier ideas about the state's primary responsibility to protect its own population and the role of the international community when it fails to do so.

2005 World Summit Agreement

RtoP was unanimously endorsed by the 2005 World Summit, the largest ever gathering of Heads of State and Government. The Summit's outcome document was later adopted as a General Assembly resolution. Paragraphs 138-140 of the World Summit's Outcome Document declared that:

> 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. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian andother peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from 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 relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress 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. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity before crises and conflicts break out.
>
> 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

This commitment to RtoP has been reaffirmed several times by the UN Security Council, including in Resolutions 1674 (2006), 1894 (2009) and 2150 (2014) and in 2009 the General Assembly committed itself to ongoing consideration of its implementation (A/RES/63/308). It is important to distinguish between the RtoP that governments have agreed to adopt and the ideas that helped shape it, including the proposals of the ICISS, mentioned earlier. There are six key points to bear in mind in this regard.

First, RtoP is narrow in scope, but universal and enduring in its coverage. RtoP applies everywhere, all the time. In other words, all states have a permanent responsibility to protect their populations from the four crimes. As the UN Secretary-General pointed out in 2012, the question is never one of whether or not RtoP 'applies' – because this wrongly implies that there are situations in which states do not have a responsibility to protect their populations – but of how best to realize its goals in any given situation.[10] The principle is narrow, though, because it relates only to the four crimes identified in the 2005 World Summit Outcome Document: genocide, war crimes, ethnic cleansing and crimes against humanity and to their prevention. RtoP does not relate directly to threats to human life stemming from natural disasters, diseases, armed conflict in general or non-democratic forms of government.[11]

Second, states have a responsibility to protect all populations under their care, not just citizens or civilians in times of armed conflict. Paragraphs 138-139 specifically refer to populations and not citizens or civilians in armed conflict.

Third, RtoP is based on well-established principles of international law. The crimes to which it relates are enumerated in international law. In addition, states already have legal obligations to prevent and punish genocide, war crimes and crimes against humanity; assist states to fulfill their obligations under international humanitarian law; and promote compliance with the law. In addition, the World Summit Outcome Document is clear in stating that RtoP is to be implemented through the UN Charter. Nothing in the RtoP principle permits action outside the UN Charter.

Fourth, the World Summit Outcome Document calls explicitly for the prevention of the four crimes and their incitement. As such, prevention is at the core of RtoP, with other measures contemplated only when prevention fails or (in line with Article 42 of the UN Charter) is thought likely to fail by the UN Security Council.

Fifth, force may be used only when authorized by the UN Security Council and when other, peaceful, measures adopted under Chapters VI and VIII of the UN Charter are thought unlikely to succeed.

Sixth, Member States declared their support for the mandate of the Special Adviser for the Prevention of Genocide. This mandate, approved in 2004, includes tasks directly related to early warning and assessment: (a) to collect existing information, in particular from within the UN system, relating to violations of human rights that could give rise, if nothing were done, to genocide; (b) to bring situations of concern to the Secretary-General and, through him, to the Security Council; (c) to make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) to liaise with the UN system on activities for the prevention of genocide and to enhance the capacity of the UN system to analyze and manage relevant information.[12]

The UN Secretary-General's Implementation Strategy

The UN Secretary-General, Ban Ki-moon has often spoken of his 'deep and enduring' personal commitment to RtoP.[13] In February 2008, the UN announced the appointment of Edward Luck as the

Secretary-General's Special Adviser on the RtoP with responsibility for the further conceptual, political and institutional development of the concept. Luck adopted a careful and consultative approach based on a forensic understanding of the 2005 agreement and deep engagement with Member States. Key to this diplomatic effort was Luck's insistence on distinguishing what states had actually agreed in 2005 from the various other forms of RtoP circulating in academic and civil society circles.[14] The result was the 2009 report of the Secretary-General on *Implementing the Responsibility to Protect*, a landmark report that identified the three pillars of RtoP and which continues to guide thought and practice. The Secretary-General's first report on RtoP clarified the meaning and scope of the concept and set out a comprehensive strategy for its implementation. It maintained that RtoP 'is an ally of sovereignty, not an adversary', that grows from the principle of sovereignty as responsibility rather than through the doctrine of humanitarian intervention.[15] As such, it contended that RtoP was focused on helping states to succeed, not just on reacting when they fail.

The Secretary-General set out a comprehensive strategy for implementing RtoP, adopting a 'narrow but deep' approach: narrow in its exclusive focus on the prevention of four crimes (genocide, war crimes, ethnic cleansing and crimes against humanity) and protection of populations from them, but deep in its ambition to employ all instruments available to the UN system, regional and sub-regional arrangements, Member States, and civil society. This strategy was organized around the idea that RtoP rested on three pillars. These pillars were non-sequential (one does not need to apply pillars one and two before moving to pillar three) and of equal importance, such that the whole edifice of RtoP would collapse if it were not supported by all three pillars.[16]

The first pillar refers to the primary responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.[17] The Secretary-General described this pillar as the 'bedrock' of RtoP which derives from sovereign responsibility itself and the international legal obligations that states already had (para. 138).[18] The Secretary-General recognized that although this commitment was unambiguous, the

question of how states might best exercise their RtoP was more difficult to answer. As such, he called for more research on why some societies plunge into mass violence whilst others managed to escape this fate.[19] He also proposed a variety of additional measures that states could take to fulfill their primary responsibility to protect.

These included, first, encouraging peer-review of their performance in meeting their RtoP obligations through the Human Rights Council's Universal Peer Review (UPR) mechanism.[20] Second, ensuring that states are parties to the relevant instruments of human rights law, international humanitarian law and refugee law, as well as to the Rome Statute of the International Criminal Court (ICC). The Secretary-General argued that states should also incorporate this law into domestic jurisdiction and implement it faithfully.[21] Third, states should assist the ICC and other international tribunals by, for example, locating and apprehending indictees.[22] Fourth, RtoP principles should be localized into each culture and society so that they are owned and acted upon by communities.[23] Fifth, states, even stable ones, should ensure that they have mechanisms in place to deal with bigotry, intolerance, racism and exclusion.[24]

These themes were further amplified by the Secretary-General in his 2013 report on RtoP, which focused on the state's primary responsibility to protect.[25] In this report, the Secretary-General further underscored the primacy of the state's responsibility to protect its own populations and identified some of the factors found within states and societies that give rise to genocide and mass atrocities. In an attempt to offer concrete advice to states about what they ought to do to fulfill their commitment to RtoP, the Secretary-General offered seven core recommendations. States should, he argued:

- Appoint a senior-level focal point with atrocity prevention responsibilities;
- Conduct a national assessment of risk and resilience;
- Sign, ratify and implement relevant international legal instruments;
- Engage with and support other Member States and regional or subregional arrangements to share experiences and enhance cooperation to promote the effective use of resources;

- Participate in peer review processes, including the universal periodic review of the Human Rights Council.
- Identify and form partnerships with other Member States, regional and subregional arrangements or civil society for technical assistance and capacity building;
- Participate in international, regional and national discussions on the further advancement of the responsibility to protect and its implementation.[26]

Whilst some of these recommendations (appoint a focal point, sign and ratify relevant treaties, conduct an assessment) were clear and specific, others were less so (identify and form partnerships). And, whilst the Secretary-General signaled a clear intention to evaluate the extent to which Member States were actually implementing these recommendations, there was relatively little follow-up and no formal process engaging member states in dialogue on implementation beyond the annual informal debate of the General Assembly.

The second pillar refers to the international community's responsibility to assist and encourage states to fulfill their responsibility to protect, particularly by helping them to address the underlying causes of genocide and mass atrocities, build the capacity to prevent these crimes, address problems before they escalate, and encouraging them to fulfill their commitments. (paras. 138 and 139).[27]

In 2009, the Secretary-General identified four specific aspects of this Pillar II responsibility.[28] First, encouraging states to meet their pillar one responsibilities (para. 138) so that those inciting or planning to commit the four crimes need to be made aware that they will be held to account.[29] The Secretary-General also suggested that this include incentives to encourage parties towards reconciliation.[30] Second, helping states to exercise their responsibility, especially by supporting security sector reform aimed at building and sustaining legitimate and effective security forces makes an important contribution to maintaining stability and provides states with the capacity to respond quickly and legitimately to emerging problems.[31] Third, helping states build their capacity to protect through targeted economic development assistance, which would assist in preventing the four crimes by reducing inequalities, improving education, giving the

poor a stronger voice, and increasing political participation.[32] He maintained that international assistance should help states and societies to build the specific capacities they need prevent genocide and mass atrocities.[33]The third element of Pillar II was the provision of assistance to states 'under stress before crises and conflicts break out'. He suggested that the UN and regional arrangements could build rapidly deployable civilian and police capacities to help countries under stress and noted that where relevant crimes were committed by non-state actors, international military assistance to the state may be an effective form of assistance.[34]

Many of these ideas were developed further in the Secretary-General's 2014 report on RtoP, which focused specifically on pillar II and the question of international assistance.[35] As with his treatment of the first pillar, the Secretary-General's follow-up on international assistance included some concrete recommendations for action by Member States, though these were somewhat vaguely worded, leading some states to ask, privately, what it was, specifically that the Secretary-General wanted them to do. The Secretary-General asked that states:

- Leverage existing mechanisms and institutions to encourage States to fulfil their responsibility to protect;
- Invest in tools to encourage States to fulfil their responsibility to protect;
- Improve existing forms of national, regional and international assistance by incorporating atrocity crime risks and dynamics into conflict analysis;
- Focus existing capacity-building efforts on eliminating horizontal inequalities and design or strengthen capacity-building programmes aimed at the seven inhibitors of atrocity crimes;
- Enhance the availability and expertise of specialized civilian resources;
- Ensure that international assistance under pillar II is coordinated and coherent.[36]

Undoubtedly the most difficult and controversial of RtoP's three pillars, Pillar III refers to the international community's responsibility to take timely and decisive action to protect populations from the four crimes through diplomatic, humanitarian and other peaceful means (principally in accordance with Chapters VI and VIII of the UN Charter) and, on a case-by-case basis, should peaceful means 'prove inadequate' and national authorities are manifestly failing to protect their populations, other more forceful means through Chapter VII of the UN Charter (para. 139).[37] The wording agreed by states in 2005 suggests that Pillar III comprises two steps. The first, set out in the opening sentence of paragraph 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 protect populations' from the four crimes), involves an on-going responsibility to use diplomatic, humanitarian and other peaceful means to protect populations. The paragraph's second sentence sets out a wider range of measures that may be used if two conditions are satisfied: (1) 'should peaceful means be inadequate' (in other words, judged inadequate by the Security Council in line with Article 42 of the Charter) and (2) 'national authorities are manifestly failing to protect their populations'. In these situations, it may be appropriate to take timely and decisive action through the Security Council, including enforcement measures under Chapter VII of the Charter.[38] The Secretary-General noted that military intervention was just one of the measures that might be used, a theme he returned to in 2012 in arguing that effective use of non-coercive measures was an important aspect of pillar III which would reduce the need for the use of force.[39]

In the context of Pillar III, the Secretary-General suggested that permanent members of the Security Council should refrain from using their veto in situations of manifest failure and should act in good faith to reach a consensus in such cases.[40] He also stressed that the UN should strengthen its capacity for the rapid deployment of military personnel.[41] Finally, he suggested that the UN should strengthen its partnerships with regional and sub-regional arrangements to facilitate rapid cooperation.[42]

The 'Arab Spring' uprisings and the post-election crisis in Cote d'Ivoire in 2010-2011 propelled RtoP to the forefront of international attention and placed the focus squarely on the principle's controversial third pillar. RtoP was explicitly used by the Security Council in its resolutions on Libya (Res. 1970 (2011); Res. 1973 (2011), which first imposed a raft of targeted sanctions and embargoes and referred the situation to the ICC and then authorized the use of force to protect civilians and police a no-fly zone. The implementation of these resolutions by NATO and its partners, and the role of UNOCI peacekeepers in the violent resolution of the conflict in Cote d'Ivoire, brought fresh urgency to questions about the implementation of Security Council resolutions and the emergence of a new concept – 'responsibility whilst protecting' – which was proposed by Brazil (see below).

In this context, the fourth report of the Secretary-General, issued in 2012, focused on the third pillar of RtoP. This report: (1) clarified the relationship between the three pillars, reiterating their mutual interdependence such that efforts under the first two pillars should reduce the need to exercise the third; (2) identified the tools available to the UN for timely and decisive response, demonstrating that there is much more to Pillar III than the use of force and that, as a general rule, the more coercive the measure is, the less likely it is to be employed; (3) identified the key partners in protection, noting the role played by humanitarian action, peacekeeping, regional arrangements and civil society; and (4) considered the concept of 'responsibility while protecting'.[43]

These reports, and the Secretary-General's strategy overall, were generally well received by the UN's member states. The General Assembly's first interactive dialogue on RtoP broadly vindicated the Secretary-General's strategy.[44] Ninety-four speakers, representing some 180 governments (including the Non-Aligned Movement) from every region participated.[45] Of those, only four (Cuba, Venezuela, Sudan and Nicaragua) called for renegotiation of the 2005 agreement. The others typically agreed with the Secretary-General's interpretation of RtoP's meaning and scope and welcomed his report.[46] The challenge, Member States agreed, was to implement RtoP, *not* re-negotiate it. Within this context, participating Asian, Latin American and sub-

Saharan African states were eager to stress six key points, which ought to be understood as bedrocks of the global consensus on RtoP. First, that RtoP is a universal principle that should be implemented equally and fairly in a non-selective fashion (early warning and assessment should be non-selective and non-political).[47] Second, that the responsibility to protect lies first and foremost with the state.[48] Third, that RtoP applies only to the four crimes (genocide, war crimes, ethnic cleansing and crimes against humanity) and their prevention. Fourth, the principle must be implemented and exercised in a manner consistent with international law, especially the UN Charter.[49] Fifth, timely and decisive response (Pillar III) encompasses more than just coercion or the use of force. Sixth, prevention is the most important element of RtoP.[50] The General Assembly passed a resolution which acknowledged the Secretary-General's report, noted that the Assembly had engaged in a productive debate, and committed the Assembly to continuing its consideration of the matter.[51] Subsequent reports and debates focused on individual aspects of the Secretary-General's agenda for implementation, especially early warning and assessment (2010), regional arrangements (2011), timely and decisive response (2012), the state's primary responsibility to protect (2013), and international assistance (2014).

The General Assembly's subsequent informal interactive dialogue provided further support for the concept of RtoP and the UN Secretary-General's strategy for implementation. Despite the highly controversial nature of the subject, Member States largely agreed with the Secretary-General's assessment that RtoP was a concept 'whose time has come', his view that nobody now doubts that states do indeed have a responsibility to protect, and belief that international debates have shifted from the question of 'whether' to implement RtoP to that of 'how' to. Member States also accepted the Secretary-General's view that that RtoP applies everywhere and all the time.

Of these, the Assembly's 2012 dialogue – coming in the wake of the controversial intervention in Libya – was perhaps the most crucial test of the Secretary-General's implementation plan. Fifty-eight states, one regional arrangement and two civil society organizations participated in the dialogue. Despite controversies about the use of force, accountability, and concerns about the potential misuse

of RtoP to justify 'regime change', no Member State called for the renegotiation of RtoP. Indeed, one of the Member States most critical of the use of force in Libya and Cote d'Ivoire in 2011, South Africa, insisted that there could be 'no going back' on what was agreed in 2005. Member States as diverse as Sri Lanka, Iran and Viet Nam voiced their acceptance of RtoP. With almost complete unanimity, States welcomed the Secretary-General's report and endorsed his view that whilst the third pillar of RtoP included much more than just the use of force or other coercive measures, enforcement measures – including military enforcement – remained an important aspect of the RtoP toolkit, to be used as a last resort. One issue that did emerge, however, was directly pertinent to the Secretary-General's three pillars. That was the question of sequencing, to which I now turn.

Three Pillars: To Sequence or Not to Sequence

One of the most significant debates relating to the three pillars of RtoP relates to the relationship between them in particular the question of sequencing. As I noted earlier, in his 2009 report on implementing RtoP, the Secretary-General maintained that the three pillars were non-sequential and of equal importance – a view that was welcomed by Member States at the time. However, in response to what it, and others, saw as problems with the interpretation and implementation of Security Council Resolution 1973 (2011) on Libya, Brazil issued a concept paper on 'Responsibility while Protecting' later that year.[52] Among other things, the paper called for the *chronological* sequencing of RtoP's three pillars. Chronological sequencing is the idea that the international community must work sequentially through the three pillars, testing every available peaceful tool and only resorting to coercion or force when these other measures have failed. A majority of participating states that referred to sequencing in the General Assembly's 2012 dialogue rejected the idea of chronological sequencing, arguing instead that the international community's response to genocide and mass atrocities should be appropriately tailored to each situation. Brazil itself offered an alternative, non-chronological, account of sequencing at the 2012 dialogue. It argued that sequencing between the pillars should be 'logical, based on

political prudence. It does not mean the establishment of arbitrary checklists'. In other words, 'timely and decisive responses' should aim to achieve the greatest degree of protection with the minimal degree of forceful interference but priority should be given to doing what works in order to protect populations from the four RtoP crimes and tailoring international responses to each individual situation. This approach to sequencing would be entirely in keeping with the Secretary-General's recommendations in his 2012 report on RtoP.

However, although Brazil altered its stance on sequencing, a small number of Member States continued to stress the need for chronological sequencing. Because of this, and because chronological sequencing raises conceptual, legal and institutional, and practical questions about this core element of RtoP, it is worth examining in more depth.

Conceptually, the three pillars of RtoP are so intertwined as to make sequencing impossible in practice. States are supported in their efforts to fulfill the first pillar by both pillar two and those elements of the third pillar which relate to assisting 'states under stress' before they reach the point of 'manifest failure'. It makes little sense to deny the obvious overlaps between the two injunctions. Equally, it makes little sense to argue that international society should withhold support from states (pillar two) until they face difficulty achieving their first pillar responsibilities. Nor does it make any sense to argue that pillar two activities should cease when 'timely and decisive response' is needed or that international society's first response to state-based mass killing should be to furnish the perpetrators with assistance (pillar II). There would be obvious moral objections to a concept of RtoP which demanded that the world's first response to the Rwandan genocide should have been to 'assist' the regime that was largely responsible.

Moreover, it is far from clear where the specific injunctions to prevent the four crimes and their incitement found in paragraph 138 of the World Summit Outcome Document would fit into the chronological sequencing schema. Taken literally, sequencing in this context would require either that diplomacy and other peaceful means not be used for preventive purposes because they were also part of 'timely and decisive responses' or that the response component of

RtoP be stripped back to its most coercive aspects. Neither solution is appealing; neither is in keeping with what states agreed in 2005. In short, taken literally chronological sequencing would give rise to a situation where international society could take preventive action only after national authorities had failed to protect their populations from the four crimes. At that point, of course, 'timely and decisive responses' would be required too.

Turning to the institutional problems, 'chronological' sequencing is inconsistent with both the UN Charter and paragraph 139 of the World Summit Outcome Document. Not only does neither document demand chronological sequencing, each counsels against it. Article 42 of the Charter states that: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...'. This wording clearly permits the Council flexibility to adopt coercive measures without first using peaceful measures in situations where it judges that such measures ('provided for in Article 41') 'would be inadequate'. The proceedings of the UN's founding conference confirm that this was the intent behind the wording, which was suggested by Canada, and that this was indeed how the article was understood at the time. Its meaning was well articulated by US Secretary of State, Edward R. Stettinius, at the time:

> It should be pointed out that the sequence of Articles 41 and 42 does not mean that the Council must in all cases resort to non-military measures in the first instance. While ordinarily this would be the case, since crises generally take a long time to develop, in a case of sudden aggression the Security Council may resort at once to military action without proceeding through any intermediate step, and the language of Article 42 has been refined to make this clear.[53]

This rationale applies equally to all situations in which the Council might consider employing measures under Article 42, including in relation to RtoP's third pillar. Thus, whilst it might be expected that in most cases the Council would respond to genocide or mass atrocities first with peaceful measures, there may be situations where these crimes begin very suddenly and sharply or where peaceful measures

are judged unlikely to succeed from the outset. In those situations, the Charter expressly permits the Council to employ Article 42 measures without having first adopted measures under Article 41.

In relation to the broader argument that the Council should make recourse to RtoP's third pillar only when member states have exhausted the first two pillars, it should be recalled that Article 39 of the Charter grants the Council an exclusive right to determine 'any threat to the peace, breach of the peace, or act of aggression' and what steps should be taken to restore international peace and security. Article 25 binds the wider membership to accepting the Council's decisions in this regard. This is not the place to discuss the merits or demerits of the UN Charter. It need only be said here that the idea of chronological sequencing in relation to RtoP's three pillars is inconsistent with the Charter and could not be advanced without either revising the Charter itself or persuading the Council to act in ways contrary to the Charter's prescriptions.

Chronological sequencing is also inconsistent with what was agreed in 2005. The first sentence of paragraph 139, cited earlier, speaks of a general international responsibility, held by the United Nations as a whole, to use diplomatic, humanitarian and other peaceful means to protect populations from the four crimes and violations. The strong presumption here is that these activities are ongoing, regular and not confined to the Security Council. 'In this context' of international efforts to protect populations from the four crimes there may be times when collective action is required through the Security Council. The paragraph's second sentence holds that when peaceful measures are inadequate and national authorities are manifestly failing to protect their populations, the Security Council should take timely and decisive action in accordance with the Charter including through Chapter VII.

Four points are of critical importance to understand why these two sentences are not chronologically sequenced. First, and most obviously, nothing in either sentence implies that the Security Council may act in relation to the second sentence only once international society has literally exhausted the first. Second, the first sentence refers to activities undertaken by the UN as a whole, not by the Security Council alone. As such, the second sentence, which refers to action by

the Council, cannot logically be said to follow the first chronologically because the two sentences relate to different entities and organs. From the Council's perspective, the first sentence refers only to the general 'context' of responsibility in which it acts. Third, read in the context of the UN Charter, it is clear that it is for the Council itself to determine whether peaceful means are inadequate and the national authorities 'manifestly failing' in their RtoP. The only conditions placed upon the exercise of this judgment are that decisions be made on a 'case- by-case basis' and in cooperation with relevant regional arrangements where appropriate. Even here, though, it is left to the Council to make determinations on both these points. No authority is granted to any other body in this regard nor any restrictions placed on the Council's judgments. There is no requirement in the text that the Council work through peaceful measures before resorting to enforcement. Fourth, in using the word 'inadequate', paragraph 139 uses the same adjective employed by Article 42 of the Charter and does not require that peaceful measures must have 'proved to be inadequate' which it surely would have done had the intention been to require formal sequencing.

A third problem with chronological sequencing is practical. Sometimes, there is simply no time to allow diplomatic, humanitarian and other peaceful means to have a restraining effect because the timeframe between the emergence of a risk of genocide and mass atrocities and its actualization is very short or because the intensity in which the crimes and violations are committed is so severe. Other times, peaceful measures are patently unsuitable. In these types of context, chronological sequencing would *require* delayed and indecisive responses – precisely the opposite of what Member States called for in paragraph 139 of the World Summit Outcome Document – and cost untold lives. Moreover, the longer that situations are allowed to persist, the more complicated and expensive decisive responses are likely to become. In the dark days of the Rwandan genocide, had the Security Council found the will to act decisively it would have made no sense to demand that it run through its (extensive) repertoire of peaceful measures before authorizing the use of force. Had it done so, the outcome would have been little different to the actual historical result in terms of the number of lives lost.

The picture is further complicated by the irresolvable question of how much time peaceful measures should be given to satisfy the demands of chronological sequencing. At the 2012 dialogue, India argued that 'sufficient time should be allowed to see that the non-coercive measures employed are bringing the desired results'. But what is 'sufficient time' and how can it be known in advance? Hutu *genocidaires* in Rwanda took only 100 days to slaughter 800,000 people. It took the Khmer Rouge a little under three years to cause the deaths of a quarter of Cambodia's whole population. The perpetrators of genocide and mass atrocities are often highly skilled at forestalling timely and decisive international action. Even when conditions are 'ripe', mediation can take months, if not years, to bear fruit, as can other non- forcible measures. Conditions are rarely 'ripe' when one party believes it can prevail by perpetrating genocide and other mass atrocities. If chronological sequencing were accepted, at what point would it be agreed that peaceful measures had failed? In all likelihood, the cost of surety would be paid for by the loss of thousands of innocent lives.

Many states argued have argued that the use of force for RtoP purposes should always be a 'last resort'. Indeed, this is a point repeatedly emphasized by the Secretary-General. It is important to clarify what 'last resort' means. According to the moral tradition from which it arose (the Christian, 'Just War', tradition) 'last resort' refers to the idea that force or other coercive measures may be used only when they are judged to be the only, or the most proportionate, means of righting a sufficiently grave wrong (one that constitutes a 'just cause' in the language of the Just War tradition). Last resort does not require literally the exhaustion of every means short of force. If it did, the use of force would never be justified because there are always alternatives – including accepting the *fait accompli* of genocide. Instead, last resort demands that decision-makers carefully evaluate all the different strategies that might bring about the desired ends, selecting force only if it appears to provide the only feasible, or the most proportionate, way of securing those ends.

Does a rejection of 'chronological' sequencing diminish the relative importance of the first two pillars of RtoP by pushing the concept inexorably towards its most coercive aspects? Pakistan raised this

concern explicitly in the General Assembly and Singapore argued that the first two pillars were mere 'window dressing' for the third. There are at least two reasons for thinking that the non-sequential account of the three pillars, articulated by the UN Secretary-General in 2009, does not give undue weight to the coercive elements of RtoP. First, the state's primary responsibility to protect its population from the four crimes and violations is an enduring legal obligation that predates the emergence of RtoP. Pillar one is the day-to-day business of government through which most of the world's states protect their own populations as a matter of routine. Likewise, RtoP's second pillar – assistance to help states fulfill their primary responsibility to protect – ought to be part of the fabric of international relations, a core and habitual practice that is normal business for the UN and its partners. Whilst much of the UN's work contributes to this goal, pillar two support is not yet a self-conscious or systematic part of the organization's daily business. In 2012, Vietnam argued that this aspect of RtoP is 'immensely important'. The direction of attention and resources to prevention should reduce the need for recourse to Article 42 of the Charter, but it does not follow that the use of this article undermines work on prevention. Indeed, as the Secretary-General pointed out in his 2012 report, past history has taught us that the more coercive the tool, the *less* likely it is to be used. What is more, as mentioned earlier, determined action in relation to the first two pillars may make action under the third pillar unnecessary.

Conclusion

Implementation of RtoP within the UN has therefore come a long way in a short space of time, though many significant challenges remain. Among the key achievements are the widening and deepening of the shared understanding of RtoP as agreed in paragraphs 138-140 of the World Summit Outcome Document and consensus on the principle. This includes consensus on the nature and scope of RtoP's three pillars, notwithstanding debate about the nature of the relationship between them. As the UN Secretary-General has argued, no one now doubts that there is a responsibility to protect or disputes the concept's meaning and scope. The global debate on RtoP is moving past the question of the principle itself towards matters relating to its

implementation, but that does not mean that the concept does not confront innumerable challenges and controversies. It is one thing to agree on an abstract principle, it is another thing entirely to agree on how that principle should be interpreted and realized in specific cases and to persuade states to change important aspects of both domestic and foreign policy.

NOTES

1. The story behind the Genocide Convention is conveyed by Power, Samantha (2002). *A Problem from Hell: America and the Age of Genocide*, New York: Basic Books.
2. For example, O'Callaghan and Pantuliano (2007). *Protective Action*, Oxfam International, *Beyond the Headlines: An Agenda for Action to Protect Civilians in Neglected Conflicts.* Oxford: Oxfam GB for Oxfam International, 2003; OCHA, *Special Report: Civilian Protection in Armed Conflict.* New York: OCHA Integrated Regional Information Network, 2003.
3. Kofi Annan (1999). 'Two Concepts of Sovereignty', *The Economist*, 18 September.
4. Independent International Commission on Kosovo, *The Kosovo Report*. Oxford: Oxford University Press, 2000.
5. Kofi Annan (1999). 'Annual Report to the UN General Assembly', 20 September.
6. Kofi Annan (2002). 'The Responsibility to Protect', address to the International Peace Academy, 15 February 2002, UN press release SG/SM/8125.
7. International Commission on Intervention and State Sovereignty (2001). *The Responsibility to Protect.* Ottawa: IDRC.
8. UN High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565, 2 December 2004, para. 203. On the issue of veto restraint see Ariela Blatter and Paul

Williams, 'The Responsibility not to Veto', *Global Responsibility to Protect*, 3 (2) 2011.

9. Kofi Annan (2005). 'In larger Freedom: Towards Development, Security and Human Rights for All', A/59/2005, 21 March 2005.

10. Ban Ki-moon (2012). *Responsibility to Protect: Timely and Decisive Response*, Report of the Secretary-General, A/66/874-S/2012/578, 25 July.

11. Contrary to what some academics have claimed. See, for example, Robert Pape (2012). 'When Duty Calls: A Pragmatic Standard of Humanitarian Intervention', *International Security*, 37 (1).

12. S/2004/567, annex.

13. First set out in his landmark 'Berlin speech' in 2008. Ban Ki-moon, 'Responsible Sovereignty: International Cooperation for a Changed World', SG/SM/11701, 15 July 2008.

14. The point was emphasized in one of Luck's first publications on RtoP after assuming the role of special adviser. Edward C. Luck (2007). 'The Responsible Sovereign and the Responsibility to Protect', *Annual Review of United Nations Affairs*, 2006/2007. Oxford: Oxford University Press, pp. xxxv.

15. *Implementing the Responsibility to Protect*, para 10(a).

16. *Ibid.*, para. 12.

17. World Summit Outcome Document, para 138.

18. Ibid.,para 11(a).

19. Ibid., paras. 15 and 22.

20. Ibid., para. 16.

21. Ibid., para. 17.

22. Ibid., para. 19.

23. Ibid., para. 20.

24. Ibid., para. 21.

25. *Responsibility to Protect: State Responsibility and Prevention. Report of the Secretary-General*, A/67/629-S/2013/399, 9 July 2013.

26. Ibid., para. 71.

27. World Summit Outcome Document, para. 139.
28. *Implementing the Responsibility to Protect*, para. 28
29. Ibid., para. 32.
30. Ibid., para. 32
31. Ibid., para. 46.
32. Ibid., para. 43.
33. Ibid., para. 44.
34. Ibid., para. 40.
35. *Fulfilling our collective responsibility: international assistance and the responsibility to protect. Report of the Secretary-General*, A/68/947-S/2014/449, 11 July 2014.
36. Ibid., para. 77.
37. A/60/L.1, 20 September 2005, paras. 138-140. See *Implementing the Responsibility to Protect*.
38. *Implementing the Responsibility to Protect*, para. 49.
39. *Responsibility to Protect: Timely and Decisive Response. Report of the Secretary-General*, A/66/874-S/2012/578, 25 July 2012.
40. *Implementing the Responsibility to Protect*, para. 61.
41. Ibid., para. 64.
42. Ibid., para. 65.
43. Ban Ki-moon (2012). *Responsibility to Protect: Timely and Decisive Response*, A/66/874-S/2012/578, 25 July 2012.
44. See Office of the President of the General Assembly, 'Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity', undated (July 2009); ICR2P, 'Report on the General Assembly Plenary Debate', p. 3; and Global Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment', August 2009, p. 3.
45. Including 51 statements from sub-Saharan Africa, the Asia-Pacific, Latin America and the Carribbean. Global Centre, 'Implementing', p 1.

46. The statement of the Non-Aligned Movement (NAM) is particularly instructive here. See Statement by Maged A. Abdelaziz, Permanent Representative of Egypt, on Behalf of the Non-Aligned Movement on Agenda Item 44 and 107: '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: report of the Secretary-General', New York, 23 July 2009. According to the Global Centre, 40 states explicitly welcomed the Secretary-General's report and over 50 endorsed his interpretation of RtoP as involving three pillars. Global Centre, 'Implementing', p. 2. The NAM conveyed 'its appreciation' to the Secretary-General for his report.
47. See Statement of Hilario G. Davide Jr., Permanent Representation of the Philippines to the United Nations to the Thematic Debate on the Report of the Secretary-General on Implementing the Responsibility to Protect (A/63/677), New York, 23 July 2009 and Statement by Jim McLay, Permanent Representative of New Zealand to the United Nations to the United Nations, 17 July 2009.
48. E.g. see statement by Leslie K. Christian, Ambassador and Permanent Representative of Ghana to the United Nations on Agenda Items 44 and 107: '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: report of the Secretary-General', 23 July 2009 and Statement by Claudia Blum, Permanent Representative of Colombia to the United Nations, 23 July 2009.
49. Statement by Maged A. Abdelaziz, Permanent Representative of Egypt, on Behalf of the Non-Aligned Movement on Agenda Items 44 and 107: '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: report of the Secretary-General', New York, 23 July 2009.
50. See Global Centre, 'Implementing', p. 6.
51. A/RES/63/308, 7 October 2009.
52. *Responsibility while Protecting: elements for the development and promotion of a concept*, concept note written by the Foreign Ministry of Brazil, 9 November 2011.

53. Cited by Edward C. Luck (2006). *The UN Security Council.* London: Routledge, note 13, p. 136. This is a generally accepted interpretation of Article 42, and I know of no objections to this view. Also see Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (2008). 'Introduction' in *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945.* Oxford: Oxford University Press, p. 7.

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The Champions

Responsibility To Protect: An Argentine Perspective

Ricardo Arredondo

Introduction

The question of humanitarian intervention was a central theme of the international agenda between the end of the Cold War, and up until the events of September 11, 2001. After the NATO intervention in Kosovo in 1999, the Secretary-General of the United Nations ("UNSG") at the time posed an interrogation to the UN: How should the international community react when human rights violations occur within a State, bearing in mind the traditional principles of sovereignty and non-intervention in internal affairs?[1]

Events such as those in Somalia, Rwanda, Bosnia-Herzegovina, Haiti, and Kosovo, among others, exemplify the lack of response from the international community to these mass atrocities. The rejection of humanitarian intervention by a large number of States evidenced the need to start looking for a different answer to these types of situations.

More than a decade after the emergence of the Responsibility to Protect ("RtoP") principle[2] and ten years after its endorsement[3] by the international community, recent events have once again emphasized both the importance and challenges of ensuring timely and decisive responses to the four core crimes covered by the principle.[4] These events have stressed the need to further operationalize the principle in order to implement it effectively and prevent mass atrocities (Arredondo, 2009).

Recent events related to specific crises such as those in Sri Lanka and Cote d'Ivoire, the intervention in Libya, the ongoing conflicts in Syria and the Central African Republic ("CAR"), among others, demonstrate the persistent challenges involved in reaching a common understanding on how to ensure the timely and effective implementation of the RtoP principle. At the same time, it is difficult to generate a common political will and an effective capacity to prevent or stop genocide, war crimes, ethnic cleansing, and crimes against humanity, whether committed by national and local authorities or non State actors. These discussions are not absent in Latin America and the Caribbean, as this special issue of *Pensamiento Propio* shows. As a matter of fact, this region has taken lead on the RtoP debate by bringing about its own experiences and perspectives that shape a unique reading of the international community and its responsibilities when dealing with the State's inability to protect its own people and prevent mass atrocities.

In light of such difficult questions, this article analyzes Argentina's past and present stance on the RtoP principle. However, any discussion on this matter should start by briefly considering what we are talking about when we say "responsibility to protect" Arredondo 2012a), what this principle encompasses, and finally the current situation regarding the historical and political context which has determined the stance taken by Argentina when implementing its foreign policy decisions.

Foreign Interventionism Or Protection Of Human Rights?

The dilemma was-and remains-between the sovereign right of a nation to be free from outside interference and the right of other

states to defend and protect human dignity on a universal basis.[5] This tension has been greatly exacerbated by the globalization process (Hardt and Negri, 1992).

This is a time when the globalization of markets and finance, not to mention other challenges such as climate change, piracy, and terrorism, test the strength and authority of the State. This notion of sovereignty, which is the traditional base of international politics,[6] is going through a prolonged crisis of identity and purpose (Brotóns, 2001: 137-138). Furthermore, the growing global media coverage of mass atrocities and the increasing involvement of civil society (a phenomenon that some authors call "empathy without borders") (Fiott, 2012) are also playing an important role. All of these factors have led to discussions about foreign intervention that are even more acute and controversial than in the past.

Faced with this dilemma, following a Canadian-Australian initiative, the International Commission on Intervention and State Sovereignty ("ICISS") was established, and by the end of 2001 it issued a report titled "The Responsibility to Protect".[7] The ICISS report sought to find a way out of the paradox posed by the Secretary-General, which proposed to introduce a fundamental change in perspective by considering the issue in terms of "responsibility to protect" rather than "humanitarian intervention".[8] The report concludes that sovereignty not only gives the state the right to "control" their affairs, but also confers upon it the primary "responsibility" to protect the population within its borders.[9] Likewise, the report states that when a State fails to protect its people, due to lack of ability or willingness, the international community should take on that responsibility.[10] The RtoP principle has been further defined to encompass three different dimensions: (1) the responsibility to prevent; (2) the responsibility to react; and (3) the responsibility to rebuild.[11]

The RtoP concept was subsequently incorporated in a series of UN documents (although non-binding from a legal standpoint). In its report, *A More Secure World: A Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*, the UN echoed the ICISS Report and stressed that more than a right to intervene, the States have an obligation *erga omnes* to take all measures in their power to prevent or put an end to serious and massive human

rights violations as soon as possible.[12] The report argues that it is a collective international responsibility, "exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing, and serious violations of international humanitarian law which sovereign governments had proved powerless or unwilling to prevent". The Panel stated that in order to legitimize the use of force by the Security Council of the UN, certain basic criteria should be considered, such as the seriousness of the threat, proper purpose, last resort, and proportionality of the response.[13] As Focarelli noted, it is almost commonplace to observe that the conditions or precautionary principles developed by the ICISS and collected in the UN Report[14] faithfully reflect those made by the Christian theological tradition of just war, although he acknowledges that the problem is not the guidelines themselves but how they are interpreted in each particular case (Focarelli, 2008: 191; 191-193; 196).

In its 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, the Secretary-General of the UN affirmed that the international community "must also move towards embracing and acting on the 'responsibility to protect' potential or actual victims of massive atrocities".[15] In this regard, he proposed that in order to authorize the use of force, a set of criteria must be fulfilled such as "the seriousness of the threat, the proper purpose of the proposed military action, whether means short of the use of force might reasonably 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".[16]

The 2005 UN World Summit Outcome provides, for the first time, a common definition of the principle of RtoP.[17] The principle of RtoP, embedded in paragraphs 138 and 139, represents an important step forward by establishing the obligation of states to protect their populations against genocide, war crimes, ethnic cleansing, and crimes against humanity. Similarly, it embodies the obligation of the international community to help States assume this responsibility and to react should they fail to protect their citizens against these four specified crimes and violations.[18]

Since its first report, *Implementing the Responsibility to Protect* in 2009[19], the UNSG issued reports on an annual basis to try to clarify different aspects of the RtoP principle and foster the debate among Member States. In 2010, the Secretary-General addressed an informal interactive General Assembly dialogue on *Early Warning, Assessment and the Responsibility to Protect*,[20] and the following year on *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*.[21] On September 5, 2012, the Secretary-General presented his report on *The Responsibility to Protect: Timely and Decisive Response*,[22] in 2013 he published his fifth report, *State Responsibility and Prevention*,[23] and on 12 August 2014, the Secretary-General released his sixth report *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*, on the Second Pillar of the Responsibility to Protect.[24]

As the Secretary-General explained, the principle of RtoP is based on three pillars, namely: (1) the State bears the primary responsibility to protect its population from genocide, war crimes, crimes against humanity, and ethnic cleansing; (2) the international community must assist States in fulfilling their protection obligations; and (3) when a State manifestly fails to protect its population or is in fact a perpetrator of these crimes, the international community has a responsibility to take collective action.[25]

The RtoP principle has undergone criticism that it is humanitarian intervention under a different name (Marks and Cooper, 2010: 91-93). In particular, it has been said that it gives powerful countries a window of opportunity to use force under their own discretion, emphasizing mainly the "responsibility to react" dimension.[26] In this regard, it must be recalled that RtoP encompasses three different dimensions which involve using all available tools under Chapters VI, VII, and VIII of the Charter, ranging from non-coercive responses to collective action.[27] This is a fundamental reflection towards the further development and the legitimacy of the principle.

The development of the RtoP principle is welcome since it clarifies and strengthens the existing obligations of states to ensure the protection of civilians.[28] In this regard, it represents an important step towards anticipating, preventing, and responding to genocide, war crimes, ethnic cleansing, and crimes against humanity. Furthermore,

it upholds fundamental principles of international law, in particular international humanitarian, refugee, and human rights law. The principles should be applied as consistently and uniformly as possible, to which effect it is crucially important that early warning and assessment should be conducted fairly, prudently, and professionally and that the use of force should remain the measure of last resort. As the European Union put it, the principle has been considered to be "critical for the survival of the community of nations".[29]

The development of the RtoP principle, particularly its prevention component, can advance global efforts towards a more peaceful world. This is bearing in mind that many mass atrocity crimes occur during periods of violent conflict, and these situations evidence the necessity to create effective capacities for structural and operational conflict prevention.[30] Furthermore, in this way, it is possible to minimize the need to recourse to the use of force, leaving it as the last resort.

Argentina, Human Rights, And Interventionism

Before considering its present stance regarding the RtoP principle, it is important to bear in mind Argentina's history and its strong support of non-intervention (Brotóns, 2007: 138; Yepes, 1935: 55). In addition, it is also relevant to analyze the well-built Argentine tradition regarding human rights (Pinto, 2007). In my view, the combination of these elements is essential to understanding the current foreign policy positions of the States of the region *vis-á-vis* the RtoP principle.

Additionally, it is also important to note that while many observers are accustomed to think of Latin America as a monolithic subject, the region shows a healthy political and ideological diversity that is reflected in the foreign policy positions taken by their governments which do not necessarily agree with positions held by these countries in the past (Oelsner, 2005).

The new political and ideological diversity "affects certain regional alliances to the extent that hemispheric geopolitical tensions translate

into 'ideological frontiers'" when addressing issues that take up the foreign policy agenda of our countries (Arredondo, 2011). At the same time, there seems to be two muscular elements of continuity in the Latin American agenda: human rights and the principle of non-interventionin internal affairs.[31]

Latin American foreign policy was built gradually during the Nineteenth and early Twentieth Century based on six principles: (1) sovereign equality of all States; (2) no intervention; (3) territorial integrity; (4) self-determination; (5) peaceful settlement of disputes; and (6) respect for international law (Petrella, 2013). Successive Inter-American Conferences from 1899 strengthened these principles, rejected interventionism, and set up exemplary humanitarian practices such as asylum and convinced the United States to inaugurate the policy of the "good neighbor", which led to greater cooperation and understanding within the hemisphere.

After World War II, the adoption of the Charter of the Organization of American States ("OAS"),[32] along with the American Treaty on Pacific Settlement, also known as the "Pact of Bogota"[33], and the American Declaration of the Rights and Duties of Man,[34] contributed to reinforcing these principles within the region. Indeed, it must be reminded that the American Declaration of the Rights and Duties of Man preceded the UN Universal Declaration of Human Rights and many of the principles of the Inter-American system were incorporated into the Charter of the UN.[35] From these historic moments, the role of the OAS, with its lights and shadows, has served to demonstrate that countries are associated mainly for two reasons: strategic needs arising from sharing a massive geographical area, and the cultural and institutional affinities reflected in common values such as democracy, human rights, and republican principles (Lagorio, 1998: 121).

The Latin American and the Caribbean region is one with a long history of human rights violations, foreign interventionism, and political instability (Halperin Donghi, 1993). The past decade brought about a change with the implementation of democracy, the development of institutions, and the building of a unique Inter-American human rights protection system (Goldman, 2009: 856-57).

This system fosters a regional-level mechanism that contributes to preventing mass atrocities and reinforcing the responsibility of States in protecting its own people (Abramovich, 2009:11-12).

It represents an effort to overcome past failures and sets an example for the international community because it establishes preventive mechanisms to protect citizens and civilian populations[36].

However, when the odds of protecting human rights in other States arises, Argentina shows strong support for the principle of non-intervention in internal affairs and a clear reluctance to support any kind of foreign intervention (Bemis, 1943: 237). This is mainly due to historical reasons evidencing that interventionism has been used as an instrument of foreign policy in Latin America, mainly by the United States. But there are also many other examples of foreign interventions by hegemonic powers of each historical period (Caminos, 1998:196-197). In this regard, it is worth recalling the words of Argentine jurist Podestá Costa:

> Facts show that interventionism has been due to several reasons: it has been founded on the desire to maintain political balance but also to cover it up several arguments were alleged from humanitarian reasons to racial or religious persecution ... in any case, what is essential is that interventionism has been left to the unilateral and ultimate government action, that decided whether or not to use it, as it considered appropriate in each case regarding its particular interest and the political circumstances of place and time. Intervention is not a tool to be used by weaker States against the strong. It is a weapon that can only wield the powerful in certain cases when accidental circumstances so warrant .... Therefore, there is no right of intervention" (Arredondo, 2012a: 252).

Perhaps it is unnecessary to underline that Podestá Costa's words are as relevant today as when they were written more than fifty years ago. They also serve to explain why the principle of non-intervention has become a cornerstone of the Argentine foreign policy. As Caminos reminds us, the rules on non-intervention in the OAS Charter are stricter than those of the UN Charter, for they not only prohibit

the use of armed force, but also all other forms of interference or attempted threat against the personality of the State in its political, economic, and cultural elements (Caminos, 1995: 963; 976).

Similar to the UN Charter, the OAS Charter contains numerous rules on the promotion and protection of human rights. These include the principle laid down in Article 3(e) that reads:

> "Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems".[37]

However, in light of the provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Inter-American Democratic Charter, and the practice of the Organization, it can be argued that human rights are no longer subject to the exclusive domestic jurisdiction of Member States of the OAS. However, the ability of the OAS and other organizations in Latin America to adopt measures for the protection of human rights and international humanitarian law depends on the applicability of the instruments referred to in a particular casea nd on the political will of Member States to adopt concrete measures to this aim (Caminos, 1995: 977). Still, it is worth noting that in Latin America, a unilateral humanitarian intervention carried out by any Member State would be considered a violation of the principle of non-intervention.

Today, Argentina, like many other Latin American and Caribbean States, continue to consider the principle of non-intervention as the cornerstone on which the framework of international relations is based and therefore sustain that the doctrine of humanitarian intervention is inconsistent with the Charters of the United Nations and OAS.

The Argentine Perspective On The Responsibility To Protect?

Latin American countries today show a divergent stance toward many issues affecting both the regional and the international agenda. In the case of RtoP, it is generally possible to draw three types of *ideological boundaries* that I call the Bolivarian, the Inter-American, and eclectic positions (Arredondo, 2011:11). The Bolivarian and Inter-American have clearly defined attitudes, while the eclectic borrows elements from the first two. The Bolivarian frontier or ALBA, which includes Cuba, Venezuela, Nicaragua, Bolivia and Ecuador, depart from what can be called an "anti-imperialist" stance that situates Latin America in an opposite position to the United States. Therefore, it seeks to strengthen the non-intervention principle, rejecting all forms of foreign interference. Therefore, the responsibility to protect is perceived as a covert instrument of the hegemon that intends to intervene to protector enforce its own interests in the region (Toro Carnevali, 2012: 135; 151-153).

The Inter-American frontier is one that brings together most of the States of the region (Uruguay, El Salvador, Mexico, Chile, Colombia, Peru, among others). These countries, while holding dear the principle of non-intervention, consider the RtoP principle is a positive tool for the protection of human rights in humanitarian crises and therefore support the consolidation of the principle.

Finally, the eclectic frontier gathers countries like Brazil and Argentina which maintain a clear assertion for the promotion and protection of human rights, however do not seem to fully support the RtoP principle.[38] Rhetorically they seem to support the RtoP principle, but they have also expressed some doubts on this issue. Brazil and Argentina maintain that RtoP needs further elaboration, particularly regarding the responsibility to react and the eventual use of force (Sainz-Borgo, 2012: 193).

In the case of Argentina, its support for the principles of national sovereignty and non-interference in the internal affairs of States is persistent in its discourse, yet Argentina is also considered an "RtoPChampion". As Kikoler points out:

> "Argentina was part of a core group of states pushing for the acceptance of the Responsibility to Protect (RtoP) at the 2005 UN World Summit. With the country's history of mass atrocities and keen understanding of Latin America's difficult history of external interference, they helped engage skeptical countries and persuaded them to support RtoP. While Argentina does not always invoke the language of RtoP, their actions in practice appear to reflect a commitment to its values" (Kikoler, 2015).

With respect to the three pillars established in this first Report of the UNSG, Argentina believes that the first pillar, which provides that each State has the responsibility to protect its own population, is not a problem. The same is true with regard to the second pillar regarding capacity building and assistance,[39] in particular Argentina has been proactive when it comes to the issue of prevention.[40] The third pillar, which upholds the necessity of a "timely and decisive response," is clearly the most controversial one as it opens the possibility of the use of force within the framework of Chapter VII of the UN Charter. In this regard, it should be noted that there remains some sensitivity to the potential risks of abuse arising from the application of the concept in practice, which proved truthful after NATO's actions in Libya in 2011.[41]

Historically, Argentina has expressed its willingness to contribute to the search for answers to humanitarian crises, as the international community has witnessed in the last decades.[42] In this regard, Argentina expressed a clear preference for the utilization of collective security mechanisms provided for in the UN Charter, and its reluctance to accept that RtoP is exercised unilaterally by a State, a coalition of States, or regional organization without the authorization of the Security Council (Arredondo, 2012c: 109; 129-130). Also, Argentina has affirmed that the UNSC has the legal framework and tools to implement the responsibility to react to cases where grave, massive, and systematic violations to human rights and humanitarian law occur.[43] This requires the will of the Member States, and in particular, the permanent members of the UN Security Council (P5) to exercise this subsidiary responsibility effectively and legitimately (Arredondo, 2012c: 130).

This position was foreshadowed in 2000, after a presentation by the UNSG on the "dilemma of intervention". At that time, Argentina stated that the principle of non-intervention in the internal affairs of a State should balance itself with the principle of non-indifference to the massive violations of human rights and humanitarian law".[44]

Following this logic, Argentina shared the opinion that the weight of RtoP falls on the Security Council, and warned about the negative consequences that would result if an intervention was carried out by a coalition or organization of States or without authorization.[45] Notwithstanding that, Argentina believed that, if possible and when necessary, Member States should be able to initiate proceedings before regional agencies, according to the conditions of Article 53 of the UN Charter, maintaining that they keep the UNSC fully informed (Arredondo, 2012a:281). Moreover, Argentina holds that the Security Council, through several of its resolutions, has created a legal framework that has substantially improved the international regime for the protection of peoples.[46] At the same time, Argentina considers that the Council has received a mandate from the UNGA which urges measures of "collective action in a timely and decisive manner to protect populations from genocide, war crimes, the ethnic cleansing and crimes against humanity".[47]

The positions mentioned above were reiterated by Argentina at the sixth Thematic Dialogues on the Responsibility to Protect, which took place between 2009 and 2014 at the General Assembly. Each of these Thematic Dialogues were preceded by a report of the UNSG that helped focus the debate on a certain aspect of the principle. A close look at the statements made by the representatives of Argentina shows that there was little to no modifications on the positions adopted by this country.

Following the Report of the Secretary-General from July 23, 2009, the Argentine government decided to join the group of likeminded countries to work together in promoting and strengthening the principle, bearing in mind the close relationship between human rights, peace and international security (Arredondo, 2012a:281-286). This decision is part of a policy to promote, protect, and respect human rights and international humanitarian law, a policy that Argentina has sustained since its return to democracy in 1983. During the past

thirty-years, Argentina has shown its concern and commitment to this area, which has earned it a prominent place in the defense of international humanitarian causes, along with active participation in causes related to prevention, cessation, and mediation in situations where gross and systematic human rights violations and international humanitarian law take place.

On this occasion, Argentina reiterated its support for the RtoP principle[48] on the grounds that a State has the primary responsibility to protect its population and that the international community has a subsidiary responsibility, which should be carried out through the UN in a timely and decisive manner. In this regard, Argentina expressed hat experience has shown that the UNSC has determined, in various occasions, that massive and systematic violations of human rights and international humanitarian law are a threat to peace and international security. From this, Argentina concluded that the current UN legal framework provides for an opportunity to react and to decisively end these types of situations if the UNSC has the political will to do so. Nevertheless, Argentina was reluctant to define criteria in order to guide the process of decision-making by the Security Council. On the one hand, Argentina felt that adopting criteria could lead to a procedural debate that could affect the decision-making process. However, in case of an eventual paralysis of the Council, some countries might be tempted to act unilaterally by using those criteria of legitimacy to act outside the system.

Considering that many States have expressed deep reservations about RtoP, linking the principle to humanitarian intervention, Argentina believed it would be useful to make efforts aimed at promoting the principle in developing countries, in particular, those that could potentially take place in areas with risky human rights situations. This position is based on the understanding that implementing RtoP is necessary to advance a common strategy model that will have the consensus of the wider UN membership.

When the UNSG report titled *Early Warning, Assessment and the Responsibility to Protect* was debated at the UN General Assembly in2010, again Argentina showed a favorable attitude towards RtoP. On that occasion, the representative of Argentina said that RtoP is an essential obligation of States since it combines all international

obligations to protect the human person. However, when States fail to satisfy their obligations, the UN cannot remain inactive and must take action to prevent the commission of grave crimes. The implementation of RtoP requires careful and detailed discussion, and the General Assembly is the appropriate forum for this debate. Argentina is convinced that, as stated in paragraph 139 of the Outcome Document, the UNGA should continue to examine the issue, in order to implement RtoP. Argentina considered that "the 'duty to protect' ... is nothing but the synthesis of other international obligations and reiterated the importance of prevention efforts and assistance, particularly in the case of those States that lack the infrastructure required to apply these types of international cooperation programs". With respect to the third pillar, referring to the timely and decisive response, Argentina considered the adoption of measures by the UN system in implementing RtoP to be very useful in protecting populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (Pace, 2012: 13-14). However, Argentina felt hesitant to accept assumptions that unilateral actions could constitute a collective armed action, and argued that the collective security system must be activated using the mechanisms provided for in the UN Charter. At that time, Argentina's position emphasized three essential aspects: (1) the need to respect human rights; (2) the importance of early warning and assessment; and (3) the continued international commitment, through the General Assembly, on the subject. Argentina noted that political dialogue between Members should continue specifically on how to implement the strategy and stated that the UN action must be complemented by regional or sub-regional efforts.

When the situation in Libya arose in early 2011, Argentina expressed "its deep concern over the grave situation" while regretting "the loss of life and violence occurring in the fighting".[49] It urged for "a quick and peaceful settlement, within a constructive democratic dialogue that grants full respect for human rights and the will of the Libyan people".[50] Further, Argentina was deeply concerned about the serious human rights violations in Libya, and co-sponsored a special session of the Human Rights Council, called for by the UN High Commissioner for Human Rights, Navi Pillay. Mr. Pillay requested an immediate end to the grave human rights violations committed by the Libyan

authorities, and the launch of an international investigation into the violent repression of demonstrations in that country.[51] However, Argentina expressly rejected the inclusion of the proposed measures under Chapter VII of the UN Charter, which it conditioned to a corroboration of the situation by objective, serious, and concluding data (Tettamanti, 2012).

These conditions were intended to prevent the kind of action that was later triggered by the authorization granted by UNSC Resolutions 1970 and 1973, for which there is heavy criticism. These Resolutions represented the first instance in which a case of RtoP led to a military intervention. The adoption of Resolution 1973 had the support of the Arab League and the African Union, which conferred upon them unquestioned legitimacy from the beginning,[52] although two permanent Members (China and Russia) and three other Members (Brazil, Germany and India) abstained. The resolution established a no-fly zone and a naval embargo on Libya and "authorized Member States to take "all necessary measures ... to protect civilians, excluding a foreign occupation force of any form on any part of Libyan territory".[53]

In July 2011, a meeting organized by the Government of Mexico for the former Special Advisor on RtoP, Edward Luck, and the Latin American "friends of RtoP," was held to discuss the third report by the Secretary-General on the matter.[54] During this meeting, the Argentine delegate supported Luck's view that in implementing RtoP, the cultural and institutional differences of each region must be taken into account and respected (Arredondo, 2012c: 125). In this regard, she recalled the development of RtoP in Latin America, where situations of massive and systematic human rights violations took place before the emergence of RtoP. Similarly, she highlighted the fact that Latin America has assigned significant value to the principle of non-intervention. Many delegations, including Argentina, agreed that the RtoP principle does not imply the emergence of a new rule, but rather summarizes existing obligations regarding the obligation of the State to protect its population in light of universal standards and regional protection of human rights and international humanitarian law mechanisms. Therefore, it confirmed the importance of second and third pillar, and reaffirmed the notion that the third pillar must

be considered a last resort in cases of grave and massive violations of human rights which can be categorized as one of the four crimes. There was also widespread agreement and concern to avoid selectivity and "regime change" as veiled objectives of powerful countries. Likewise, the important role of regional agencies in implementing RtoP obligations was addressed, considering the specific mechanisms adopted in the OAS framework as well as other sub-regional organizations. In this regard, the "democratic clause" adopted at OAS, Southern Common Market (Mercosur), Union of South American Nations (Unasur), etc., was recalled. Similarly, the precursor role of the Inter-American system for the promotion and protection of human rights and the fight against impunity was also mentioned. While regional initiatives may not have developed solutions for the fight against impunity in cases of massive and systematic violations of human rights, the lessons learned from these experiences could be the basis for regional capacity building.

On February 21, 2012, an informal meeting organized by the Permanent Mission of Brazil, Brazil's Minister of Foreign Affairs, and the UN Special Adviser for RtoP, was held on the concept of "Responsibility while Protecting" (RWP) to address the components of the concept paper submitted by Brazil. The meeting was followed by a lively debate and was marked with high participation by Member States. Argentina expressed its support for the Brazilian initiative, stressing that it represents a "substantive" contribution and "overcomes" the RtoP principle.[55] Argentina stated that this proposal "rightly captures our own vision" and "represents an opportunity to progressively develop a substantive aspect of RtoP" (Arredondo, 2012c:127). It further added that it is imperative to strengthen protection strategies on the ground with clear and predictable rules, since it is unacceptable that the very protection the international community intends to provide could result in further damage to the same innocent civilians they seek to protect. Taking into consideration that the Security Council's actions are based on a case-by-case basis, Argentina highlighted the need to establish clear rules that respond to the essential objective of protection, and consequently prevent the concept from being manipulated and misrepresented in order to implement regime change.

One of the corollaries of the armed intervention in Libya was there luctance of many Latin American countries, including Argentina, to support any kind of use of force in Syria.[56] As the Argentine representative put it:

> "The concerns risen (sic) by the coercive action in Libya include resorting to the use of force without trying other measures first, regime change, the adequacy of air strikes to protect civilians, the need for the Security Council to do a follow up of the authorized measures and accountability of those authorized use of armed force. Those reservations must be addressed in order to ensure that action by the United Nations does not cause more victims than civilians protected, that it does not incur in legitimizing political objectives beyond those of the Organization and, in the end, to ensure the legitimacy of collective action by the United Nations".[57]

Conclusions

There is no consensus in Latin America and the Caribbean on the principle of RtoP, but instead, there are three main trends amongst the countries in the region and their approach to this principle. On one hand there is a group of countries that promote a strong opposition against the concept. This group is represented by Venezuela, Cuba, and other ALBA member countries, whose criticism of the principle is based on the prevalence of state sovereignty and the principle of nonintervention. The second group of countries is characterized by a steady support for RtoP, and represented by Mexico, Panama, Chile, Costa Rica, and Guatemala amongst others. A third group, including Argentina and Brazil, two countries with a very strong human rights discourse, have a long history of support for UN lead missions and an active role in the development of RtoP, although from different perspectives.

In the case of Argentina, its support for the respect of state sovereignty and the principle of non-intervention is persistent in its discourse, yet it is also considered an "RtoP Champion", bearing in mind that it has taken an active role in promoting the principle since its inception.[58]

Within this framework, two contending juridical traditions struggle to impose their own principles to foreign policies of Latin American Governments: (1) the tradition of unrestricted respect for state sovereignty and the defense of the principle of non-intervention; and (2) a strong tradition of promotion and protection of human rights, particularly relevant after the demise of military dictatorships in the eighties.

An analysis of the Argentine position shows that while it has accepted the principle of RtoP, it is still reluctant to legalize the unilateral use of armed force on humanitarian excuses, especially in light of the abuses that have taken place in the past. In that sense, Argentina, like most States, do not feel inclined to open the norm under Article 2.4 of the UN Charter in order to include an exception for humanitarian intervention (Schachter, 1984: 1620; 1624). As Goodman clearly explains "The overriding concern about pretext wars turns on assumptions about state opportunism and the power of both law and perceived legitimacy in regulating state behavior" (Goodman, 2006: 107; 109).

The regional roundtables convened by the ICISS, as well as the subsequent consultations on the Report with NGOs and Governments coordinated by Canada and other civil society organizations, served to evidence that in most cases there was a widespread hostility towards the notion of humanitarian intervention, and a broad consensus against the idea of an alleged "right of intervention", particularly when that alleged right was associated with unilateralism (World Federalist Movement-Institute of Global Policy, 2003; Morada, 2006: 59-60).

But this deep skepticism towards intervention did not necessarily translate into a rejection of the underlying purpose of RtoP-the prevention of genocide and mass atrocities and the protection of vulnerable populations.[59] The adoption of a text, which focused on the rights of endangered populations rather than the alleged right of intervention, contributed to a wide range of State and civil society actors who expressed a disposition to recognize that sovereignty entails responsibilities and that an international intervention can be legitimate in certain circumstances. However, the Commission's approach to unilateral intervention and apparent openness to actions

authorized by the Security Council revealed that it was unlikely that the RtoP principle would be accepted without a careful examination (Arredondo, 2012a: 41).

The military intervention of 2011 in Libya shows the need to clarify the role of regional and sub-regional organizations when applying RtoP. Although such organizations can be both legitimizers and operational agents for the implementation of RtoP, they often lack capacities and resources to carry out operations in a meaningful way.

The three mentioned trends and established traditions raise a series of questions on the validity of the RtoP principle in this region. First, the usefulness of RtoP in Latin America and the Caribbean, taking into account the existence of a preventive system such as the Inter-American Human Rights System, even if it is applicable ex post facto. Second, the different positions that it entails for the foreign policies of the LAC countries, particularly within a very dynamic process of regionalism and regional transformation, and the prevalence of the principles of national sovereignty and non-intervention. Third, the involvement of several Latin American countries in peace operations and both the impact and influence of the LAC experience and debate on the issue of humanitarian intervention for the global agenda. Finally, the role of civil society organizations and networks in prevention in a region where democratic systems prevail.

As the representative of Argentina before the UNSC stated, “It is crucial that we put into practice regional and universal early-warning mechanisms to prevent atrocities, an aspect in which regional and national scope becomes essential to cooperation and dialogue in order for the rule of law to be strengthened”.[60]

Argentina has expressed its willingness to contribute to the search for answers to the humanitarian crises, and expressed a clear preference for the use of collective security mechanisms provided in the Charter of the United Nations. It has also expressed a reluctance to accept the RtoP principle to be exercised unilaterally either by a State, a coalition of States, or a regional body without express authorization of the UNSC. Moreover, Argentina has stated that the UNSC already has the legal framework and tools to implement that responsibility to react to serious, massive and systematic violations of human rights

and humanitarian law violations. The will of the UN Security Council Member States, and in particular, the P5, is a required condition to effectively and legitimately exercise that vicarious liability imposed on the international community as a whole.

As the Permanent Representative of the United States of America to the UN eloquently stated, "The international consensus around RtoP remains a signal achievement of multilateral cooperation and a testament to our common humanity".[61] It seems that Argentina and Latin America will continue to support and foster RtoP. However, this drive will heavily rely upon how the international community, and particularly its most powerful members, use this principle in the future.

NOTES

1. See G.A. Res. 54/2000, 217, U.N. Doc. A/RES/54/2000 (Mar. 27, 2000).
2. See Int'l Comm'n on Intervention and State Sovereignty (ICISS) (2001), *The Responsibility to Protect* [hereinafter ICISS Report], p. 11-15, available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 18/05/2015).
3. See G.A. Res. 60/1, # 138-39, U.N.Doc. A/RES/60/1 (Oct. 24, 2005).
4. See id. # 138.
5. See Press Release, U.N. Secretary-General, Secretary-General Presents his Annual Report to General Assembly, U.N. Press Release SG/SM/7136-GA/9596 (Sep. 20, 1999); see also ICISS Report, supra note 2, at 1-2.
6. See U.N. Charter art. 2, para. I ("The Organization is based on the principle of thesovereign equality of all its Members").
7. See ICISS Report , supra note 2, at 1-2.
8. See id. at 9, 17.
9. See id. at 13.

10. See id. at 17.
11. See id. p. 17.
12. See G.A. Res. 59/565, 1 203, U.N. Doc. A/RES/59/565 (Dec. 2, 2004).
13. See id. p. 207.
14. U.N. Secretary-General (2004). *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*, A/59/565 (Dec. 2, 2004).
15. See G.A. Res. 59/2005, # 132, U.N. Doc. A/RES/59/2005 (Mar. 21, 2005).
16. See id. # 6(h).
17. See G.A. Res. 60/1, 1 138-39, U.N.Doc. A/RES/60/1 (Oct. 24, 2005).
18. See id. # 138.
19. See U.N. Secretary-General (2009). *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].
20. U.N. Secretary-General (2010). *Early Warning, Assessment and the Responsibility to Protect*,U.N. Doc. A/64/864 (July 14, 2010).
21. U.N. Secretary-General (2011).*The Role and Subregional Arrangements in Implementing the Responsibility to Protect*, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011).
22. U.N. Secretary-General (2012). *Responsibility to Protect: Timely and Decisive Response*, U.N.Doc. A/66/874-S/2012/578 (July 25, 2012).
23. U.N. Secretary-General (2013). *Responsibility to Protect: State Responsibility and Prevention*,U.N. Doc. A/67/929-S/2013/399 (July 9, 2013).
24. U.N. Secretary-General (2014), *Responsibility to Protect: Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*, U.N. Doc. A/68/947–S/2014/449 (July 11, 2014).
25. See *Implementing the Responsibility to Protect*, supra, # 1.
26. See Noam Chomsky, Statement to the United Nations General Assembly Thematic Dialogueon the Responsibility to Protect (July 23, 2009), available at http://www.un.org/ga/president/63/interactive/

protect/noam.pdf (accessed 18/05/2015); also Hobsbawm, Eric (2008). *Guerra y Paz en el Siglo XXI*, Barcelona, Crítica, p. xiv-xv.

27. See *Implementing the Responsibility to Protect*, supra, # 4, 9, 23.

28. See The Asia-Pacific Centre for the Responsibility to Protect (2009), *The Responsibility To Protect and the Protection of Civilians: Asia-Pacific In The UN Security Council* Update No. 1, p. 2, http://www.responsibilitytoprotect.org/files/PoC_Update_1[1][1].pdf (accessed 18/05/2015).

29. Rep. of Comm. on Foreign Affairs, Plenary Sitting, Mar. 21, 2013, Eur. Parl. Doc. A7-0130/2013 (Mar. 27, 2013) (adopting proposal on the UN Principle of the "Responsibility to Protect").

30. See id. at 6.

31. Id. at 5-6.

32. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119U.N.T.S. 3 [hereinafter OAS Charter].

33. American Treaty of the Pacific Settlement, Apr. 30, 1948, 30 U.N.T.S. 55 [hereinafterBogota American Treaty].

34. American Declaration of the Rights and Duties of Man, 1948, O.A.S. Res XXX, reprintedin Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4, doc. 1 rev. 13 (2010).

35. G.A. Res. 48/141, 1 3, U.N. Doc. A/RES/48/141 (Jan. 7,1994).

36. Id. at 10.

37. OAS. Charter art. 3, para. e.

38. See Global Center for the Responsibility to Protect (2009) *Implementing The Responsibility to Protect - 2009 General Assembly Debate: An Assessment.* available at http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf(accessed 18/05/2015)

39. See Statement by Argentina at the Open Debate of the United Nations Security CouncilMaintenance of International Peace and Security:"War, its lessons, and the search for a permanent peace", 29 January 2014,Unofficial Transcript, available at http://responsibilitytoprotect.org/Argentina%282%29.pdf (accessed 18/05/2015). See also Open Debate on Protection of Civilians in Armed Conflict Statement by Mrs. RA RP, Amb. Maria Cristina Perceval, UN Security

Council, 2013, available at http://enaun.mrecic.gov.ar/en/content/armed-conflict (accessed 18/05/2015).

40. See Statement by Argentina at Security Council Meeting on: Threat to International Peace andSecurity: Prevention and Fight Against Genocide, Unofficial Transcript, 16 April 2014, available at http://www.responsibilitytoprotect.org/Statement%20by%20Argentina%20at%20Security%20Council%20Meeting.pdf(accessed 18/05/2015).

41. UN General Assembly, Interactive dialogue on the Responsibility to Protect. Statement by the Argentine delegation, New York, 11 September 2013, available at http://responsibilitytoprotect.org/Argentina%2013.pdf (accessed 18/05/2015).

42. Press Release, General Assembly, "Recognizing Evolving Nature of Humanitarian Crises, General Assembly Encourages Dialogue Among Member States, UN Agencies to Bolster Emergency Response System", U.N. Press Release GA/11327 (Dec. 13, 2012).

43. U.N. SCOR, 61st Year, 5577th mtg. at 2, U.N. Doc. S/PV.5577 (Dec. 4, 2006).

44 See U.N. SCOR, 55th Year, 4194th mtg. at 6, U.N. Doc. S/PV.4194 (Sept. 7, 2000); U.N. SCOR, 56th Year, 4288th mtg. at 9, U.N. Doc. S/PV.4288 (Mar. 7, 2001); see also Press Release, Security Council, "Security Council Meets to Review Commitments of September 2000 Summit: Secretary-General Cites Council's 'Crisis of Credibility," U.N. Press Release SC/7024 (Sept. 3, 2001).

45. See U.N. SCOR, 55th Year, 4194th mtg. at 6, U.N. Doc. S/PV.4194 (Sept. 7, 2000).

46. Delegation of Argentina, Statement delivered at the 2010 United Nations General Assembly Interactive Dialogue on the Responsibility to Protect (Aug. 9, 2010) [hereinafter Statement of Argentina].

47. General Assembly, Draft Resolution Referred to the High-Level Plenary Meeting of the General Assembly by the General Assembly at its Fifty-Ninth Session at 31, A/60/L.1 (Sept. 15, 2005).

48. See Statement Delivered by the Government of Argentina During the July 2009 United Nations General Assembly Debate on the Responsibility to Protect (July 27, 2009) (transcript available at http://www.globalr2p.org/media/files/argentina-2009-r2p-debate.pdf).

49. Press Release, Dirección de Prensa de Cancillería, "Situación en Libia: Profunda Preocupación del Gobierno Argentino", Argentina Foreign Ministry Press Office, Situation in Libya: Deep Concern of the Argentine Government, (Feb. 22, 2011).
50. Ibidem.
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60. Statement by Argentina at the Open Debate of the United Nations Security Council(Jan. 29, 2014), available at http://responsibilityto-protect.org/Argentina(2).pdf (accessed 19/05/2015).

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Chile's Human Rights Foreign Policy and RtoP

Claudia Fuentes Julio

This chapter examines Chile's responses to the international norm known as *Responsibility to Protect* (RtoP) and places it within the greater context of Chile's foreign policy since the transition to democracy.[1] It argues that Chile's support of RtoP is highly consistent with the objectives and international strategies developed by the new democratic authorities that since early in the 1990s decided to actively include human rights as an integral part of Chile's national interest. Chile is recognized today as an international human rights promoter, praised by organizations such as Human Rights Watch as one of the most influential nations from the Global South in the promotion and protection of universal human rights (Kenneth, 2009; HRW, 2010, 2011).

The first part of this article highlights Chile's trajectory within the international human rights regime including ratification of human rights treaties, participation at the UN Human Rights Council and other

relevant institutions protecting human rights, and Chile's support to UN peace-keeping operations. It highlights that among the main objectives of the first democratic government led by the center-left coalition in power ("Coalition of Parties for Democracy" or CPD) was to actively promote the reinsertion of Chile into the community of democratic states as a way of recovering the country's international credibility that was lost due to the multiple condemnations made by international institutions, states, and transnational NGOs aiming to stop the human rights abuses perpetrated by the military regime. The CPD promoted the notion that a relatively small country like Chile without geostrategic or economic prominence needs to search for alternative sources of power actively participating in the creation and strengthening of international norms and institutions and reinforcing Chile's traditional emphasis on international law and multilateralism as a way of leveling the playing field among nations.

Against this backdrop, the promotion of international human rights became an integral part of Chile's international strategy during the more than twenty years that this coalition was in power.[2] One of the key conditions for Chile to become a human rights promoter was the presence of domestic actors at relevant positions in the government and the Ministry of Foreign Affairs willing to mobilize, promote, and legitimize human rights ideas into the foreign policy process. These actors shared common values, had similar beliefs about what constitutes Chile's national interest and, most importantly, developed concrete foreign policy initiatives with an emphasis on international human rights and the promotion of democracy. This same dynamic is also responsible for Chile's more recent commitment to the RtoP norm.

The second part of this article specifically assesses Chile's international stance on RtoP since the concept was first introduced by the International Commission on Intervention and State Sovereignty (ICISS) in 2001. Particular attention is paid to Chile's position towards RtoP within UN forums and especially during the 2005 UN World Summit, when the country supported the inclusion of specific international commitments endorsing RtoP in the Outcome Document. Also a brief discussion of Chile's response to the most current and more controversial issues regarding RtoP such as the recent implementation of the norm in Libya (2011) and the failure to respond to massive human

rights atrocities in Syria is also included. The chapter ends with some conclusions regarding the challenges ahead for the second administration of Michelle Bachelet (2014-2018) in the context of Chile's seat at the UNSC (2014-2015) and the need to further mobilize domestic and international assets for the normative advance, consolidation, and implementation of RtoP.

Chile's Human Rights Foreign Policy

Why Chile became a Human Rights Promoter?

Chile's involvement with the promotion of universal human rights dates back to the creation of what is today the international human rights regime after the Second World War. Chilean diplomats along with a reduced number of leaders from other developing countries particularly from Asia and Latin America were able to play a significant role during the drafting of the UN Charter, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Chile's Permanent Representative at the UN, Hernán Santa Cruz, was one among the group of ten international figures who drafted the UDHR in 1948 (Sikkink, 1993(b)/2004; Reus-Smit, 2011). Chile was also active in the ensuing debate. Speaking in the Third Committee of the General Assembly on the draft Declaration, the Chilean Representative stated almost prophetically "no one could infringe upon the rights proclaimed in it [the Universal Declaration] without becoming an outcast from the community of states"(Reus-Smit, 2011: 532).

The coup d'**état** in 1973 and subsequent military regime broke Chile's traditional engagement with the international human rights system. During this period, Chile's participation in the United Nations and other international and regional forum was drastically reduced. Those very same international institutions that Chile had helped to create were at the forefront of the fight against the massive human rights violations perpetrated by the military regime. The United Nations condemned the Chilean government several times, at critical moments of

state repression. Following the coup against President Salvador Allende, the United Nations established an *ad hoc* working group (1975) to inquire into the situation of human rights in the country. This *ad hoc* working group is generally perceived to be the first "Special Procedure" of the United Nations Commission on Human Rights.[3] In 1979, this working group was replaced by a special *rapporteur* and two experts to study the fate of the disappeared. This led to the establishment of the first thematic Special Procedure in 1980: The Working Group on Disappearances to deal with the question of enforced disappearances throughout the world. The Inter-American Commission on Human rights also presented several reports on the human rights situation of the country.[4]

By late 1970s and early-1980s, Chile was increasingly seen as a pariah state within the international community and the country's international image was at its lowest levels. Chile's relations with Latin American countries dramatically deteriorated after the country decided to withdraw from the Andean Pact; some European countries issued complaints against the country due to the killing of their nationals in Chile's territory—most notably Spain, and the lessening of United States' support after the killing in 1976 of the former Chilean Minister of Foreign Affairs, Orlando Letelier and his American assistant, Ronni Moffit, in Washington DC significantly affected the country's standing within the international community. Agents of the Chilean secret police planned and perpetrated this assassination, the first one of this kind committed not only beyond Latin American borders but in US soil and with one local casualty. The international repercussions of the killings were considerable and accentuated international criticism of the military regime. In the words of the Chilean diplomat and scholar, Heraldo Muñoz: "…each time the government increases its authoritarian measures domestically there will be a revitalization of the negative image of the regimen externally and political isolationism will continue characterizing the foreign relations of the military regime" (Muñoz, 1982: 597).

The reestablishment of democracy opened an enormous window of opportunity for the restoration of Chile's diplomatic prestige. Consistent with its historical tradition, and in light of the new democratic government's redefined objectives, Chile's most immediate foreign

policy objective was to re-insert itself into the international community. Promotion of human rights became an integral part of the country's international strategy. The newly elected President Patricio Aylwin defined this objective clearly in his 1992 State of the Union—a speech that traditionally has an almost exclusive domestic focus— in which he explains the importance of human rights for Chile's foreign policy:

> We consider that the defense of human rights is an ineluctable duty of any government that is committed to peace, one in which there is no room for invoking the principle of non- intervention. As a designated member of the United Nations Human Rights Commission, Chile will act according to this conception (Aylwin in Morande and Aranda, 2010: 95).

The need to recover Chile's international prestige and the value that the new elected President Patricio Aylwin placed on getting international support toward a domestic agenda aiming to a stable transition to democracy prompted the first democratic government to fully embrace international human rights. Foreign Policy decisions made during Aylwin's term paved the way for the next three administrations of the Coalition of Parties for Democracy (CPD) (Eduardo Frei, 1994-2000, Ricardo Lagos, 2000-2006 and, Michelle Bachelet, 2006-2010) to adopt human rights as a salient foreign policy objective. Chile's interest in international human rights was further enhanced by the personal commitment to democratic and human rights values embraced by the political authorities from the CPD that governed Chile, including a group of international relations experts that took leading positions within the Ministry of Foreign Affairs for four consecutive presidential terms (Fuentes and Fuentes, 2014; Fuentes Julio, 2014). President Michelle Bachelet is one of the clearest examples of a leader employing ethical principles as a motive for action. During her time in office she was particularly sensitive to the topic, as she herself was a victim of the Pinochet regime's ruthless methods of torture and imprisonment. Explaining the Chilean commitment to the UN Security Council, Bachelet indicated:

> You will be aware of my own personal experience with the abuse of human rights. Those were painful times for me, for my family, and for my country. They were certainly the darkest chapter in Chile's history (...). But we are striving to create

> a world in which such abuses are no longer possible. *Nunca Más*, never again, as we said in Chile after our experience in the 1970s and 1980s. And that is what we must also say in the United Nations, and act accordingly. Chile subscribes fully to a broad concept of freedom and emancipation under which respect for human rights—along with economic and social development, peace and security—is one of the pillars of the mission of the United Nations in this new century. As such we would like to contribute with our experience and commitment to the new Human Security Council (Bachelet, 2011).[5]

In sum, Chile's foreign policy for the more than twenty years that was under the Coalition of Democratic parties was led by a group of political leaders who shared a common understanding of the importance of human rights in domestic and international policies. Most importantly, this group of people managed to match words with deeds. During their time in office, they led and developed concrete foreign policy initiatives with an emphasis on international human rights, the promotion of democracy, and most recently RtoP.[6] As the following assessment illustrates, Chile became particularly active in three areas international areas with an important human rights focus: a) the ratification of major international human rights instruments; b) participation in multilateral organizations that promote peace, human rights and democracy; and c) Peace Promotion and peacekeeping operations under the auspices of the United Nations. Together, these three priorities helped to pave the way for Chile's support of RtoPin the early 2000s.

Assessing Chile's International Human Rights Performance

Human Rights Instruments

Chile has ratified a number of international human rights treaties since the return of democracy in 1990 (See Table 1). It has also recently ratified the following human rights instruments: the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169); the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty; the Protocol to the American Convention on Human Rights to Abolish the Death

Penalty; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of Persons with Disabilities. Chile formally joined the International Criminal Court in 2009, ten years after signing its founding treaty.[7] At the regional level, Chile ratified the American Convention and recognized the jurisdiction of the Inter-American Court only a few months after its transition to democracy.

Table 1.
Selected Human Rights and Humanitarian Treaties: Chile

Treaties	Year of Ratification
American Convention of Human Rights	1990
International Covenant on Civil and Political Rights	1972
International Covenant on Economic, Social, and Cultural Rights	1972
Convention Against Torture	1988
Ottawa Convention	2001
Convention on the Rights of Persons with Disabilities.	2008
ILO C169 Indigenous and Tribal Peoples Convention	2008
International Convention for the Protection of All Persons from Enforced Disappearance	2009
International Criminal Court/ Rome Statue	2009

Source: Coalition for the International Criminal Court. http://www.iccnow.org/?mod=country&iduct=35; Office of the High Commissioner for Human Rights. http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en

Human Rights Organizations

Chile has been active in various multilateral organizations with an important human rights mandate (see table 2). Since the 1990s, the country has been elected twice (1996-1997/2003-2004) to a non-permanent seat on the UN Security Council (UNSC) in spite of an intense domestic debate on the possible political costs associated with such a post particularly during the US-led war in Iraq. From 2014-2015,

Chile will once again occupy a non- permanent seat at the UNSC. Chile has also actively participated in the UN Economic and Social Council (ECOSOC), even holding the presidency on several occasions. It also supported the creation of the UN Peace-Building Commission in 2005, holding the presidency of that organization for two years. Since 1999 Chile has been part of the Human Security Network,[8] a group of likeminded countries that have made human security an integral part of their foreign policy concerns (Brauch and Fuentes J., 2009). The country was one of the founding members of the Community of Democracies[9], a global, intergovernmental coalition of democratic countries, whose goal is the promotion of democratic rules and the strengthening of democratic norms and institutions around the world.

Since the 1990s, Chile was also an active participant at the UN Human Rights Commission sponsoring and co-sponsoring important initiatives and resolutions especially on issues such as the right to truth and reparations for victims of mass atrocities. After the 2006 merging of the Commission into the Human Rights Council, Chile continued with its strategy of supporting institutions for the protection and promotion of human rights within the UN. Indeed, Chile has been praised by Human Rights Watch as one of the most influential countries from the Global South in the promotion and protection of universal human rights internationally (Kenneth, 2009; HRW, 2010, 2011). Human Rights Watch latest report (2011) on the Council's work states that "Chile has a strong and coherent voting record at the Council. Its positions are based on a principled approach to human rights, which is consistent and non-selective". The country has been elected member of the Council twice (2008 and 2011) for three years terms and in 2009 it was selected as Vice-president of the Council for one year to represent its regional group. In terms of resolutions addressing country or special sessions considering urgent situation's, Chile systematically voted in favor of examining situations or resolutions o Sudan, North Korea, Iran, Belarus, Sri Lanka, Congo and Syria (HRW, 2011).

In terms of initiatives on the HRC, Chile has been an important actor when it comes to supporting the effective implementation of the Council's mandate to respond promptly to human rights emergencies. It was a cosponsor of the special session on Libya and the only council member of the Group of Latin American and Caribbean

countries to sponsor the resolution on Iran, which led to the creation of the special *rapporteur* mandate (HRW, 2011). In a note to the UN General Assembly presenting its candidacy for reelection to the Human Rights Council, this point was made fairly clear by the Chilean delegation: "We believe that, as part of the Council's action, there can and must be a strengthening of the procedures for the early warning of and response to situations of mass violations of human rights in a particular State, including special sessions, on-site visits and stronger resolutions on such countries" (Permanent Mission of Chile at the General Assembly, 2011).[10]

Table 2
Chile's Participation in Multilateral Initiatives with a human rights mandate

UN Institution	**Years of Participation (since the 1990s)**
Security Council	1996-1997, 2003-2004, 2014-2015
Economic and Social Council (ECOSOC)	Presidency 1993, 1998 (Juan Somavia)
UN Human Rights Commission	Member from1998-2000,2002-2004
UN Human Rights Council	2008-2014
Peace-building Commission (PBC)	Presidency 2009-2010 (Heraldo Munoz)
UN Peacekeeping	UNIKOM (Iraq – Kuwait), 1991-1993 UNTAC (Cambodia), 1992-1993 ONUSAL (El Salvador), 1992-1995 MOMEP (Ecuador- Peru), 1995, 1999 UNSCOM (Iraq), 1996-1998 UNMIBH (Bosnia Herzegovina),1997-2002 UNTAET (Timor Oriental), 2000-2002 UNMOVIC (Iraq), 2000-2003 UNMIK (Kosovo), 2000-Present UNFICYP(Chipre), 2001-Present UNMISET (Timor Leste), 2002-2003 MONUC (DRC), 2003 UNAMA (Afghanistan), 2003-2004 MINUSTAH(Haiti)2004-Present

Other Initiatives:	
Human Security Network	1999-PresentPresidency 2001-2002
Community of Democracies	2000-Present, Presidency 2003-2005

Source: Authors' table. United Nations: http://www.un.org/; Ministerio de Relaciones Exteriores de Chile: www.minrel.gov.cl; CECOPAC-Chile: http://www.cecopac.cl/chile_en_opaz/contribucion.html

UN Peacekeeping Operations

Chile's respond to the international intervention in Kosovo in 1999 was originally cautious, explicitly making manifest the concern about NATO'S decision to intervene without UN approval. This position is probably due to the coincidental arrest of General Pinochet in London and the need to be consistent with the notion advanced by the country´s state officials that prosecuting Pinochet outside Chilean jurisdiction was not in the interest of Chile, a sovereign state capable of judging him at home. Yet, Chile ultimately condemned the atrocities perpetrated in Kosovo and decided to participate in peacekeeping and policing in the area when solicited by the UN (Serrano, 2000).

Chile also contributed to peacekeeping operations in Iraq, Cambodia, and El Salvador, among other missions. However, it was not until 2010 that Chile drastically increased its participation in peacekeeping, sending troops to the Multinational Force for Haiti and later to the United Nations Stabilization Mission in Haiti (MINUSTAH). With more than 500 troops on the ground since the beginning of the mission in 2004, Chilean officials see participating in MINUSTAH as one of its greatest contribution to the protection of human rights, human security and regional peace. The latter point is continuously emphasized by Chilean delegates, which indicate that this operation is at the core a regional one. Two Chilean diplomats have been selected as Special Representatives of the Secretary-General and Head of Mission since the beginning of the mission in 2004. Additionally, since 2010 Chile's International Cooperation Agency (AGCI) has been implementing programs on education and development in the Caribbean nation.[11]

Chilean Foreign Policy and RtoP

Chile's road to RtoP

Due to Chile's strong support for the promotion of international human rights and its concrete foreign policy agenda on the subject, the country was already primed to understand and embrace the normative aspirations embodied by the Responsibility to Protect. In May, 2001 the International Commission on Intervention and State Sovereignty's (ICISS) choose to hold their regional consultations in Santiago, where they prepared the RtoP report. The host country immediately demonstrated its solidarity with the Commission and the proposed concept of RtoP. In the consultation's opening address, Soledad Alvear, Chile's Minister of Foreign Affairs, referred to international intervention as a subject closely related "to life and death," and one that international organizations, despite all their technological progress, have been unable to effectively address. She further indicated that "… massacres and other major aggressions against humankind continue to occur, to the dismay of the international community. All this urgently requires international organizations and UN state members to compromise on a common approach." (ICISS, Part III-Background: 369).

The next opportunity for Chile to state its position in relation to RtoP was during the 2005 UN World Summit, when the country supported the inclusion of specific international commitments endorsing RtoP in the Outcome Document. As expressed by the former Chilean Minister of Foreign Relations, Ignacio Walker, at the Sixtieth Session of the UN General Assembly, "When States are unable or unwilling to act this organization cannot remain indifferent in the face of genocide, ethnic cleansing, war crimes and crimes against humanity. We have an international responsibility to protect which we cannot ethically shrink" (Walker, 2005: 2).

The World Summit Outcome Document contains two paragraphs on the Responsibility to Protect. Paragraph 138 declares that "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...." Paragraph139 states that "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 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..."

The Chilean representatives to the UN endorsed these paragraphs on RtoP because they contained three elements that were at the core of the delegation's concerns at that time. First, they stated that the issue being considered was not "the *right* to intervene" but the *responsibility* of every state to protect its population. Thus, the debate was shifted from the more traditional rhetoric regarding humanitarian intervention to a debate wherein each state and the international community would share the onus of protecting human beings from gross human rights violations.

Second, the Chilean delegation insisted on its interpretation of the Responsibility to Protect as a "continuum," which included the international responsibility to prevent and assist (Labbe, 2005). It argued that efforts to prevent genocide and other crimes against humanity needed to address root causes, such as hatred among ethnic groups and inequality among various groups within a country.

Finally, in accordance with the UN Charter, the Chilean delegation concurred with the idea of a collective international obligation to take timely and decisive action when needed. The concept of decisive action included the provisional use of coercive tactics only under certain extreme conditions and only with the collective consent of the Security Council. Chile, along with Mexico and Japan, floated these ideas in a non-paper, which was meant to facilitate discussion prior to the World Summit; the document clearly emphasized the importance of strengthening conflict prevention mechanisms as part of the RtoP framework.[12]

In July 2009, for the first time since the adoption of the 2005 World Summit Outcome Document, the UN General Assembly met to re-

consider the responsibility to protect (RtoP) agenda. On this occasion, the General Assembly gathered specifically to discuss the UN Secretary, General Ban Ki-Moon's report "Implementing the Responsibility to Protect." Chile once again confirmed its commitment to RtoP, supporting Ban Ki-moon's call to turn RtoP into an operational concept. Chile endorsed the Secretary General's formulation of a three pillar strategy: state responsibility, assistance to states, and timely and decisive action by the international community. Chile acknowledged the importance of the first two pillars, but also insisted on the essentiality of generating preventive instruments to avoid mass atrocities, specifically through the promotion of democracy (Muñoz, 2009b).

From 2001, when the International Commission on Intervention and State Sovereignty (ICISS) presented its original report, through the most recent debates at the United Nations that have taken place in the last two years regarding the implementation of RtoP, Chile has continually insisted on the need for a political debate about the practical and consensual implementation of RtoP. Two topics appear prominently in Chile's official statements on RtoP: clarifying the conceptual and practical relationship between sovereignty and non-intervention, and defining the precise scope of RtoP as well as the criteria for intervention.

Regarding the sovereignty debate, it is worth noting that support for the principle of non-intervention has traditionally been very strong in Latin America and the Caribbean. As early as 1933, at the Inter-American Conference in Montevideo, Latin American countries had already crafted a repudiation of the Roosevelt Doctrine. The Convention of Rights and Duties of the States indicated that "no state has the right to intervene in the external or internal affairs of one another" (Coopper and Legler, 2006). The concept of Responsibility to Protect once again brought the tension of "sovereignty versus intervention" back to Latin America, and into the international debate.

Heraldo Muñoz, Permanent Representative of Chile to the UN, expressed the nature of this debate very clearly:

> During the cold war, many countries in Latin America, including my own, suffered dictatorial repression with crimes against humanity. The Nixon administration actively contri-

> buted to the tragedy in my country while others, both from the North and the South, kept silent. During the 80s, dictatorships began making way to restored democracies. The legacy of extrajudicial killings, disappearances of political prisoners and torture still haunts Latin American societies with its consequences. Our countries felt caught between a rock and a hard place. Most Latin American leaders wished to explore a better alternative to the stark choice between inaction vs. unilateral external intervention in case of a humanitarian crisis (Muñoz, 2009a:3)

As the previous quote illustrates, unlike other Latin American authorities that claim that RtoP is a threat to their sovereignty or represents a new form of interventionism, Chilean leaders have insisted that no country is less sovereign because of its willingness to accept an international responsibility to respond to mass atrocities. Chilean policy makers have explicitly indicated that RtoP is a legitimate alternative for responding to humanitarian crises. Yet, there is a much broader discussion – one which carries beyond the scope of RtoP – in the Latin American context. It considers when and by which means it is justifiable to intervene in a domestic or regional crisis. This discussion revolves around the application of the Inter-American Democratic Charter and how to respond to a democratic crisis. It has opened the regional debate over sovereignty versus collective response to defend democracy and prevent gross human rights violations in Latin America and the Caribbean (Sikkink, 1993 (a); Farer 1993/1996; Muñoz, 1998; Coopper and Legler, 2006).

The second topic regards the scope and the criteria for responding to atrocities. Chilean authorities view this subject as critical to making interventions legitimate. Chilean foreign policymakers have stated clearly that in order to avoid misinterpretations and potential abuses of the concept, the most viable political alternative is to narrow RtoP's focus and decide on concrete methods of implementation. "To make it workable in real life, the concept must be saved from friends and foes by narrowing its focus and making RtoP as operational as possible so as to effectively implement it …" (Muñoz, 2009b:1). This was precisely the intention of the 2005 UN World Summit Document and the 2009 Secretary General Report, *Implementing the Responsibility to Protect*.

Both documents were strongly supported by the Chilean delegation to the United Nations. In terms of scope, Chilean authorities insisted on narrowing RtoP to just four crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity as outlined in paragraph 139 of the UN World Summit Document. In Muñoz words, "… not all humanitarian tragedies or human rights violations can or should activate the RtoP" (Muñoz, 2009b: 2).

When considering activating RtoP at the international level, the Chilean delegation to the UN emphasized that, in order to protect the civilian population from mass atrocities, the international community is obliged to use the peaceful means outlined in Chapters VI and VIII of the UN Charter as a first resort (Labbe, 2005). Additionally, as the UN World Summit Outcome Document (2005) indicates, non-peaceful collective action is subject to at least two conditions: the determination to take collective action on a case-by-case basis and only "should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide…" Again the Chilean delegation concurred with narrowing down the coercive components of RtoP, so that they would only be applied under certain extreme conditions and only through the collective action of the Security Council. As indicated by Heraldo Muñoz in the 2009 UN General Assembly, "It is clear that the collective obligation is not to intervene, but rather to adopt whatever timely and decisive actions the international community deems appropriate, in accordance with the UN Charter. There is no automaticity, triggers, or implicit green lights for coercive action in what the world leaders agreed upon" (Muñoz, 2009a: 2).

One aspect that the Chilean position has underscored is the necessary emphasis on prevention as a means of addressing mass atrocities; acting in advance and tackling the root causes of conflict and mass atrocities. As indicated in the 2005 UN debate, "Chile views the responsibility to protect as a 'continuum' that includes international prevention and assistance entities and functions, and as the development and creation of national capacities" (Labbe 2005: 4). Specifically, Chile has pointed out that the best "strategy for preventing the occurrence of the RtoP crimes should contemplate the promotion of democracy…In the long run, the expansion of democracy could be a useful means for preventing the occurrence of atrocities, thus avoiding the recurrence

of the third pillar that could lead to coercive measure on the part of the international community"(Muñoz, 2009a: 9).

Finally and in light with Chile's commitment to RtoP at the United Nations, the country is part of several international networks aiming to promote this concept. Chile is part of the nations that are "Friends of RtoP" acting as an informal group within the United Nations in order to promote, discuss, and concert positions when RtoP situations arise. The Chilean Ministry of Foreign Affairs has also convened a couple of seminars in partnership with the Global Centre for Responsibility to Protect through their mission in New York to discuss relevant aspects of RtoP particularly from a regional perspective.[13] Also, Chilean nationals occupying relevant positions in international organizations have actively participated in international seminars to discuss the prospects for consolidating and implementing RtoP. Heraldo Muñoz, former Chilean Ambassador at the UN and now current Minister of Foreign Affairs of Bachelet's second administration has written a series of papers on the subject and was very active as the head of the Peace Building Commission. He was also pivotal in framing the Chilean response to RtoP and he is widely recognized among the diplomatic community as an RtoP supporter. In 2012, Michele Bachelet, acting as the Executive Director of UN Women, participated as a key speaker at the Stanley Foundation presenting her vision on the prospect for the Responsibility to Protect in the next decade.[14]

Chile's position on Libya and Syria

The crisis in Libya and Syria are probably two of the best case examples to demonstrate the difficulties for implementing RtoP as an international norm. In the case of Chile, it also coincides with the arrival in March 2010—exactly a year before the crisis in Libya started— of President Sebastian Piñera as the newly elected President and the first right-wing leader in fifty-two years to win an election democratically. Even though human rights was not explicitly a foreign policy priority of Piñera's Presidency and underscoring that his government placed special attention and resources to international economic policies, there are important signs of continuity when comes to Chile's position on the responsibility to protect and its diplomatic responses to RtoP situations in the Middle East.

During the Special Session of the UN Human Rights Council (UNHRC) on the situation in Libya in on the February, 25 2011 Ambassador Oyarce condemned the human rights violations in the country asking for immediate responses from the UNHRC. Oyarce explicitly used RtoP language referring to the humanitarian emergency in Libya:

> *"Todo estado tiene la responsabilidad de proteger a sus ciudadanos, asegurando la protección de los derechos humanos. La comunidad internacional debe alentar, ayudar y exigir a los países ejercer dicha obligación, utilizando todos los medios políticos y diplomáticos posibles (…) Instamos al gobierno Libio a cumplir su responsabilidad de proteger sus ciudadanos y llamamos a la comunidad internacional a intensificar sus esfuerzos para garantizar esa protección".*

Even though Chile was not part of the UN Security Council to vote on the resolutions on Libya imposing sanctions (Res. 1970) and authorizing a non-fly zone and the use of force by NATO (Res. 1973), Chile's position was of support. On the open debate on the protection of civilian in armed conflict in 2013, Ambassador Errazuriz, Chile' representative to the UN explicitly supported both resolutions:

> "However, States themselves hold the primary responsibility for protecting their populations. They must create early warning and conflict detection mechanisms and adopt corresponding preventive measures. As that has not always been possible, however, the Council has had to take the measures necessary to adequately protect civilians in conflict situations. The adoption of resolutions 1970 (2011) and 1973 (2011) on Libya responds to that need. The measures contemplated in those resolutions are adequate for the protection of civilians, and their implementation must also be so. When States cannot protect their civilians, the international community, through the United Nations, cannot remain indifferent to the fate of those whose rights are being seriously, systematically and repeatedly violated" (Errazuriz, 2013).

Unlike other Latin American countries, Chile did not entered into the debate regarding the interpretation and operationalization of

Res.1973 on Libya. Furthermore, there is no official statement on NATO's action in Libya regarding the controversy on whether or not the mission extended its mandate from the protection of civilians to regime change. As indicated on Brazil's chapter in this volume, the issue of regime change lies at the heart of the Brazilian concept note, Responsibility while Protecting (RwP) presented in 2011. Yet, Chile did not entered into this debate nor did they use Brazil's note (RwP) as a window of opportunity to further discussions on the Responsibility to Protect among Latin American countries. Unfortunately, the Brazilian proposal had very little resonance in the region and no country - nor Brazil as the leader of the initiative or the supporters of the concept such as Chile - took the lead to advocate for a Latin American debate on the subject.

In the case of Syria, since the beginning of the crisis Chile has supported a pacific and consensual resolution to the conflict based on political dialogue and negotiation between the parties. President Piñera strongly condemned the use of chemical weapons and "the indiscriminate use of force against the civilian population." Beyond condemnation to the systematic human rights violations in Syria, Chile has reiterated in several occasions and in different UN forums the appeal for countries that have the veto power to refrain from using it in cases of massive atrocities. Speaking at the Opening of the 68th UN General Assembly, President Piñera urged veto-holding countries on the Security Council to "refrain from exercising that right in situations of crimes against humanity, war crimes, genocide or ethnic cleansing." More recently, and already as a non-permanent member of the United Nations Security Council, Chile's delegation reiterated the appeal launched at the General Assembly, urging "the Security Council, in particular its permanent members, to shoulder that responsibility. Let us not forget the failures of recent years and the complex situations facing us today. May we not act too late" (Statement by Chile at the UNSC, April 2014).

Chile also co- sponsored a draft resolution referring the situation in Syria to the International Criminal Court (ICC).[15] The resolution was voted on May, 22 (2014) and sought to refer the situation in Syria to the ICC for the investigation and subsequent punishment of those responsible. However, the resolution could not be adopted due to the

veto of China and Russia. After the voting, Chile's delegation at the UNSC issued a statement indicating that:

> "Chile sponsored the draft resolution in a spirit of openness and in the conviction that it represented a necessary step in obtaining justice for all the victims of the conflict in Syria, without any distinction between the various sides. Our country is a party to the Rome Statute and, as such, we believe that its integrity must be upheld so as to enable it to be fully implemented and effective in the fight against impunity. The International Criminal Court has shown itself to be the best tool for investigating the acts that have produced the draft resolution that could not be adopted today" (Statement by Chile at the UNSC, April 2014).

Bachelet and RtoP: Challenges Ahead

Michelle Bachelet's term in the Presidency (2014-2018) will reinforce Chile's commitment with RtoP. The President herself and the current Ministry of Foreign Affairs, Heraldo Muñoz, had been personally advocating for the promotion of human rights and the need to hold the international community responsible for the prevention and response to massive atrocities. At the same time, Chile's seat as a non-permanent member at the United Nations Security Council (2014-2015) will provide a unique opportunity to influence the Council's agenda. Chile has been particularly supportive of a wide range of human security issues at the UNSC, including women, peace and security, children and armed conflict, and the protection of civilians in conflict (Security Council Report, 2013). During his time at the Security Council, Chile will continue supporting the implementation of RtoP as it was evidenced by the country's co-sponsoring of the resolution referring the situation in Syria to the ICC.

However, if Chile wants to strengthen its position as an RtoP advocate and a promoter of human rights more broadly, the country will have to invest greater political and economic resources into its international foreign policies. The final paragraphs of the conclusions are dedicated to highlight some of these challenges.

At the regional level, Chile's diplomacy needs to initiate further debates among Latin American countries with the aim of coordinating policies and initiatives especially on topics in which there is greater regional consensus such as early response to emergencies, prevention and mediation, and peace-building. Brazil's concept note on Responsibility while Protecting was a lost opportunity when comes to engaging other Latin American countries with this emergent international norm.

At the national level, the problem with Chilean policies on RtoP as well with other relevant decisions in related human rights areas is that they are fundamentally based on individual leadership rather than institutional support. Political leadership was fundamental for prompting Chile's foreign policy towards a greater engagement with international human rights in previous administrations. But for Chile to gain a more prominent role in this area, further institutionalization and local capacities are needed. In the case of RtoP, for example, there is no office or government official in the Ministry of Foreign Affairs in Santiago dealing with the issue. Chile is not part of the RtoP focal point initiative sponsored by the Global Center for the Responsibility to Protect. The objective of this initiative is to appoint a senior level official responsible for the promotion of RtoP at the national level who will support international cooperation by participating in a global network.[16] The lack of appointment of a national focal point reflects the fact that Chile's international actions on RtoP are processed by the missions to the United Nations in New York and Geneva. It also underscores one of Chile's shortcomings when dealing with humanitarian issues abroad: there are very limited domestic capacities dealing with RtoP and other topics such as conflict prevention at the Ministry of Foreign Affairs.

On other topics, such as human rights and human security, specific units were created within the Ministry of Foreign Affairs. Yet, when relevant decisions regarding human rights and international security are made, these units show very little capacity for generating responses. Rather than elaborating on the state's human rights policies internationally, the main task of the human rights division is to respond to Chile's monitoring requirements for international treaties. In sum, there is need of further institutionalization of RtoP and human rights within the Ministry of Foreign Affairs. There is also a greater need to

hire new personnel with expertise on this topic and to train younger diplomats so they are better prepared to respond to RtoP situations and to understand the human rights implications of complex political decisions.

Finally, Chile's non-governmental organizations remain weak, and their access to the decision-making process in foreign policy is limited. There is no evidence that the political opposition or other relevant groups are currently engaged in monitoring Chile's international action. Furthermore, unlike in the late-1980s and early 1990s, there are very few national academic institutions dedicated to the systematic study of Chile's international policies. Thus, there is relatively little pressure on the government to keep its previous commitments to international human rights. This is an important weakness considering that these types of organizations are fundamental to ensuring that states abide by international norms, especially in the area of human rights.

NOTES

1. This article takes some insights from a previous chapter written by the author and Claudio Fuentes S. See: Fuentes and Fuentes forthcoming in 2014.
2. President Patricio Aylwin (1990-1994), Eduardo Frei (1994-2000), Ricardo Lagos (2000-2006), and Michelle Bachelet (2006-2010).
3. On Special Procedures see: http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx
4. For a detailed description on these reports see: (Vargas 2012)
5. Notes for the speech of H.E. President Michelle Bachelet at the meeting with Human Rights Watch, New York, September 2007. See http://www.hrw.org/en/news/2007/09/25/chilean-president-visits-human-rights-watch (accessed January 20, 2011).

6. Among them it is possible to include: Heraldo Muñoz, Juan Gabriel Valdes, Alberto van Klaveren, and Carlos Portales. Also the first head of Human Rights Unit at the Ministry of Foreign Affairs was a very well known human rights lawyer, Roberto Garreton and the appointments that followed as head of this unit were all professionals with extensive experience in human rights.

7. Despite being one of the first nations to sign the Rome Statute, the country's ratification process was delayed by a number of legal and constitutional difficulties and could only be ratified after the Chilean Chamber of Deputies approved a constitutional amendment recognizing the Court's jurisdiction.

8. This network involves thirteen countries: Austria, Canada, Chile, Greece, Ireland, Jordan, Mali, the Netherlands, Norway, Slovenia, South Africa, Switzerland, and Thailand.

9. The Community of Democracies was initiated by seven countries: Poland, Chile, the Czech Republic, India, the Republic of Korea, Mali, and the United States. Today, this organization consists of seventeen member countries. In 2000, in Warsaw, ministerial delegations from 106 countries signed the final declaration calling for the establishment of the Community of Democracies, see http://community-democracies.org/index.php?option=com_content&view=article&id=1&Itemid=23 (accessed February 15th, 2011).

10. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/65/730&Lang=E

11. See, Chilean Embassy in Haiti: http://chileabroad.gov.cl/haiti/

12. For more details regarding the Chilean position during the 2005 World Summit see: a) Statement by Ambassador Alfredo Labbé, "Meeting of the Plenary Assembly on the Reform of the United Nations". New York, 21 June 2005. b) Group of Friends of the UN Reform, non paper "The Responsibility to Protect, Civilian Protection, and the High level Panel Report", May 25, 2005.

13. The Permanent mission of Chile to the UN in New York convened a meeting on March 2012 under the title: "RtoP: Una Mirada en el Futuro".

14. Find the video of the conference at: http://www.stanleyfoundation.org/RtoP.cfm

15. Find the resolution at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf
16. For a description of the initiatives and a list of member states see: http://www.globalRtoP.org/our_work/RtoP_focal_points

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Guatemala, los derechos humanos y la responsabilidad de proteger: Entre la memoria del pasado y los retos del presente[1]

Gabriel Aguilera Peralta

Las experiencias de una época obscura

Antes de que las matanzas en Rwanda y la antigua Yugoeslavia generaran los debates mundiales que dieron principio a la *Responsabilidad de Proteger* (RdeP) Guatemala experimentó hechos de extrema violencia con gran pérdida de vidas y sufrimiento de población civil durante la prolongada guerra interna que tuvo lugar en el país entre 1960 y

1996.[23] Esa contienda se libró sin respetar las normas del derecho internacional humanitario; decenas de miles de personas perdieron la vida y millones se convirtieron en refugiados. Se estima que murieron alrededor de 200,000 personas, en su gran mayoría población civil no combatiente, principalmente integrantes de los pueblos indígenas y que cerca de un millón de personas (en esa época la décima parte de la población), huyeron en calidad de refugiados o desplazados internos. Las violaciones a los derechos humanos fueron masivas y prolongadas en el tiempo, incluyendo masacres de aldeas. El análisis realizado por la comisión específica creada para investigar el enfrentamiento armado, concluyo que la responsabilidad casi total de esos hechos recayó en las fuerzas del Estado.[4]

En ese periodo estaban ya vigentes las normas e instituciones de Derechos Humanos (DH) surgidas con posterioridad a la segunda guerra mundial. Guatemala como miembro de Naciones Unidas y de la Organización de Estados Americanos estaba por consiguiente obligada a observar las disposiciones de DH contenidas en la Carta Internacional de los Derechos Humanos de Naciones Unidas y la Convención Americana sobre Derechos Humanos de la OEA.

En atención a esa situación y a las numerosas denuncias presentadas ante la Comisión Interamericana de Derechos Humanos, esta entidad solicitó durante su 31 periodo de sesiones realizada en octubre de 1973 autorización del gobierno de Guatemala para realizar una visita *in loco.* La respuesta del Ministro de Relaciones Exteriores del gobierno guatemalteco de la época, Jorge Arenales Catalán, por medio de un cablegrama, en octubre del mismo año indicaba:

> "Gobierno Guatemala respeta y garantiza derechos humanos y en la misma forma que respeta soberania demas estados cuida celosamente la propia. Por lo expresado y por encontrarse el pais en plena actividad preelectoral, Guatemala no da anuencia para visita comisión, especialmente porque podría prestarse a posibles tergiversaciones por partidos políticos en plena campaña elecciones presidenciales."[5]

Al continuar agravándose el deterioro de los DH, la CIDH decidió durante su cuadragésimo periodo de sesiones en 1979, insistir en la visita a Guatemala e informó al gobierno que había decidido elaborar

un informe sobre el país. Ante ello en enero de 1980, el gobierno de Guatemala finalmente extendió la invitación para una visita *in loco*. La CIDH acogió la invitación y propuso la visita para septiembre de 1980. Empero el gobierno guatemalteco respondió que la fecha no era conveniente, aduciendo el agravamiento de la situación interna: "el Gobierno de Guatemala considera que la fecha propuesta no es conveniente, ya que se ha producido una escalada de violencia por parte de grupos subversivos estimulados desde el exterior por organizaciones sectarias que desconocen la realidad social de Guatemala y que pretenden ignorar las grandes realizaciones que el pueblo de Guatemala lleva a cabo se presume que dichas facciones, que operan en la clandestinidad , incrementaran sus acciones delictivas y por consiguiente, por la propia seguridad de los miembros de la Comisión, es preferible que no se lleva a cabo la visita en la fecha sugerida."[6]

Pese a las reiteradas peticiones de la CIDH para que se fijara nueva fecha, el gobierno de Guatemala no respondió las comunicaciones, por lo que la Comisión elaboró su primer informe sobre el país sin visita *in loco*. Ese informe fue severamente crítico de la situación en el país. "En la gran mayoría de los casos, las muertes originadas por esa violencia se han debido a las ejecuciones ilegales y las desapariciones practicadas por las fuerzas de seguridad o por grupos paramilitares de civiles que han actuado en estrecha colaboración con las autoridades gubernamentales, sin que esas autoridades hayan procedido a una adecuada y eficaz investigación de la autoría de esos crímenes.

Tales ejecuciones ilegales y desapariciones, además de violar principalmente el derecho a la vida, han creado un clima endémico de total inseguridad e incluso de terror, lo que ha significado subvertir el Estado de Derecho y en la práctica inhibir la gran mayoría de los derechos consagrados en la Convención Americana sobre Derechos Humanos."[7]

La actitud del gobierno de Guatemala frente a la CIDH era reflejo de la posición oficial de los sucesivos gobiernos guatemaltecos durante la mayor parte del conflicto armado: la negación de que acaecieran violaciones a los derechos humanos, atribución de los sucesos de violencia a la insurgencia, a grupos ilegales fuera del control del Estado o bien a grupos delictivos llegaos del extranjero. Posteriormente se añadió el argumento de que se trataba de campañas de desinformación y propaganda generada por las organizaciones insurgentes y sus aliados

internacionales. En los hechos el Estadio guatemalteco implementaba una política que sería la que posteriormente cabalmente la Responsabilidad de Proteger (RdeP) buscaría evitar: en lugar de proteger a su población civil la contrainsurgencia incluía deliberadamente estrategias de ataques a esa población con la finalidad de imponer el control social por medio del terror[8].

Situación similar se dio en relación a la Comisión de Derechos Humanos de las Naciones Unidas, con base en Ginebra, la cual a partir de 1979 colocó al país bajo escrutinio. En 1982 la Comisión pidió al Secretario General de la ONU el nombramiento de un Relator para examinar la situación de los DH en Guatemala. Pero también en Ginebra la Misión de Guatemala ante la oficina de Naciones Unidas persistía en negar las violaciones a los DH.

La postura de los gobiernos guatemaltecos obedecía a la naturaleza autoritaria del régimen político que imperó a lo largo de las décadas de los años 60 a 80 del siglo XX. Aunque se daban procesos electorales, la mayoría fueron fraudulentos, las garantías contenidas en las Constituciones de la República no se observaban en la realidad y la división de poderes no era respetada por el organismo ejecutivo que determinaba sus decisiones.

Debe tomarse en cuenta igualmente que la insurgencia armada, representada por cuatro organizaciones que a partir de 1982 actuaron unitariamente bajo el nombre de “Unidad Revolucionaria Nacional Guatemalteca” (URNG), había expandido el ámbito de sus teatros de operaciones y había sumado importantes apoyos sociales, a lo que se unía la conflictividad generalizada en Centroamérica, con guerras internas en Nicaragua y El Salvador. La meta de los insurgentes era la toma del poder por la vía armada y la instauración de regímenes revolucionarios.

Las resoluciones de condena a las violaciones a los derechos humanos de Guatemala no lograron inicialmente modificar la conducta de los gobiernos del país, sin embargo ello fue creando una situación de aislamiento internacional que afectó la política exterior del estado y las relaciones bilaterales con algunos de los principales actores mundiales.

Parte de ello fue la decisión del gobierno norteamericano, bajo la presidencia de Jimmy Carter, de suspender la asistencia militar, la

pérdida de apoyos en Naciones Unidas para el diferendo que Guatemala sostenía con Belice y la creciente critica de varios Estados y de muchas entidades de la sociedad civil e Iglesias por la violaciones a los derechos humanos.

La situación descrita empeoró durante el gobierno del Presidente Romeo Lucas Garcia (1978-82). Bajo su mandato se sucedieron los asesinatos de connotados líderes social demócratas, Alberto Fuentes Mohr y Manuel Colom Argueta, conocidos a nivel internacional, la renuncia y fuga de Guatemala del Vicepresidente de la República Francisco Villagrán Kramer, el asesinato de multitud de líderes políticos y sindicales así como de la academia, especialmente de la Universidad de San Carlos de Guatemala, y de entidades religiosas, el asalto y quema de la embajada de España, tomada por campesinos indígenas que protestaban por la represión en el campo y el inicio de masacres colectivas que en ocasiones implicaban el arrasamiento de aldeas completas.

Sobre ese periodo un informe de la OEA comentaba: "el terror que se desató durante este Gobierno desestructuró todas las organizaciones sociales, políticas y profesionales existentes. La administración de justicia también se vio fuertemente afectada por ello. Jueces y abogados fueron asesinados con el objeto de paralizar completamente la justicia y toda protección de los derechos humanos. En ningún otro periodo se ejecutaron tantos jueces y abogados, especialmente aquellos que habían dado trámite a recursos de exhibición personal o que habían dictado resoluciones contrarias a los interese del Gobierno"[9].

Se había creado por consiguiente una opinión internacional casi unánime, contraria al régimen político de Guatemala y consciente de que acaecían graves violaciones a los derechos humanos, a pesar de lo cual no se plateó alguna iniciativa de intervención externa. Aunque el concepto de la RdP no formaba aún parte de la normativa internacional, si se podían dar interpretaciones de mecanismos existentes que permitieran la intervención por razones humanitarias. Un caso de ello se dio cuando culminó la crisis nicaragüense, en los días finales de la insurrección sandinista.

En la OEA la XVIII Reunión de Consulta de ese organismo le dio seguimiento a las disputas entre Nicaragua y Costa Rica y a las violaciones

a los DH en el primero de esos países. Se llegó a proponer -por cierto por parte de Estados Unidos- una intervención militar.

Se argumentaban violaciones a los derechos humanos. Así una declaración del grupo de países andinos del 4 de junio de 1979 argumentaba:"La solidaridad internacional y la justa preocupación por la dramática realidad nicaragüense nos lleva a expresar nuestra más honda preocupación por cuanto la situación política existente en ese país puede representar una amenaza para la paz de América. Por ello expresamos nuestro ferviente deseo de que concluyan las violaciones sistemáticas de los derechos humanos y se establezcan las bases para una auténtica democracia representativa en Nicaragua" y finalmente se aprobó el 23 de junio de 1979 una resolución que demandaba el "reemplazo inmediato y definitivo del régimen somocista."[10]

Es de notar que en ese caso, la acción para defender los DH se vinculó a una clara iniciativa para cambio de régimen.

Ello se debió posiblemente a la diferencia del balance de fuerzas entre los dos países, en que el poder estatal de Guatemala no se deterioró al nivel que había llegado el gobierno de Anastasio Somoza Debayle ni la URNG llegó a adquirir el poder de los sandinistas, a que no se dio la presencia de un país como el caso de Costa Rica que se posicionó como acusador del régimen somocista y principalmente a que, dados los efectos de la revolución nicaragüense en el Istmo y la conclusión del gobierno de Carter en Estados Unidos, y la llegada a la presidencia de Ronald Reagan, esta potencia se opuso a cambios de régimen que estimaba afectaban su seguridad en el mundo de la aún existente Guerra Fría.

Pese a eso el gobierno guatemalteco se resentía del aislamiento internacional y a ello se unía el descontento tanto en las fuerzas armadas como en el sector empresarial y los partidos políticos, por la corrupción, el deterioro de la situación económica y la manipulación de las elecciones, las cuales se repitieron una vez más con la elección presidencial fraudulenta en marzo de 1982. El 23 de ese mismo mes tuvo lugar un golpe de Estado impulsado por un grupo de oficiales jóvenes que derrocó al general Romeo Lucas y derogó la Constitución de la República. Después de un breve periodo de una Junta de Gobierno, asumió la presidencia el General Efraín Ríos Montt.

El nuevo gobierno adoptó varias decisiones para la liberalización del régimen y el retorno a la constitucionalidad. A nivel internacional asumió inicialmente una actitud abierta e inclusive invitó a la CIDH a que visitara el país. Así finalmente la CIDH envió su misión en septiembre de 1982.

El informe rendido por la misión toma nota del inicio de la transición a la democracia, tales como los preparativos para llamar a una Asamblea Constituyente, la organización de una autoridad electoral independiente, la creación de un Consejo de Estado con participación indígena, etc. Por otra parte el Estatuto Fundamental de Gobierno contenía un capítulo de derechos humanos.

Sin embargo, el reporte -aunque reconoció una disminución en las violaciones a los derechos humanos, fue severo en su crítica de los Tribunales de Fuero Especial y en la sucesión de desapariciones o secuestros, ejecuciones extrajudiciales y en denuncias de las matanzas colectivas en el área rural, si bien la misión no pudo establecer fehacientemente los detalles de las mismas.[11]

Debe recordarse que cabalmente durante el periodo de gobierno del General Ríos Montt, las masacres de comunidades iniciadas durante el régimen anterior continuaron e inclusive acaecieron algunas de las más graves.[12] Existía por consiguiente una contradicción entre el discurso sobre DH y la realidad. Ante las denuncias de la CIDH el gobierno guatemalteco reaccionó de la misma forma que lo hacía antes, ya sea negando que los hechos hubieran sucedido (así por ejemplo, cuando se denunció en la OEA la ahora conocida matanza de San Francisco Nentón, el delegado del gobierno de Guatemala afirmó que ese sitio no existía) o achacándolos a la subversión. Es materia de especulación las razones de esa doble conducta, a menos que el gobierno guatemalteco hubiera esperado lograr engañar a la CIDH.

El 8 de agosto de 1983 acaeció un segundo golpe de Estado, derribando al General Ríos Montt, quien fue sustituido por el General Oscar Mejía Víctores. Su gobierno prosiguió con la transición a la democracia, teniendo lugar en 1984 las elecciones a la Asamblea Nacional Constituyente. Nuevamente ese gobierno mostró una actitud de apertura hacia los organismos internacionales de DH y en el caso de la CIDH, se le invitó a enviar una misión a Guatemala para constatar, según

el tenor de la invitación, los avances en materia de DH que estaban teniendo lugar.

La misión se llevó a cabo en mayo de 1985 y efectivamente el informe presentado a la Asamblea General de la OEA consigna los avances en la transición a la democracia, siendo especialmente positivo en su valoración del contenido de la nueva Constitución. En materia de DH ya no se habla de masacres, pero el informe es exhaustivo en tratar el tema de los desaparecidos, analizando numerosos casos particulares, incluyendo algunos que tuvieron lugar en tanto que la misión de OEA se encontraba en el país y describiendo los mecanismos de los secuestros y torturas, en un relato que llega a lo espeluznante.[13]

El escenario en la transición a la democracia y el proceso de paz

En enero de 1986 asumió la presidencia en Guatemala, como primer gobernante de la transición a la democracia, Vinicio Cerezo Arévalo, ya estando en vigencia la Constitución aprobada en 1985. Este instrumento jurídico contiene un capítulo extensivo sobre DH y acepta, igualmente, la preeminencia de los tratados y convenciones internacionales ratificados por Guatemala en esa materia, sobre el derecho interno.

El nuevo gobierno asumió un discurso pro DH, aunque los hechos de violencia continuaron en escala reducida. Entre los casos más espectaculares se dio el secuestro y asesinato del dirigente social demócrata salvadoreño Héctor Oquelí y su compañera la abogada guatemalteca Gilda Flores y de la socióloga Myrna Mack, cuyo caso se convirtió con el tiempo en un símbolo mundial.

El problema era que la guerra interna continuaba y los aparatos de seguridad del Estado mantenían -quizás con desconocimiento de las autoridades civiles,- acciones de represión ilegal. Esas situaciones suelen darse en una primera fase de las transiciones a la democracia y en el caso de Guatemala se sucedieron inclusive dos intentos de golpe de Estado, impulsados por sectores militares y civiles opuestos a la transición democrática y al inicio de las negociaciones de paz.

El gobierno de Cerezo se desenvolvió aún entre márgenes estrechos, sin pleno control de los cuerpos de seguridad y la oposición de sectores militares y políticos de extrema derecha, que inclusive intentaron dos veces deponerlo mediante golpe de Estado.[14]

En los escenarios internacionales de DH, particularmente en Ginebra, Nueva York y Washington, continuó por consiguiente la confrontación entre las gestiones de los frentes diplomáticos de la insurgencia, las entidades de derechos humanos de la sociedad civil y gobiernos que apoyaban a estas últimas y las representaciones diplomáticas del gobierno de Guatemala que persistían en minimizar o negar su responsabilidad en las violaciones de DH.

El escenario mundial, con el fin de la Guerra Fría y el regional, con el Proceso de Paz de Esquipulas, iniciado por el Presidente Vinicio Cerezo, creó condiciones para los procesos de negociación y pacificación en El Salvador, Nicaragua y Guatemala. Bajo la gestión del Presidente Cerezo se desarrollo el Diálogo Nacional y se creó la Comisión Nacional de Reconciliación que organizó las primeras pláticas de la URNG con diversos actores de la sociedad civil. El gobierno posterior del Presidente Jorge Serrano tuvo la decisión de iniciar oficialmente la negociación de paz. Ese proceso se interrumpió brevemente debido al golpe que el mismo gobernante intento ejecutar debido a sus desacuerdos con el Congreso y el poder judicial, pero se reanudó con sus sucesores Ramiro de León Carpio y Álvaro Arzú Irigoyen.

El escenario principal del debate sobre los DH durante ese periodo fue la Comisión de Derechos Humanos de las Naciones Unidas en Ginebra, que seguía considerando anualmente el caso de Guatemala. Las delegaciones del gobierno de Guatemala se esforzaron en cerrar ese caso con el argumento de los avances en la democratización y la negociación de paz y las delegaciones de la insurgencia buscaron que el caso de mantuviera abierto como medio de presión.

Sin embargo, ya en 1987 esa Comisión dio por terminado el mandato de los Relatores Especiales, sustituyéndolo por la figura de los Expertos independientes, cuya misión giraba del énfasis en la vigilancia a la de asesoría al gobierno de Guatemala para consolidar el régimen de DH. Ese rol lo desempeñaron sucesivamente Héctor Gros Espiel, Christian Tomuschat y Mónica Pinto. Sus informes, objetivos, reconocían avan-

ces pero eran críticos en las serias debilidades que seguían dándose en el régimen de respeto a los DH.

Cerezo fue sucedido en 1990 por el Presidente Jorge Serrano, el cual con mucha decisión superó la oposición de sectores militares e inicio las negociaciones de paz con la insurgencia de la URNG. Sin embargo, en 1993 intentó impulsar él mismo un golpe de Estado para resolver una disputa de poder con los poderes legislativo y judicial, fue depuesto y sucedido por el Presidente Ramiro de León Carpio, quien prosiguió con las conversaciones de paz. Al avanzar los entendidos se consensuaron dos instrumentos centrales para los DH, el "Acuerdo Global sobre Derechos Humanos" y el "Acuerdo sobre el establecimiento de la Comisión para el esclarecimiento histórico de las violaciones a los derechos humanos y los hechos de violencia que han causado sufrimientos a la población guatemalteca", ambos de 1994.

El primero de los textos reitera y amplía principios contenidos en la Constitución y obliga al respeto de los DH aún en el marco del enfrentamiento armado interno, el segundo establece una Comisión de la Verdad.[15] Aparte de ello el primer Acuerdo convino en solicitar a Naciones Unidas el establecimiento de una Misión verificadora de los DH y el cumplimiento de lo acordado, mandato que posteriormente se extendió a verificar el debido cumplimiento de todos los acuerdos de la paz.

La importancia de dichos acuerdos fue central para indicar un cambio en profundidad en la actitud del Estado guatemalteco en relación a los DH, ya que aparte de irse comprometiendo a un tejido normativo cada vez más denso en materia de DH, el llamado a Naciones Unidas estableció un veedor internacional en el país, esperándose que ello no haría posible que el respeto a los DH fuera solamente declarativo. En efecto, la Misión de Verificación de Naciones Unidas en Guatemala (MINUGUA) estuvo a lo largo diez años en el país y su papel fue absolutamente esencial para la consolidación de un régimen de DH y la expansión de la mentalidad de DH en la sociedad.

Como a ello se añadía la designación de diversos Relatores por parte de la Comisión de Derechos Humanos de Naciones Unidas y las visitas *in situ* de la CIDH, progresivamente la situación de los DH en Guatemala fue mejorando a la vez que el discurso oficial sobre que el

país había cambiado su conducta en relación a los DH ganaba fuerza en los escenarios internacionales.

El "Acuerdo de Paz Firme y Duradera" que puso fin a la guerra interna se firmo en la ciudad de Guatemala el 29 de diciembre de 1996. Dos años después, en 1998, la Comisión de Derechos Humanos de Naciones Unidas finalmente cerró el caso de Guatemala ante una petición conjunta de las delegaciones de Guatemala y de la URNG. Posteriormente Guatemala fue electa integrante de la Comisión y finalmente pasó a ocupar la Vicepresidencia. Así, de un país juzgado en materia de DH, con el paso de los años se convirtió en una nación formando parte de los jueces mundiales para supervisar la observancia de los DH en el mundo.

MINUGUA continúo su labor de supervisión y asesoría hasta el 2004.

Desde la conclusión del enfrentamiento armado interno, el tipo de violencia originado en políticas estatales, que tanta violación a los DH había provocado, fue disminuyendo y finalmente cesó, aunque se dieron casos puntuales de altísima relevancia, como el asesinato del Obispo Mario Gerardi en 1998, tras la publicación de un informe sobre la recuperación de la memoria histórica de lo acaecido durante la guerra, llamado "Guatemala nunca más!". Sin embargo, un nuevo tipo de violencia ha azotado a la sociedad guatemalteca desde entonces, por el crecimiento del crimen organizado, particularmente debido al asentamiento de Carteles de la droga en el territorio guatemalteco, la expansión de los linchamientos, así como por el desarrollo de una forma virulenta de pandillerismo juvenil, llamado "Maras" de compleja prevención y contención debido a sus grandes dimensiones y complejos orígenes esencialmente socio económicos.[16]

La observancia de los DH siguió mostrando debilidades, particularmente en relación a los derechos de segunda y tercera generación, aunque se han registrado casos singulares de responsabilidad estatal, como la existencia de políticas de "limpieza social" o ejecuciones extrajudiciales de delincuentes[17] acaecidos durante el gobierno del presidente Oscar Berger (2004-2008).

Un caso singular: la CICIG

La Comisión Internacional contra la Impunidad (CICIG) es una misión de Naciones Unidas, dependiente del Secretario General, conformada a petición del gobierno de Guatemala en 2003 y establecida en 2006, cuyo cometido es asistir a dicho gobierno en el combate a los llamados "cuerpos ilegales y aparatos clandestinos de seguridad" refiriéndose con ello a estructuras formadas durante la guerra interna y que después de la paz, experimentaron una metamorfosis convirtiéndose en entidades delincuenciales, ligadas al crimen internacional organizado y particularmente difíciles de combatir, dado que retuvieron sus vínculos y posiciones dentro del Estado, inclusive los aparatos de seguridad pública y los de justicia. [18]

Las autoridades guatemaltecas convocaron a la CICIG por la imposibilidad de controlar por sus propios medios a esas particulares estructuras criminales. Lo específico de la experiencia es que no hay precedentes de un país soberano reconociendo a un ente internacional atribuciones como las que tiene la CICIG. La Comisión puede conducir sus propias investigaciones judiciales, inicia querellas penales y acompaña como "querellante adhesivo" los respectivos procesos. Puede también emitir opiniones públicas sobre decursos judiciales o administrativos que tengan que ver con la justicia, evaluar la conducta de funcionarios públicos, capacitar personal policíaco e investigativo. En suma, el Estado de Guatemala ha cedido a la CICIG parte de sus atribuciones de cuidar de la seguridad y la justicia.

Aunque existe polémica en relación a algunas de las actividades de la CICIG, la opinión general es altamente favorable a sus actividades y a los éxitos que ha alcanzado. La experiencia de la CICIG ha sido altamente positiva. Ha contribuido a resolver varios casos paradigmáticos, ha desarticulado redes del crimen organizado con ramificaciones en estructuras del Estado y ha fortalecido el Ministerio Público y en general el sistema de justicia. En síntesis, la CICIG contribuyó a romper la impunidad que afectaba el ejercicio de la justicia en Guatemala. El ejemplo ha motivado iniciativas para replicar la Comisión en otros países de Centroamérica.

El mandato de la CICIG dura hasta el 2015 y teniendo en cuenta que MINUGUA estuvo 10 años en el país, ello significa que Guatemala

habrá tenido durante 19 años una veeduría de Naciones Unidas con un alto grado de incidencia directa en procesos internos. Desde luego ello ha evidenciado la voluntad del Estado de consolidar el estado de derecho y la vigencia de los derechos humanos, pese a los problemas generados por el alto nivel de violencia.

Guatemala en Naciones Unidas

Es de destacar que Guatemala, pese a ser país fundador de Naciones Unidas nunca había integrado el Consejo de Seguridad. Desde el 2001 Guatemala desarrolló interés en esa posición y su primera candidatura formal, planteada en el 2006 fracasó, ya que no se logró conciliar con la aspiración, en aquel entonces, de Venezuela a la misma posición. En este segundo intento, la candidatura de Guatemala fue endosada por el GRULAC y recibió el apoyo de 191 de los 193 países miembros

Guatemala tuvo en Naciones Unidas en las etapas iniciales del organismo mundial un papel muy activo. Por ejemplo, la resolución 181 para la creación del Estado de Israel en 1947, pasó a la historia unida al nombre del entonces representante de Guatemala en el organismo mundial Jorge García Granados, su impulsor conjuntamente con Perú. Igualmente en 1966 el Ministro de Relaciones Exteriores de Guatemala Emilio Arenales Catalán fue electo presidente de la 23 Asamblea General de Naciones Unidas habiendo sido antes de ello uno de los fundadores de la UNESCO.

Pero ese impulso se fue desvaneciendo en el marco de guerra interna con el desarrollo del conflicto armado, Guatemala fue perdiendo espacio en los ámbitos internacionales, en particular en relación a la situación de los derechos humanos. Como ya vimos, Guatemala fue objeto de escrutinio en la entonces Comisión de los Derechos Humanos y otros organismos de Naciones Unidas en Ginebra durante varios años. Si bien se puede recordar que varios otros países con muy cuestionable record en materia de Derechos Humanos no fueron objeto de atención por la Comisión e inclusive formaron parte de ello, el caso de Guatemala se volvió paradigmático y por ello objeto de muy severo análisis crítico por importantes actores internacionales, tanto Estados como entes de sociedad civil.

Asimismo, durante el periodo del conflicto armado la política exterior de Guatemala no supo adaptarse a los cambios internacionales y a la comprensión de la fortaleza y de los intereses de nuevos bloques regionales tales como de los países árabes y los africanos. Por el contrario, como un reflejo de las fijaciones ideológicas internas, Guatemala se aferró a alianzas y posicionamientos propios de la Guerra Fría y del pensamiento anticomunista, cuando otros Estados latinoamericanos evolucionaban hacia posiciones de autonomía en la arena internacional.

En consecuencia el país no logró influencia en la arena internacional y más bien experimentó aislamiento en diversos foros. Inclusive en Naciones Unidas esa problemática se reflejó en la imposibilidad de Guatemala de lograr respaldo para su reclamación territorial sobre Belice, cuando el tema se sometió a decisiones del organismo mundial.

La correlación mencionada cambió con la transición a la democracia y el proceso de paz que puso fin a la guerra interna y que se prolongó durante siete años. Naciones Unidas pasó a desempeñar un papel activo y probablemente central en apoyar las negociaciones de paz y la observancia de su cumplimiento mediante MINUGUA. Posteriormente la presencia de Naciones Unidas y su apoyo a la consolidación del Estado de derecho y el combate a la impunidad continuo con la CICIG, misión que no tiene precedentes por constituir una figura en la que un Estado soberano llama a un organismo internacional a compartir la función de justicia.

Destaca por otra parte el rol proactivo que Guatemala asumió en el seno de la Comisión de Derechos Humanos de Naciones Unidas y posteriormente en el Consejo de Derechos Humanos que sustituyó a la Comisión.

Cabalmente, debido a los sucesos del pasado, el Estado guatemalteco desde que se retornó a la democracia, ha fijado como uno de sus ejes de política exterior el apoyo y promoción a los derechos humanos.

También ejerció la presidencia del ECOSOC, de la Quinta Comisión de la Asamblea General, del PNUD/FNUAP, de la Comisión para el Desarrollo Sostenible, ha ejercido Vicepresidencias de la Asamblea General de todas sus comisiones principales y ha participado en múltiples foros de la organización.

Igualmente se definió como una de las funciones centrales de las fuerzas armadas la participación activa en las misiones de mantenimiento de la paz. Ello se manifiesta en dos contingentes: uno en la MINUSTAH en Haití y el otro como parte de la MONUC en el Congo. En el caso del país africano, la unidad guatemalteca inclusive ha entrado en combate y sufrido bajas. Además ha enviado observadores militares a varias otras misiones.

Todo lo anterior evidenció que en los años posteriores a su proceso de pacificación y democratización, Guatemala ha venido demostrando su compromiso con Naciones Unidas y con la paz, esto último fruto de su propia experiencia.

Guatemala y la responsabilidad de proteger

Como se sabe el concepto que daría origen a la RdeP surgió en los años 90 del siglo pasado, como reacción a las violaciones de DH y matanzas étnicas que se dieron en Rwanda y la antigua Yugoeslavia. Originalmente definida como el "derecho a la intervención humanitaria" la idea central fue después redefinida por la Comisión Internacional sobre Intervención y Soberanía de los Estados (ICISS) creada por el gobierno de Canadá en el 2001. Esta Comisión de notables, de la cual formó parte el Dr. Eduardo Stein, de Guatemala, quien había sido Ministro de Relaciones Exteriores y posteriormente fue Vicepresidente de la República, es la que propuso el termino de "Responsabilidad de Proteger", giro afortunado porque de un derecho se paso a una responsabilidad y el énfasis se puso no en la intervención sino en la protección.

Es igualmente conocido que a raíz de ese informe el Secretario General de Naciones Unidas de aquel entonces, Kofi Annan, estableció un Grupo de Alto Nivel sobre "Amenazas, los Desafíos y el Cambio" el cual aceptó la propuesta de la RdeP y sobre esa base, el Secretario General en su informe "Un Concepto más Amplio de Libertad" incorporó el concepto y solicitó que se explicitaran los criterios en que se constituiría una situación de RdeP. Como culminación de ese decurso en la Cumbre Mundial de Naciones Unidas del 2005, la Cumbre del Milenio, los Estados de la comunidad internacional aceptaron oficialmente la RdeP, cuando se den situaciones de genocidio, crímenes de

guerra, depuración étnica y crímenes de lesa humanidad y convinieron en la responsabilidad de la comunidad internacional de proteger a la población amenazada, adoptando medidas colectivas por medio del Consejo de Seguridad de NNUU.[19]

Es sabido que el nuevo concepto no se incorporó al imaginario de Naciones Unidas sin dificultades. Aunque nadie disentía de la necesidad de proteger a la población civil, un número de Estados resintieron la dimensión de la intervención en situaciones internas de Estados, lo que parecía contravenir el concepto westfaliano de la soberanía. Además interpretaban que bajo el manto de protección humanitaria, se podrían encubrir intervenciones de occidente en contra del Tercer Mundo.

Guatemala no tuvo dificultades en incorporar la RdeP ni en aceptar una eventual limitación de su soberanía. En primer lugar la terrible experiencia de los años de la guerra interna le hacía proclive a apoyar mecanismos internacionales que tiendan a evitar la repetición, ya sea en el propio país o en cualquier lugar del mundo, de hechos similares. Por otro lado la experiencia con MINUGUA ,que significo una presencia muy intrusiva de Naciones Unidas a fin de consolidar la paz y fortalecer los DH, era el antecedente que explicaba para Guatemala no tener problemas con acciones de protección que incluyen mecanismos de intervención para proteger a la población civil. Esa actitud muy proactiva a la cooperación internacional inclusive en temas internos, se manifestó posteriormente con la creación de la CICIG ya descrita. Así, la posición de Guatemala es, por cuestión de principio, de apoyo a la RdeP

> “en el ámbito global existe mayor respaldo a las convenciones internacionales relativas a los derechos humanos y humanitarios. En ese sentido, está surgiendo una salvedad al principio de no intervención con el reconocimiento de que los Gobiernos no pueden y no deben invocar este principio como pretexto para hacer caso omiso de su propia obligación frente a sus respectivas poblaciones civiles.”[20]

De allí que desde el inicio, la delegación de Guatemala ante Naciones Unidas formo parte del bloque de naciones que apoyo la RdeP, inclusive su representante permanente, Gert Rosenthal, asumió el liderazgo para la conformación del grupo de Estados Miembros de

la Asamblea General denominado "Amigos de la responsabilidad de proteger" que impulsaron un proyecto de resolución de la Asamblea General favorable a la RdeP.

La normativa de RdeP ya ha sido invocada en varios casos por diversos actores para justificar acciones tomadas en relación a situaciones internas de Estados miembros de las Naciones Unidas. No todas esas experiencias han servido para fortalecer el principio, en especial la intervención en Libia, en la cual lo que debería haber sido una operación de protección a la población civil se convirtió en una acción de cambio de régimen. El precedente alimenta los temores de los Estados que tienen dudas sobre la RdeP y evoca antiguas percepciones de que con un matiz humanitario actualizado, se repitan las intervenciones militares de países del Norte en contra de países del Sur. Se admite que Libia afectó la credibilidad de la RdeP y es la causa principal de que ya no se haya aplicado en el caso de Siria.

Las dudas surgidas después de Libia originaron la importante variante del principio expresada por Brasil en "*la responsabilidad al proteger*" (RalP) la cual enfatiza que la arquitectura del principio, asentada en tres pilares[21] debe seguir una línea estricta de subordinación política y secuencia cronológica, distinguiendo que la seguridad colectiva puede ser ejercida por medio de medidas no coercitivas y la seguridad colectiva, en cuyo dominio se puede recurrir a mecanismos de fuerza, cuando las situaciones específicas de violencia contra una población civil se caracterice como una amenaza a la paz y la seguridad internacional.[22] El sentido de la RalP es que el empleo del "tercer pilar" no subsume todo el principio, que deben aplicarse al máximo mecanismos derivados de los pilares uno y dos, o sea el rol del mismo Estado y las medidas preventivas empleadas al máximo y si es necesario el empleo de la fuerza admitido por el tercer pilar, se deben tomar precauciones particulares para que su uso no sea distorsionado en los fines.

Sobre este debate la posición de Guatemala ha sido admitir la valía del aporte de la RalP, estimando que el mismo fortalece y no debilita el concepto de la RdeP.

> "hay que recordar que el llamado pilar tercero siempre se concibió como un recurso de última instancia, con criterios acotados y adoptados a circunstancias peculiares, caso por

caso. A nuestro juicio la principal contribución de la iniciativa brasileña es matizar las fronteras entre los tres pilares, subrayando que no por fuerza son etapas secuenciales y explora con mayor profundidad el abanico de opciones para darle un carácter operativo al tercer pilar…se insiste en la diplomacia preventiva sobre el uso de la fuerza, pero…no se descarta el uso de la fuerza cuando todas las demás opciones fallan, siempre y cuando medie una decisión del Consejo de Seguridad y previo un minucioso análisis…”[23]

Conclusión

En Guatemala la recepción del principio de RdeP, fuera del ámbito de Naciones Unidas, se ha dado en el marco gubernamental, la Cancillería y en el "punto focal" del tema que estuvo ubicado en la Comisión Presidencial de los Derechos Humanos (COPREDEH). A nivel de la sociedad civil, ha sido en especial en el ámbito académico que el Instituto de relaciones internacionales y estudios de la paz (IRIPAZ) ha promovido el conocimiento y discusión del principio en relación a la realidad de Guatemala.

Sin embargo, el seguimiento al principio no es muy alto, pese a que en Guatemala la cuestión general de los DH, en especial en cuanto a la no impunidad para los delitos de lesa humanidad que ocurrieron durante la guerra, se mantenga como un tema relevante, tanto por los procesos judiciales a responsables de esos delitos, como por el debate entre actores sociales y gubernamentales sobre responsabilidades de los hechos de la guerra. Acaece empero que puesto que la RdeP se desarrolló cuando ya estaba en sus fases finales el conflicto armado y ya habían concluido las violaciones a los DH de naturaleza masiva, ocuparse de la RdeP es de carácter preventivo y el principio se ve como de utilidad no porque pueda aplicarse a situaciones actuales sino por incorporarlo a las medidas que eviten la repetición de esas situaciones.

Por otra parte, como ya se mencionó, el Estado guatemalteco pertenece a todo el entramado de normativas relacionadas con la protección a los DH de Naciones Unidas y la OEA; aparte de ello, a nivel subregional está integrado al Sistema de Integración Centroamericano (SICA),

incluyendo la observancia del Tratado Marco de Seguridad Democrática Centroamericana y otros instrumentos del sistema.

Por esa razón el Estado se interesa en los pilares uno y dos del Principio, en cuanto hace aportes como haber ratificado el Tratado de Roma y la participación en operaciones de paz como la de Haití, no considerando que el tercer pilar tenga relación con la realidad de Guatemala, su apoyo es al conjunto de la RdeP (o si se quiere de la RalP) para fortalecer su viabilidad a nivel internacional. Ciertamente en Guatemala se dan situaciones de inseguridad que afectan la gobernabilidad democrática, pero ese no es un ámbito de aplicación para la RdeP.

Puede decirse que esta situación es similar para Latinoamérica, que tiende a ser una región de paz, si bien en los debates de sociedad civil sobre el tema se ha discutido si el Principio podría aplicarse a situaciones de Estados fallidos como podría ser el caso de Haití, a países en los cuales aún se mantiene un conflicto armado interno o situaciones relacionadas con la violencia del crimen organizado, ello por ahora no ha trascendido del espacio del diálogo académico.[24]

NOTAS

1. Este trabajo expresa opiniones personales del autor.
2. Gabriel Aguilera Peralta (1997). "La Guerra Interna", en: Jorge Luján Muñoz (Director General) Guatemala, Historia General de Guatemala, Tomo VI, Época Contemporánea, de 1945 a la Actualidad, Asociación de Amigos del País, Fondo de Cultura Editorial, 1997, *135*.
3. Comisión para el Establecimiento Histórico, "Guatemala; causas y orígenes del enfrentamiento armado interno. Prólogo de Edelberto Torres Rivas, Guatemala, F&G Editores, 2006, Guatemala.
4. Comisión Interamericana de Derechos Humanos, Organización de los Estados Americanos; "Informe sobre la situación de los derechos humanos en la República de Guatemala", OEA/Ser.L/V/II.53. Doc.21 rev.2, 13 octubre 1981.

5. Ibid.,3-4.
6. Ibid.81.
7. Sobre esa estrategia ver: Carlos Figueroa Ibarra: "Genocidio y terrorismo de Estado en Guatemala: una interpretación", en: Virgilio Álvarez et al. (2012). Guatemala: una historia reciente (1954-1996) tomo I. Proceso político y antagonismo social, Flacso, Guatemala y Gabriel Aguilera Peralta y Jorge Romero Imery (1981). "La dialéctica del terror en Guatemala", Educa, Costa Rica.
8. OEA/Comisión Interamericana de Derechos Humanos, Compilación de informes publicados sobre la situación de los derechos humanos en Guatemala, 1980-1995, Tomo I (1980-1985) Washington, DC, 1 de junio de 1995. Citado en: Comisión…, Op. Cit. Pag.213
9. Jorge Luis Zelaya Coronado (2012). "Vivencias históricas de un político y diplomático guatemalteco", 1942 a 198, Piedra Santa, 2012, Guatemala. págs. 253,254 y 260.
10. OEA/Comisión Interamericana de Derechos Humanos, "Informe sobre la situación de los Derechos Humanos en la República de Guatemala", OEA/ser.L/V/II.61, Doc.47, 3 de octubre de 1983.
11. Comisión para…, pág.
12. OEA/Comisión Interamericana de Derechos Humanos "Tercer Informe sobre la Situación de los Derechos Humanos en Guatemala", OEA/Ser.L/V/II.66. Doc.16, 3 de octubre de 1985
13. Sobre esos intentos ver: Gustavo Adolfo Díaz López (2011). "La Rebelión de los Pretorianos", Editorial Oscar de León Palacios, Guatemala.
14. Ver los textos de los acuerdos en: "Acuerdos de Paz", Universidad Rafael Landívar, Ministerio de Educación, Secretaría de la Paz, Gobierno de Suecia, Fotomecánica De León, 1998, Guatemala.
15. Ver: Programa de las Naciones Unidas para el Desarrollo: "Informe sobre Desarrollo Humano para América Central 2009-2010. Abrir espacios a la seguridad ciudadana y el desarrollo humano", especialmente la segunda parte, capítulos 3 a 8. D´Vinni SA, 2010, Colombia.
16. Aston, Philip (2006). Palabras del relator especial de Naciones Unidas sobre ejecuciones extrajudiciales, sumarias o arbitrarias. Conferencia de prensa al concluir su visita a Guatemala , 24 de agosto de 2006. Guatemala htpp://www.pag.org/MG/pdf/Palabras del Relator Al… Consultado 26 de agosto de 2006.

17. Acuerdo de creación de una Comisión Internacional contra la Impunidad en Guatemala, 12 de diciembre de 2006. http://cicig.org/index=php?page=mandato. Recuperado el 8 de diciembre del 2013.

18. Naciones Unidas, Asamblea General: Documento Final de la Cumbre Mundial 2005. Parágrafos 130 a 140 A/RES/60/1. www2.ohchr.org/soanish/bodies/hrcouncil/docs/gaA.RES.60.1_sp.pdf recuperado 7/12/2013

19. Intervención del Embajador Gert Rosenthal, representante permanente de Guatemala ante las Naciones Unidas, en el IV Diálogo Informal Interactivo de la AG sobre la Responsabilidad de Proteger. 5 de septiembre de 2012. Texto de la intervención. Misión Permanente de Guatemala ante Naciones Unidas, Nueva York, p.1

20. Son conocidos los pilares descritos en un informe del Secretario General de NNU del 2009, "1. El Estado tiene la responsabilidad primordial de proteger a su población del genocidio, los crímenes de guerra, la depuración étnica y los crímenes de lesa humanidad y de la incitación a cometerlos. 2. Corresponde a la comunidad internacional alentar a los Estados a que cumplan esta responsabilidad y a prestarles asistencia al respecto. 3. La comunidad internacional tiene la responsabilidad de utilizar los medios diplomáticos, humanitarios y otros medios pacíficos apropiados para proteger a la población contra esos crímenes. Si es evidente que un Estado no está protegiendo a su población, la comunidad internacional debe estar dispuesta a adoptar medidas colectivas para proteger a esa población de conformidad con la Carta de las Naciones Unidas".

21. Responsibility While Protecting: Elements for the Development and Promotion of a Concept. Letter from the Permanente Representative of Brazil to the United Nations addressed to the Secretary General. En: Pensamiento Propio, 35, CRIES, enero-junio 2012, Buenos Aires, Argentina.

22. Intervención de Gert Rosenthal, representante permanente de Guatemala ante las Naciones Unidas con ocasión de la discusión informal sobre la "Responsabilidad al Proteger" organizada por la Misión Permanente de Brasil ante las Naciones Unidas. 21 de febrero de 2012. Misión Permanente de Guatemala ante Naciones Unida.

23. Un ejemplo de esos debates en: Coordinadora Regional de Investigaciones Económicas y Sociales CRIES: Segundo Encuentro Regional sobre la Responsabilidad de Proteger, Multilateralismo y Sociedad

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Breaking the Cycle: Costa Rica, the Arms Trade Treaty and the Responsibility to Protect[1]

Luis Alberto Cordero and Kirsten A. Harmon

Introduction

Costa Rica is among the strongest supporters of the Responsibility to Protect (RtoP) doctrine and has been a leader in the development and implementation of this principle to date, always with an emphasis on prevention. Costa Rica also performed an integral role in catalyzing negotiations for and securing the eventual adoption of the Arms Trade Treaty (ATT), which establishes common international standards for the international trade of all conventional arms.

The unchecked proliferation of conventional arms not only provides the tools with which atrocities may be carried out, but also fuels political and socio-economic conditions that increase the risk that such

violence may occur. Therefore, without effective regulation of the international trade in conventional arms, the ability of States to fulfill their responsibility to protect is fundamentally undermined. In this way, the ATT can play an important role in helping the international community to operationalize RtoP.

Part II of this article provides a brief summary of the development and legal foundations of RtoP. Part III discusses key elements of Costa Rica's approach to the responsibility to protect as an international legal norm and what steps it has taken to operationalize RtoP. Part IV discusses Costa Rica's prominent role in the negotiation and adoption of the ATT and highlights important complementarities between the ATT and RtoP. Part V concludes by advocating that in addition to continuing to promote RtoP at the United Nations level as well as through national and transnational initiatives, Costa Rica should advocate for the universal adoption and implementation of the ATT as an essential tool for preventing the commission of atrocity crimes.

Background and Legal Basis of the Responsibility to Protect

The responsibility to protect (RtoP) is an emerging norm of international law. It received formal recognition in the 2005 World Summit Outcome Document, adopted by the United Nations General Assembly in its Resolution 60/1 of 2005, which provides in relevant part that:

> 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. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*
>
> 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 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 relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress 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. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[2]

In 2009, the General Assembly resolved to continue its consideration of RtoP, despite the reservations expressed by some states—namely Venezuela, Iran, Ecuador, Nicaragua, Cuba, Syria and Sudan.[3]

Since 2009, UN Secretary General Ban Ki-moon ("the Secretary General") has presented several reports to facilitate Member States' continued consideration of RtoP. Although these reports are not themselves binding, they provide useful guidelines for Member States in understanding and applying RtoP as an international norm. The "Report of the Secretary General – Implementing the Responsibility to Protect," issued in 2009, sets forth the three interrelated pillars that have come to define subsequent analysis and development of the RtoP doctrine, namely the protection responsibilities of the State ("Pillar I"), the commitment of the international community to provide international assistance and capacity-building to assist States in fulfilling their protection responsibilities ("Pillar II"), and the responsibility of the international community to take timely and decisive action when States manifestly fail to meet their responsibilities ("Pillar III").[4]

Subsequent reports have shed additional light on these three pillars. In 2010, the Secretary General presented a second report, "Early warning, assessment and the responsibility to protect," which focused on the need for early warning and assessment capacities to facilitate the implementation of RtoP.[5] In 2011, the Secretary General reported on "The role of regional and sub-regional arrangements in implementing the responsibility to protect," which focused on the role of regional and sub-regional organizations in operationalizing all three pillars and explored opportunities for collaboration.[6] The Secretary General's 2012 Report, "Responsibility to Protect – Timely and Decisive Response," discussed how international, regional, national and local actors can respond to threats or occurrences of atrocities in a timely and decisive manner.[7] The 2013 Report on "State Responsibility and Prevention" examines risk factors that have been identified in situations where atrocities have been committed in the past, and provides examples of preventive measures drawn from the experiences of Member States.[8]

In spite of its infancy, RtoP is gaining traction in international law. Indeed, the UN Security Council has reaffirmed the doctrine in a number of binding resolutions. For example, Resolutions 1674 and 1894 on protection of civilians in armed conflict "*[r]eaffirm*[]the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139 thereof regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[9] Resolutions on situations of concern with respect to protection of civilians in specific countries have also reaffirmed RtoP, such as Resolution 2063 on the situation in Sudan,[10] Resolution 2009 regarding Libya,[11] and Resolutions 2069 and 2120 regarding Afghanistan,[12] among others. Also of particular significance is Resolution 2117on small arms and light weapons, which highlights a specific link between RtoP and the misuse of small arms and light weapons to commit atrocity crimes.[13]

These reaffirmations at the Security Council level point to the strengthening of RtoP as an emerging norm of international law. Nevertheless, Member States continue to debate the legal and political status of RtoP.[14] One thing, however, is clear: the substantive content of RtoP and how it should function in practice, are still in flux. Costa Rica has and should continue to voice its vision of a robust interpretation of

RtoP, not merely as an abstract point of legal doctrine but rather as a guiding operational principle for its efforts at the national, regional, and multilateral levels.

Costa Rica and the Responsibility to Protect

Costa Rica has strongly affirmed the legitimacy of RtoP, which it understands to flow from the fundamental responsibility of States to protect their citizens.[15]Moreover, it interprets RtoP as being, to draw from the words of the Secretary General, "narrow but deep."[16] Narrow in that its legal scope is limited to instances of genocide, war crimes, ethnic cleansing, and crimes against humanity only; deep in that it goes to the very core of sovereignty. These limitations notwithstanding and in accordance with its long-standing commitments to human rights, humanitarian law, and disarmament, Costa Rica has been amongst the strongest supporters of the RtoP doctrine. It is important to recognize, however, that Costa Rica does not understand RtoP to amount to a *carte blanche* for humanitarian intervention. Rather, consistent with the language of Resolution 60/1, collective action under RtoP must adhere to the parameters set forth in the UN Charter.[17]

Costa Rica understands RtoP to be first and foremost a doctrine of prevention. As articulated by former Director General of Foreign Policy, Danilo González, in his capacity as Costa Rica's RtoP Focal Point,

> [t]he best way to prevent mass atrocities and large scale humanitarian crises, is to prevent conflict…investment in democracy, strengthening the rule of law, and promoting the protection of human rights in a context of human development, remain the best way to avoid social tensions and the signs of intolerance that are often cited as causes of those conflicts that have erupted into the gravest humanitarian crises of our times.[18]

This focus on prevention—on eradicating the seeds of conflict before they take root—is consistent with Costa Rica's unflagging commitment to promoting peace, democracy and human dignity, both domestically and in the international arena. Costa Rica has demonstrated its com-

mitment to RtoP through its actions within the sphere of the United Nations, as well as through national initiatives and participation in transnational networks dedicated to the promotion and application of RtoP.

Promotion of RtoP within the United Nations

Costa Rica supported both General Assembly Resolutions on the subject of RtoP: Resolution 60/1 containing the Outcome Document of the 2005 World Summit,[19] and Resolution 63/308,[20] by which the General Assembly resolved to continue its consideration of RtoP. Moreover, Costa Rica has been an active participant in the ongoing General Assembly Interactive Dialogue on RtoP.[21] Costa Rica voiced a particularly progressive stance with respect to the 2005 World Summit Outcome Document, voicing its faith in the Security Council as "the only legitimate mechanism for confronting threats to peace," while advocating for significant reforms to the Security Council, including an expansion of the number of non-permanent numbers and an elimination of the veto right in matters of genocide, war crimes, crimes against humanity, and massive violations of human rights.[22]

Indeed, recent events in Syria highlight the extent to which current Security Council structures may impede the kind of "timely" and "decisive" action that Pillar III of RtoP calls for.[23] As evidenced by the Syria situation, further analysis of how to facilitate robust application of Pillar III within the parameters of the UN Charter is needed. Although its suggested reforms to the Security Council were not ultimately reflected in the Outcome Document, they are indicative of Costa Rica's active role in promoting a strong application of RtoP, even from its earliest stages. Costa Rica should continue to contribute to this dialogue.

Costa Rica also advocated for the development and application of RtoP during its recent term as a member of the Security Council, from 2008 to 2009. For example, Costa Rica requested that the Security Council consider humanitarian intervention in Myanmar, in response to evidence of massive human rights violations and an increasingly dire humanitarian situation.[24] Although the Security Council elected not to take such action, Costa Rica's proposed response to circumstances

in Myanmar offers a useful example of how Pillar III can be put into practice in a way that is consistent with the UN Charter and the primacy of the UN Security Council in authorizing the use of force.

During its 2008-2009 Security Council term, Costa Rica was also a vocal advocate of the International Criminal Court (ICC). The ICC is a key tool for operationalizing RtoP because it provides an alternative to impunity or *ad hoc* prosecution arrangements for those found to have committed atrocity crimes.[25] In particular, Costa Rica expressed concern with what it perceived to be insufficient action by the Security Council to ensure the Sudanese government's compliance with Security Council Resolution 1593 of 2005, referring the situation in Darfur, Sudan to the Prosecutor of the ICC.[26] Costa Rica also expressed support for the warrant issued in 2009 for the arrest of Sudanese President, Omar Al-Bashir.[27] As a result of this firm stance, the Security Council approved a Presidential Declaration in June of 2009, demanding that Sudan turn over to the ICC two Sudanese accused of war crimes and crimes against humanity: Ahmad Harun, Former Minister of the Interior, and Ali Kushayb, alleged leader of the Janjaweed Militias.[28]

Costa Rica's support for the ICC goes beyond its participation in the Security Council, particularly through its role in the Group of Friends of the International Criminal Court.[29] In that capacity, Costa Rica has focused on strengthening the relationship between international criminal law and human rights, attributing to the ICC an integral role in enforcing international human rights law where violations of those rights constitute crimes against humanity, war crimes and/or genocide.[30]

By taking a decisive stance in support of RtoP in the General Assembly and during its recent tenure on the Security Council, as well as through continued support of international institutions critical to the implementation of RtoP such as the ICC, Costa Rica has demonstrated its commitment to the responsibility to protect not only in word, but also in deed. Costa Rica continues to implement this commitment beyond the UN context through its pioneering efforts at the national and transnational levels.

Transnational Cooperation

Costa Rica participates in a number of transnational networks dedicated to the promotion of RtoP through intergovernmental coordination as well as collaboration between governments and nongovernmental actors, including the RtoP Focal Points Initiative and the Latin American Network for Genocide and Mass Atrocity Prevention. Both of these innovative initiatives were highlighted in the Secretary General's 2013 Report.[31]

Costa Rica is one of four co-organizer States for the RtoP Focal Points Initiative, along with Australia, Denmark and Ghana.[32]Launched in 2010 by the Global Centre for the Responsibility to Protect in association with the governments of Denmark and Ghana, the RtoP Focal Points Initiative seeks to encourage UN Member States to designate senior officials ("Focal Points") responsible for improving atrocity crimes prevention and response efforts at the national level, as well as to facilitate international coordination and cooperation by linking those focal points to form a global network.[33] The Secretary General's 2013 Report specifically noted that 28 States had appointed RtoP Focal Points as of July 2013 and encouraged other States to consider similar measures.[34]

To date, there have been three meetings of RtoP Focal Points, focusing on issues such as what role the Focal Point can and should play, discussing experiences of promoting RtoP at the domestic level, and identifying challenges to the effective implementation of R2toP.[35] Furthermore, the first regional meeting of RtoP Focal Points, for Europe, was held in Slovenia in 2013, where the issues discussed included how to enhance cooperation on RtoP, such as through regional bodies such as the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe, what additional improvements are needed to strengthen capacities for atrocity crimes prevention, and the importance of consensus-building among States as to the content and operationalization of RtoP.[36]

Along the same lines, Latin American States can build on their legacy of intergovernmental coordination through organizations like the Organization of American States (OAS) and the Inter-American Commission on Human Rights, as well as sub-regional bodies such

as the Andean Community (CAN) and the Union of South American Nations (UNASUR), to pursue opportunities for regional coordination in clarifying and strengthening the role of RtoP Focal Points in those States where they have already been appointed, and encouraging designation of RtoP Focal Points in States where one has not yet been put in place.

The role of the RtoP Focal Point encompasses both internal and external dimensions.[37] At the domestic level,the main responsibilities are advocacy and socialization, institutionalization (such as training and capacity-building for relevant actors such as police and military forces), mass atrocity strategic planning and advice, and early warning and response coordination.[38] Focal points also engage externally, communicating and coordinating with one another through networks.[39]

This dual approach facilitates the effective application of RtoP in two key ways. First, because implementing RtoP at the national level necessarily implies a wide range of actors, including different organs of government as well as civil society organizations and the private sector, the focal point acts as a "proactive 'hub' for analysis, policy input, and intergovernmental coordination,"[40] as well as promoting accountability at the national level. Second, coordination among focal points facilitates early warning communications as well as opportunities for the exchange of experiences and best practices.

The Latin American Network for Genocide and Mass Atrocity Prevention, another transnational venture dedicated to promoting RtoP, was formed in 2012 by the governments of Argentina, Brazil, Chile, Costa Rica, Ecuador, Panama, Paraguay, Peru, and Uruguay in collaboration with the Auschwitz Institute for Peace and Reconciliation (AIPR) and with the support of the Office of the Special Advisor of the UN Secretary General on Genocide Prevention (OSAPG).[41] Network membership has since grown to 18 countries, with the addition of Bolivia, Colombia, El Salvador, Guatemala, Mexico, the Dominican Republic, Honduras and Venezuela.[42]

The primary function of the Latin American Network for Genocide and Mass Atrocity Prevention is education, using seminars administered at sites of past genocide and mass atrocities to train first policy-makers and eventually future instructors, in order to institutionalize atrocity

crimes prevention training programs at the national level.[43] The Network also encourages its members to strengthen genocide prevention initiatives in their national government structures or to develop such programs where none exist, and aims to facilitate annual meetings to promote intergovernmental collaboration and information exchange.[44]

These innovative inter-governmental and inter-sectorial collaborations are important steps toward the operationalization of the preventive dimensions of RtoP. Costa Rica and other regional leaders should continue to support their development and encourage the expansion of their membership.

National Implementation

Of course, transnational cooperation is meant to enhance, rather than to substitute for, domestic efforts to prevent atrocity crimes. For its part, Costa Rica has engaged in a variety of actions at the national level including, notably, the formation of the Costa Rican Commission on International Humanitarian Law and the Inter-Institutional Commission on Human Rights.

The Costa Rican Commission on International Humanitarian Law (CCDIH), formed in 2004, operates under the auspices of the Ministry of Foreign Affairs and is comprised of 16 members: 11 government agencies, 2 universities, the National Council of Rectors, the Bar Association, and the Red Cross of Costa Rica.[45] The Commission advises the Executive branch with regards to the adoption, application and dissemination of international humanitarian law. Among the Commission's most notable accomplishments is its role in making Costa Rica the first Latin American country to be a State Party to all international treaties on or related to international humanitarian law as of 2012.[46] The Commission also trains functionaries of relevant government agencies, such as the Congress and police forces, in international humanitarian law.

The Inter-Institutional Commission for the Oversight and Implementation of International Human Rights Obligations, also overseen by the Ministry of Foreign Affairs, was formed in 2011. This Commission is made up of twenty government agencies as well as a permanent consultative mechanism to facilitate direct civil society participation.[47]

The Commission's main function is to ensure Costa Rica's compliance with its various human rights surveillance and reporting obligations under applicable international instruments.

These steps to operationalize international humanitarian law and international human rights law at the national level form the core of Costa Rica's current strategy for implementing its responsibilities under RtoP and provide useful examples for other UN Member States to consider. However, although Costa Rica's efforts to date are no doubt laudable, it is clear that additional tools are needed in order to effectively prevent and respond to atrocities.

Strengthening the RtoP Toolkit: The Arms Trade Treaty

The availability of conventional arms, particularly small arms and light weapons, is a significant risk factor for the commission of atrocity crimes. This relationship is highlighted in UN Security Council Resolution 2117,[48] as discussed above, as well as in the Secretary General's 2009[49] and 2013[50] Reports and the Genocide Analysis Framework promulgated by the Office of the UN Special Adviser on the Prevention of Genocide (OSAPG), which identifies the presence of illegal arms and armed elements, indicative of the "capacity to commit genocide," as one of eight factors used to determine whether there is a risk of genocide in a given situation.[51] In addition to the integral role of arms as the literal instruments by which atrocity crimes may be committed, the unregulated flow of weapons may itself be a trigger for these crimes, insofar as it can aggravate underlying conditions of instability and conflict, such as ineffective institutions, inequality, and the marginalization of certain social groups, that have been shown to contribute to the outbreak of atrocities.[52]

One conclusion to be drawn from this is that effective arms control mechanisms are essential to the successful application of RtoP. As such, support is growing around the Arms Trade Treaty ("ATT"), which establishes universal regulations for the international trade of all conventional arms and their ammunition. U.S. Permanent Representative to the United Nations, Samantha Power, recently highlighted the ATT as an example of "multilateraliz[ing]" efforts to prevent atrocities,

putting RtoP into practice by "help[ing] to prevent the illicit flow of arms to atrocity perpetrators."[53] Shortly thereafter, the Security Council passed Resolution 2117, which not only reaffirmed RtoP and clarified its connection to small arms and light weapons, but even went so far as "[*u]rg[ing]* States to consider signing and ratifying the Arms Trade Treaty as soon as possible and *encourag[ing]* States, intergovernmental, regional and sub-regional organizations that are in a position to do so to render assistance in capacity-building to enable States Parties to fulfil [*sic*] and implement the Treaty's obligations."[54]

The ATT can help prevent atrocity crimes both directly, by keeping weapons out of the hands of those who would commit them, and indirectly by reducing the extent to which the now under-regulated trade in conventional arms fuels conditions that present risk factors for the commission of atrocity crimes. Thus, the ATT should be at the core of future efforts to operationalize RtoP. Costa Rica, which has been at the vanguard of the international community in promoting both RtoP and the ATT, is poised to lead this endeavor.

The Arms Trade Treaty and Costa Rica's Role

After some seven years of intensive negotiations, the UN General Assembly adopted the Arms Trade Treaty ("ATT") on April 2, 2013, by a vote of 154 in favor, with only 3 votes against (Iran, the Democratic People's Republic of Korea, and Syria), and 23 abstentions.[55] To date, 115 States have signed the treaty and 9 have ratified it.[56] Momentum for this landmark treaty can be traced at least as far back as 1997, when a group of Nobel Laureates led by former Costa Rican President Dr. Óscar Arias Sánchez proposed an International Code of Conduct on Arms Transfers.[57] Costa Rica, one of the "Co-Author" Countries that first proposed the ATT to the General Assembly in 2006, remained one of the treaty's strongest advocates throughout the negotiation process and was among the first countries to sign it on June 3, 2013. On September 3, 2013, Costa Rica became the third country to ratify the ATT,[58] due in large part to the steadfast support and commitment of the administration of Costa Rican President, Laura Chinchilla Miranda.

The objectives of the ATT are to "[e]stablish the highest possible common international standards for regulating or improving the regulation

of the international trade in conventional arms" and to "[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion."[59] These objectives serve a threefold purpose: to contribute to international and regional peace, security and stability; to reduce human suffering; and to "[p]romot[e] cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties."[60]

The ATT operates by establishing a set of criteria that States Parties must apply to all transfers of conventional arms, ammunition, parts and components that come within the treaty's scope.[61] The conventional arms covered fall into seven main categories: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.[62] The criteria to be applied to the decision of whether or not to authorize a transfer can be divided into two main categories: prohibitions and export assessments.

First, all States Parties are prohibited from authorizing a transfer of conventional arms ("prohibitions")where the transfer would (1) violate the State's obligations under measures adopted by the Security Council acting under Chapter VII of the UN Charter, (2) violate relevant international obligations under international agreements to which the State is party, particularly arms control agreements, and (3) if the State "has knowledge that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is party."[63]

The second set of criteria apply only to arms-exporting States ("export assessments"), obliging those States to conduct a risk assessment and, where there is an overriding risk that certain negative consequences would result from the export despite any efforts to mitigate the risk in question, decline to export. These negative consequences include that the arms will be used to:

> (i) commit or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law; (iii) commit or facilitate an

> act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or (iv) commit or facilitate an act constituting an offence under international conventions or protocols related to transnational organized crime to which the exporting State is a Party.[64]

The treaty also confers responsibilities upon arms-importing States, to provide adequate and relevant information to exporting States to facilitate accurate export assessments,[65] and requires all State Parties to take measures, where appropriate and feasible, to regulate the transit and transshipment of conventional arms through their territory.[66] All States Parties must also take steps to prevent the diversion of conventional arms to anyone other than their authorized end user, and must comply with recordkeeping and reporting requirements.[67]

The Arms Trade Treaty and RtoP

As discussed above, the ATT can serve the objectives of RtoP both directly and indirectly. Directly, in that the ATT expressly prohibits the transfer of arms not only where the State Party has knowledge that they will be used to commit atrocity crimes, but also where the transfer would violate Security Council decisions, particularly arms embargoes and other steps that may be taken under Pillar III of RtoP in response to a State's manifest failure to protect its people from atrocity crimes. Thus, the ATT would provide crucial support for a collective response taken under Pillar III, whether through the use of force or otherwise, by making all States subject to the same set of standards with respect to international arms transfers and thereby prohibiting certain States from circumventing attempts by the Security Council or other international bodies to prevent or halt atrocity crimes through arms embargoes or other coordinated actions. Recent events in Syria, where Russia has continued to supply arms to President Bashar al-Assad even as the civilian death toll continues to mount,[68] exemplify how an ATT that holds all States to the same set of prohibition and risk assessment standards for all international transfers of conventional weapons, could dramatically change the course of events in a situation where atrocity crimes have been or are at risk of being committed.

Furthermore, the insufficient regulation of conventional arms transfers that the ATT seeks to address, contributes significantly to factors of social, political and economic instability that place societies at increased risk of atrocity crimes taking place. The Secretary General's 2013 Report identifies a number of key factors influencing the risk of atrocity crimes, which preventive efforts should seek to address, including history of discrimination or other human rights violations against members of a particular group or population; an underlying motivation – often political, economic, military or religious – for targeting a particular community; the presence of armed groups or militia and their capacity to commit atrocity crimes, including the proliferation of arms; the existence of particular circumstances that facilitate the perpetration of such crimes; the incapacity of the government to prevent the crimes or the absence of structures and institutions designed to protect the population; and the commission of acts that could be elements of genocide, war crimes, or crimes against humanity as defined by the Rome Statute of the ICC.[69]

It is now widely accepted that there is "a strong association between higher levels of armed violence and fragile institutional capacities," as well as "a strong association between insecurity and underdevelopment."[70] In other words, armed violence is both a cause and a consequence of institutional instability and underdevelopment, both of which can contribute to the risk of atrocity crimes.

The 2011 Global Burden of Armed Violence Report demonstrates the close and mutually reinforcing relationship between armed violence, defined as "the use or threatened use of arms to inflict injury or death,"[71] and key development indicators. For example, higher incidence of armed violence is correlated with higher adolescent birth rates, higher child and infant mortality rates, higher percentage of persons living with HIV between the ages of 15-49, lower share of national income or consumption held by the poorest quintile of the population, higher population living off of less than USD $1 per day, lower human development indices, and higher unemployment rates for both men and women between the ages of 15-24.[72]

Coupled with the ready availability of conventional arms, particularly small arms and light weapons whose authorized transfers alone amounted to at least USD $8.5 billion between 2009 and 2011, not to

mention their vast illicit trade,[73] such manifestations of socioeconomic instability provide fertile ground for atrocity crimes. Paired with underdeveloped or ineffective political institutions, the combination becomes even more combustible.

Thus, bringing the global trade in conventional arms under control is essential if RtoP is to be operationalized effectively. The ATT has the capacity to make a significant impact in that regard. However, the treaty's adoption and growing number of signatures are but the first steps in a much longer journey. The ATT will not even enter into force until fifty UN Member States have ratified it.[74]Then, once the treaty enters into force, each State Party must take the necessary measures to implement its obligations under the treaty, which in some cases will involve significant reforms at the national level that a State may or may not have the financial and technical resources to undertake. Moreover, anything less than universal accession and implementation will undermine the treaty's effectiveness, insofar as non-parties may continue to act as loopholes through which irresponsible arms transfers can pass unchecked.

Therefore, Costa Rica's work as a champion of the ATT is far from over: indeed, it is just beginning. In its continued efforts to promote the universalization and effective implementation of the ATT, Costa Rica should highlight the significance of these actions not only for their own sake but also as consistent with RtoP.

Conclusion

The development of a responsibility to protect in international law is an ongoing process. While the base of support for the RtoP doctrine continues to broaden among States, its legal contents and effect remain uncertain. Even for advocates of RtoP, the form that this emerging norm will ultimately take remains to be seen.

Opponents of the RtoP doctrine have framed it as creating a right to *ad hoc* intervention and, as such, presenting a threat to state sovereignty. This mischaracterizes RtoP in two key ways. First, RtoP is not, at its core, a new right or obligation: it is merely an expression of the inherent

responsibilities that accompany the right of sovereignty. Second, this responsibility is not a threat, but rather, as articulated in the Secretary General's 2012 Report, "an ally of sovereignty, in that collective action by the international community to protect populations is not called for where a State fully discharges its sovereign responsibility to protect."[75] In other words, the best way for Member States to guard against outside intervention is to fulfill their fundamental responsibility to their own people by protecting them from atrocity crimes.

Costa Rica, a strong supporter of RtoP from its inception, has interpreted RtoP as a doctrine rooted in prevention and has taken significant steps to implement that understanding, as discussed in this article. However, it is important to recognize that a strong RtoP framework cannot be built on a foundation that is continually eroded by the ceaseless flow of arms and ammunition to vulnerable regions around world. Thus, to effectively operationalize RtoP, this tide simply must be stemmed. In this way, the recently adopted Arms Trade Treaty, or ATT, offers an important complement to RtoP.

To be sure, the ATT is no panacea for atrocity crimes. Indeed, the ATT has attracted its own set of detractors, echoing many of the same concerns with respect to infringement of sovereignty that have been voiced with regard to RtoP. Even States that support RtoP, the ATT, or both, may view the prospect of a linkage between RtoP and the ATT with some skepticism, particularly to the extent that such a linkage may provide additional ammunition for those States that oppose one or the other as an unacceptable infringement of their sovereignty. This is a legitimate concern in principle. However, highlighting the extent to which these two sets of international legal obligations can complement one another in their application does not imply expansion of the scope of the legal obligations set forth under either. To take advantage of the potential for synergies need not change the nature of the legal norms themselves.

Effective regulation of conventional weapons transfers is essential if States are to succeed in protecting their citizens from atrocity crimes and the conditions that foment them. The alternative, as former Costa Rican President and Nobel Peace Laureate Oscar Arias aptly stated in his 2006 General Assembly Address, is to be "condemned to walk to the edge of the cliff, to live in the wheel of eternal return, like Sisyphus with each summit reached only to walk the path over again."[76]If we are

to succeed in putting RtoP into practice for the good of the world's people we must commit ourselves to breaking this cycle, and the ATT is a vital tool in that struggle. As the first Latin American country to ratify the ATT and one of its most vocal champions from the outset, Costa Rica can and should lead this charge.

NOTES

1. The views expressed in this article are the authors' own and do not necessarily reflect official positions or opinions of the Government of Costa Rica.
2. G.A. Res. 60/1, 138-139, U.N. Doc. A/60/L.1 (Sept. 15, 2005) (emphasis added). *See also* Ministerio de Relaciones Exteriores y Culto de Costa Rica, *Memoria Institucional* 2005-2006, 47-49 (2006).
3. G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).
4. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter 2009 Report]. *See also* International Coalition for the Responsibility to Protect (ICRtoP), *Core Documents: Understanding RtoP*, http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents (providing a summary of core documents relating to RtoP, including the Secretary General's Reports).
5. U.N. Secretary General, *Early warning, assessment and the responsibility to protect: Rep. of the Secretary General*, U.N. Doc. A/64/864 (Jul. 14, 2010) [hereinafter 2010 Report]. *See alsoCore Documents: Understanding RtoP*, *supra* note iii.
6. U.N. Secretary General, *The role of regional and sub-regional arrangements in implementing the responsibility to protect: Rep. of the Secretary General*, U.N. Doc. A/65/877–S/2011/393 (Jun. 27, 2011)[hereinafter 2011 Report]. *See also Core Documents: Understanding RtoP*, *supra* note iii.
7. U.N. Secretary General, *Responsibility to Protect – Timely and Decisive Response: Rep. of the Secretary General*, U.N. Doc. A/66/874–S/2012/578 (Jul. 25, 2012) [hereinafter 2012 Report]. *See also Core Documents: Understanding RtoP*, *supra* note iii.

8. U.N. Secretary General, *State Responsibility and Prevention: Rep. of the Secretary General*, U.N. Doc. A/67/929–S/2013/399 (Jul, 9, 2013) [hereinafter 2013 Report]. *See alsoCore Documents: Understanding RtoP*, *supra* note iii.

9. S.C. Res. 1674, para 4, U.N. Doc. S/Res/1694 (Apr. 28, 2026); S.C. Res. 1894, preambular para. 7, U.N. Doc. S/Res/1894 (Nov. 11, 2009).

10. S.C. Res. 2063, preambular para. 4, U.N. Doc. S/RES/2063 (Jul. 31, 2012) (resolving to extend the mandate of the United Nations Mission in Darfur, UNAMID).

11. S. C. Res 2009, preambular para. 2, U.N. Doc. S/RES/2009 (Sept. 16, 2011) (not citing the World Summit Outcome Document directly but recalling resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflict).

12. S.C. Res 2069, preambular para. 2. U.N. Doc. S/RES/2069 (Oct. 9, 2012); S.C. Res. 2120, preambular para. 3, U.N. Doc. S/RES/2120 (Oct. 10, 2013) (recalling resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflict).

13. S. C. Res. 2117, preambular para. 16, S/RES/2117 (Sept. 26, 2013).

14. *Compare* John Bolton, *Irresponsible: Against a "Responsibility to Protect,"in* Natl. Rev. (Apr. 01, 2011), *available at* http://www.aei.org/article/politics-and-public-opinion/irresponsible-against-a-responsibility-to-protect-in-foreign-affairs/ (criticizing RtoP as "limitless") *and* Alfredo Toro, *El concepto de la Responsabilidad de Proteger: La perspectiva de la República Bolivariana de Venezuela y otros países en desarrollo*, *in* Pensamiento Propio, Vol. 35 (2012) *with* Kofi Annan, *Two concepts of sovereignty*, The Economist (Sept. 18, 1999), *available at*www.theeconomist.com (highlighting a "developing international norm in favour of intervention to protect civilians from wholesale slaughter").

15. Ministerio de Relaciones Exteriores y Culto de Costa Rica, *Costa Rica impulsa red de países comprometidos con la responsabilidad de proteger en las Naciones Unidas* (Sept. 29, 2012), http://www.rree.go.cr/?sec=servicios%20al%20publico&cat=servicios%20de%20informacion&cont=593¬icia=1154 (author's own translation from the Spanish)[hereinafter Costa Rica on RtoP Focal Points].

16. Amb. Jorge Urbina, Permanent Representative of Costa Rica to the United Nations, Joint Statement of the Delegation of Denmark and Costa Rica, Thematic Debate of the General Assembly on the Responsibility to Protect (Jul. 23, 2009) (on file with author) [hereinafter 2009 Joint Statement].
17. Ministerio de Relaciones Exteriores y Culto de Costa Rica, *Memoria Institucional 2008-2009*, 102-103 (2009).
18. Costa Rica on RtoP Focal Points, supra note xiv (author's own translation from the Spanish).
19. G.A. Res. 60/1, supra note i.
20. G.A. Res. 63/308, *supra* note ii.
21. *See e.g.*, 2009 Joint Statement, *supra* note xv.
22. Press Release, General Assembly, World Leaders Pledge Wide-Ranging Steps on Poverty, Terrorism, Human Rights, UN Reform, as 2005 Summit Concludes in New York, U.N. Press Release GA/10385 (Sept. 16, 2005), *available at* http://www.un.org/News/Press/docs/2005/ga10385.doc.htm.
23. *See e.g.*, U.N. News Centre, *Security Council Fails to Adopt Resolution on Syria* (Jul. 19, 2012), http://www.un.org/apps/news/story.asp/html/story.asp?NewsID=42513&Cr=Syria&Cr1=#.UtkfUvbxSpo; Michael R. Gordon, *U.N. Deal on Syrian Arms is Milestone After Years of Inertia*, NY Times (Sept. 26, 2013), http://www.nytimes.com/2013/09/27/world/middleeast/security-council-agrees-on-resolution-to-rid-syria-of-chemical-arms.html?pagewanted=all&_r=0.
24. *Memoria Institucional 2008-2009*, *supra* note xvi, at 103, 109-110.
25. *See* Bruno Stagno Ugarte (2009). Ministro de Relaciones Exteriores y Culto de la Republica de Costa Rica, Statement, *in Memoria Institucional 2008-2009*, 114-117.
26. *Memoria Institucional 2008-2009*, *supra* note xvi, at 118-120.
27. *Id.*
28. *Id.*, at 118-119.
29. Ministerio de Relaciones Exteriories y Culto de Costa Rica, *Costa Rica promueve la relación entre los derechos humanos y la justicia penal internacional* (May 15, 2013), *available* at http://www.rree.

go.cr/?sec=servicios%20al%20publico&cat=servicios%20de%20informacion&cont=593¬icia=1369.

30. *Id.*

31. 2013 Report, *supra* note vii, at paras 56-57.

32. *Our Work*, Global Centre for the Responsibility to Protect: RtoP Focal Points, http://www.globalr2p.org/our_work/r2p_focal_points.

33. *Id.*

34. 2013 Report, *supra* note vii, at paras 56-57.

35. Global Centre for the Responsibility to Protect, Summary: Meeting of National Focal Points on RtoP convened by Costa Rica, Denmark and Ghana, New York, 17 and 18 May 2011 (Jun. 2011); Global Centre for the Responsibility to Protect, Meeting Summary: Second Annual Meeting of the Network of National RtoP Focal Points (Feb. 27, 2013); Global Centre for the Responsibility to Protect, Summary: Third Annual Meeting of the Network of National RtoP Focal Points, Jun. 11-12, 2013.

36. Global Centre for the Responsibility to Protect and the Ministry of Foreign Affairs of the Republic of Slovenia, Chairman's Summary: Regional RtoP National Focal Points Meeting for Europe, Apr. 10-11, 2013.*See also* Summary: Third Annual Meeting of the Network of National RtoP Focal Points, *supra* note xxxiv, at 3-4 (highlighting the role of regional bodies).

37. Global Centre for the Responsibility to Protect, Summary: Meeting of National Focal Points on RtoP convened by Costa Rica, Denmark and Ghana, New York, 17 and 18 May 2011, 2 (Jun. 2011).

38. *Id.*, at 4.

39. *Id.*, at 2.

40. Global Centre for the Responsibility to Protect and The Stanley Foundation, Policy Memo: Preparatory Workshop for the Second Meeting of the RtoP Focal Points Network 3 (Mar. 12, 2012),

41. Auschwitz Institute for Peace and Reconciliation (AIPR), Latin America Network Concept Paper, p. 1, 3, http://www.auschwitzinstitute.org/_content/Latin-American-Network-Concept-Paper.pdf [hereinafter AIPR Concept Paper].

42. *Puntos Focales establecidos para la Red Latinoamericana para la Prevención del Genocidio y Atrocidades Masivas* (Sept. 6, 2013), http://www.auschwitzinstitute.org/_content/focal-points-sept2013.pdf.

43. AIPR Concept Paper, *supra* note xxxvi, at 4-5.

44. *Id.*

45. Ministerio de Relaciones Exteriories y Culto de Costa Rica, *Comisión Costarricense de Derecho Internacional Humanitario, available at* http://www.rree.go.cr/?sec=politica%20exterior&cat=comision%20derecho%20humanitario. *See also*Meeting Summary: Second Annual Meeting of the Network of National RtoP Focal Points, *supra* note xxxiv, at 3 (describing Costa Rica's national experience of implementing RtoP).

46. *Id.*

47. Ministerio de Relaciones Exteriories y Culto de Costa Rica, *Cancillería instala la Comisión Interinstitucional para el Seguimiento e Implementación de las Obligaciones Internacionales de Derechos Humanos* (Dec. 14, 2011), http://www.rree.go.cr/?sec=servicios%20al%20publico&cat=servicios%20de%20informacion&cont=593¬icia=872.

48. S.C. Res 2117, *supra* note xii.

49. 2009 Report, *supra* note iii, at para. 58.

50. 2013 Report, *supra* note vii, at para. 22.

51. Office of the UN Special Advisor on the Prevention of Genocide (OSAPG), *Genocide Analysis Framework*, *available at* https://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf.

52. 2013 Report, *supra* note vii, at paras. 12-29.

53. Amb. Samantha Power, U.S. Permanent Representative to the United Nations, Statement at an Informal Interactive Dialogue on the Responsibility to Protect, U.S. Mission to the United Nations (Sept. 11, 2013), *available at* http://usun.state.gov/briefing/statements/214066.htm (calling RtoP a *doctrine* for "prevention"; highlighting the Arms Trade Treaty as an example of the multilateralization of efforts to prevent atrocities).

54. S. C. Res 2117, *supra* note xii, at para. 19.

55. UN Office of Disarmament Affairs (UNODA), The Arms Trade Treaty, http://www.un.org/disarmament/ATT/.

56. *Id.*

57. Nobel Peace Laureates' International Code of Conduct on Arms Transfers (May 1997), *available at* https://www.wagingpeace.org/articles/1997/05/00_nobel-code-conduct.htm.

58. Gerardo Ruiz Ramón, *Diputados Aprobaron en Segundo Debate el Tratado Sobre Comercio de Armas*, La Nación (Sept. 3, 2013), *available at* www.nacion.com.

59. Arms Trade Treaty, Object and Purpose, Apr. 2, 2013.

60. *Id.*

61. *Id.*, Arts. 2-4.

62. *Id.*, Art. 2.

63. *Id.*, Art. 6.

64. *Id.*, Art. 7

65. *Id.*, Art. 8

66. *Id.*, Art. 9

67. *Id.*, Arts. 11-13.

68. *See e.g.*, David Kenner, *What Russia Gave Syria*, Foreign Policy (Jun. 21, 2012), *available at* http://www.foreignpolicy.com/articles/2012/06/21/what_russia_gave_syria; Jonathan Saul, *Exclusive: Russia Steps Up Military Lifeline to Syria – Sources*, Reuters (Jan. 17, 2013), *available at* http://www.reuters.com/article/2014/01/17/us-syria-russia-arms-idUSBREA0G0MN20140117.

69. 2013 Report, *supra* note vii, paras. 17-29.

70. Geneva Declaration Secretariat, Global Burden of Armed Violence, Chapter 5 Summary 2 (2011), *available at* http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011-Ch5-Summary.pdf.

71. Geneva Declaration Secretariat, Armed Violence Prevention and Reduction: A Challenge for Achieving the Millennium Development Goals: Background Paper 9 (2008), *available at* http://www.genevadeclaration.org/fileadmin/docs/Geneva-Declaration-Millennium-Development-Goals.pdf.

72. Global Burden of Armed Violence, *supra* note lxiv, at 2.
73. Small Arms Survey, Yearbook 2012 5 (2012), *available at* http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2012/eng/Small-Arms-Survey-2012-Intro-EN.pdf.
74. Arms Trade Treaty, *supra* note liii, Art. 22.
75. 2012 Report, *supra* note vi, at para 18.
76. Oscar Arias Sanchez, President of Costa Rica, Remarks Before the 61st Session of the U.N. General Assembly (Sept. 19, 2006) (author's own translation from the Spanish) (on file with author).

The Grey Zone

Brazil´s Responsibility while Protecting: a failed attempt of Global South norm innovation?

Andrés Serbin and Andrei Serbin Pont

Brazil´s Responsibility while Protecting (RwP) note, presented in 2011, put the South American nation under the international spotlight as it tackled a crucial ongoing debate inside the UN system. Launched in the prime of recent Brazilian foreign policy, at the end of its stage at the UN Security Council as a non-permanent member, with a sustained history of commitment to international peace keeping operations and with prospects of becoming an important global player in the international arena, the note grasped the attention of policy makers, academia and civil society practitioners. But, after 2012, it was followed with silence from Brazil, and no further development was made on what many analysts and decision-makers considered a conceptual advancement in the Responsibility to Protect (RtoP) debate from the Global South.

Many reasons are attributed to Brazil´s lack of follow up engagement of the initiative. RwP stirred the global debate on RtoP and contributed to foster reactions on the issue by both Western powers and other Global South emerging powers. However, the RwP initiative events quickly went from being the focus of attention to falling gradually into oblivion. While valuable contributions were made with RwP, the opportunity to position Brazil as a global rule innovator or norm entrepreneur vanished, not only because of the rejection of the Western powers or the different priorities and interests of some of the mayor players from the Global South, but because the initiative was dropped by the ones who started it.

This chapter is aimed at explaining RwP, its contributions, its criticisms and how in the end it was a lost opportunity to promote norms from the Global South in the international debate. It also questions Brazil´s role as a reliable norm entrepreneur or rule innovator, and whether this country can actually become a global player within the emerging international system or if it is limited by the shortcomings of its own foreign policy exertion tools.

From Responsibility to Protect to Responsibility while Protecting (RwP)

In November 2011, in the context of a failed international intervention in Libya based on a resolution inspired by RtoP language, Brazil launched its Responsibility while Protecting (RwP) note. Seen by specialists as Brazil's first serious effort at norm entrepreneurship on a major issue within the United Nations system, it was in part a response to Resolution 1973 that led to military operations (Operation Unified Protector) in Libya. Recent events in this country, especially the actions of the United Kingdom, the United States and France (the P-3), that went beyond the RtoP mandate outlined in Resolution 1973 and led to a regime change operation in Libya provided the context for Brazilian contestation on the issue of international intervention and the use of force under UN mandate. As Gareth Evans points out:

> *"…perception by a large number of countries—led by the so-called "BRICS" (Brazil, Russia, India, China and South*

> *Africa)—that the major Western powers, as the NATO-led intervention in Libya went on, overreached the civilian protection mandate they had been given by the Security Council by demanding, and achieving, nothing less than the complete destruction of the Gaddafi regime*" (Evans, 2014: 19-20).

Briefly introducing the concept and the perceptions behind it, then Brazilian Minister of Foreign Affairs at the time, Antonio Patriota, wrote in an article for the Brazilian newspaper *Folha de Sao Paulo,* in anticipation of the note on RwP presented later at the UN, that:

> "*…for Brazil, it is fundamental that when exerting the Responsibility to Protect through the use of the military, the international community must not only hold the corresponding multilateral mandate, but also observe another precept: The Responsibility while Protecting. The use of force must only be contemplated as a last resort. (…) Burning phases and precipitating the recourse of coercion is an attempt against the "rationale" of international law and the UN Charter. If our greater objectives included the decisive defense of human rights in their universality and indivisibility, as consecrated in the 1993 Vienna Conference, Brazilian actions must be defined case by case, under rigorous analysis of the circumstances and the means that are most effective to deal with each specific situation*" (Patriota, 2011).

Later that month, on September 21st 2011, President Dilma Rousseff stated during the 66th General Assembly in the United Nations, what would be the formal international presentation of the Responsibility while Protecting:

> "*We vehemently repudiate the brutal repression of civilian populations. Yet we remain convinced that for the international community, the use of force must always be a last resort (….) Much is said about the responsibility to protect; yet we hear little about responsibility while protecting. These are concepts that we must develop together. For that, the role of the Security Council is vital - and the more legitimate its decisions are, the better it will be able to play its role.*"[1]

On November 9th of the same year, the Brazilian Permanent Representative at the UN, Ambassador María Luisa Viotti, presented letter with a concept note – "Responsibility while Protecting: Elements for the Development and Promotion of a Concept"[2] during the 12th Security Council Debate on the Protection of Civilians in Armed Conflict. As noted by Sainz-Borgo, it is important to stress that the note was addressed to the Secretary General, while Brazil was still occupying its seat at the Security Council (SC) (together with the other BRICS members), probably with the aim of moving the debate to the General Assembly even after Brazil left the SC (Sainz-Borgo, 2012: 194-195).

As summarized by Garwood-Gowers, the document contained two main features. First, it outlined several criteria for the Security Council to consider when deliberating over the use of force for civilian protection purposes. These included principles of force as a last resort only, proportionality and likelihood of success. The second significant feature was a call for the Security Council to establish monitoring and compliance mechanisms for assessing the manner in which resolutions are interpreted and implemented. This was a direct response to concerns over the way NATO interpreted resolution 1973 in Libya. Overall, RwP can be seen as an attempt to build a bridge between the West and the Global South, and particularly RtoP rejectionists like Russia and China. As a concept RwP was intended to complement, rather than replace, RtoP (Garwood-Gowers, 2013: 34).

Rodrigues points out that there were conjuncture and structural motivations for the launching of the RwP initiative by Brazil. On the conjuncture side he mentions the manipulation of the Libyan intervention by the P-3 and the concern about the possible application of RtoP in the developing situation in Syria, while the structural motivations were related to the difficulties of the implementation of the third pillar of RtoP as an international concern and to Brazil´s constitutional commitment to human rights as part of its domestic agenda (Rodrigues, 2012: 171-173).

In general terms, the note expressed its support for the principle of RtoP but also its discontent over its recent use, as mentioned above. The note refers to paragraphs 138-139 of the World Summit Outcome Document[3] on the issue but not to the principle's original formulation by the International Commission on Intervention and State Sove-

reignty (ICISS).[4] Criticized for being redundant in some aspects as it repeated many of the points of the ICISS report, the RwP note was innovative in its sixth paragraph where it calls for the strict political and chronological sequencing of RtoP's three pillars,[5] and establishes a conceptual distinction between collective responsibility and collective security. The note, focused on decision-making procedures and accountability mechanisms, was in tune with a general concern by the international community on the need to deepen the reflection and the debate about the building of rules and procedures – particularly juridical and political – for the implementation of RtoP (Rodrigues, 2012: 176-177).

Historically, humanitarian intervention has been a complex issue for Brazilian foreign policy makers, and with Brazil´s increasing participation in global debates, it became a key issue it had to face. Split between the non-interventionism and sovereignty principles and the need to protect human rights, especially in the face of mass human rights violations such as the ones witnessed in Srebrenica, Somalia and Rwanda, Brazil had to carefully analyze its path in the global debate growing around the issue of civilian protection, moving from the adherence to the principle of "non indifference" promoted in previous years to an apparently more concrete and operationalized notion of the "Responsibility while Protecting" (RwP).[6] In this regard, from the perspective of international law, Brazil made an effort to separate two trends of International Humanitarian Law in the proposal – the protection of civilians and the use of force in military operations (Sainz-Borgo, 2012: 200-201). The concept aimed at reinforcing the prioritization of preventive mechanisms, increasing prudence in its application, and supporting accountability measures when the Security Council decides to use force (Rodrigues and de Souza, 2012).

The main contribution of the RwP note was its attempt to operationalize the RtoP concept and that it established a set of guidelines to orient the Security Council and other involved states in contemplating and setting up an RtoP-based intervention:

> *i) Just as in the medical sciences, prevention is always the best policy. It is the emphasis on preventive diplomacy that reduces the risk of armed conflict and the human costs associated with it;*

ii) The international community must be rigorous in its efforts to exhaust all peaceful means available in the protection of civilians under threat of violence, in line with the principles and purposes of the Charter of the United Nations and as embodied in the 2005 Outcome Document;

iii) The use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter of the United Nations, or, in exceptional circumstances, by the General Assembly under its Resolution 377 (V);

iv) The authorization for the use of force must be limited in its legal, operational and temporal elements. The scope of military action must abide by the letter and the spirit of the mandate conferred by the UNSC or the UNGA, and be carried out in strict conformity with International Law, in particular International Humanitarian Law and the International Law of Armed Conflicts;

v) The use of force must produce as little violence and instability as possible. Under no circumstances can it generate more harm than it was authorized to prevent;

vi) In the event the use of force is contemplated, action must be judicious, proportionate and limited to the objectives established by the Security Council;

vii) These guidelines must be observed throughout the entire length of the authorization, from the adoption of the resolution to the suspension of the authorization by a new resolution;

viii) Enhanced UNSC procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting;

ix) The Security Council must ensure the accountability of those to whom authority is granted to resort to force".[7]

Within this framework, Brazil´s RwP proposes to complement RtoP by focusing on a sequencing of the three pillars:

1) Pillars of RtoP "*must follow a strict line of political subordination and chronological sequencing*",

> 2) All peaceful means must be exhausted, therefore a "*comprehensive and judicious analysis of the possible consequences of military action*" must take place before considering the use of force,
>
> 3) Only the Security Council can authorize the use of force in accordance with Chapter VII of the UN Charter, or "*in exceptional circumstances, by the General* Assembly*, in line with its resolution* 377 (V)*"*,
>
> 4) Such authorizations of the use of force must "*be limited in its legal, operational and temporal elements*", and the enforcement must remain true to "*the letter and the spirit*" of the mandate,
>
> 5) "*enhanced Security Council procedures are needed*" in order to ensure adequate monitoring and assessment of the interpretation and implementation of the concept;
>
> 6) The Security Council is also obliged to "*ensure the accountability of those to whom authority is granted to resort to force*".[8]

Nevertheless, Pasarelli argues that Brazil´s RwP note was only innovative in its terminology and in its attempt to consolidate a fragmented discussion (Pasarelli, 2012). According to the author, the demand for criteria for the use of force, a key aspect of RwP, was not new. Overall, RwP´s guidelines for implementation of Pillar III were a consolidation of existing principles and criteria under a single expression. A first example is that the RwP note stated that the "*use of force must be preceded by a comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis*" which has been previously highlighted by international, policy-makers and academics (Pasarelli, 2012: 80). In stating "*l[I]n exercising its collective responsibility, the international community should be careful not to provoke more instability than the one it is seeking to limit or to avoid*" it evokes the notion of "Do no harm" that was already included in the ICISS[9] discussions as well as the concept of proportionality.[10] The need for UNSC to approve the use of force as stated in the RwP note is already clear in the UN Charter, and the concept of accountability is also included in the ICISS report.[11]

However, Brazil´s note marked a departure from its traditional posture on the international debate by advancing a new concept that contested the understanding of sovereignty.[12] Also, it is a rare example of Brazil advancing concrete initiatives that contribute to its aspiration of becoming a possibly constructive member of the UN Security Council. In any event, it was a first Brazilian attempt to act as a "norm entrepreneur" or "rule innovator" at the United Nations.

Without going in further detail on the contents of RwP broadly debated and analyzed by other authors, the sudden reaction of Brazil at the moment of ending his stage as non-permanent member of the Security Council, and the initial full support by President Dilma Rousseff to the initiative at the UN should be seen both as part of an initiative addressed to the nation members of the UN in an attempt to led the country on the path of a long-time aspiration – becoming a legitimized global player and, eventually, contributing to the reform of the UN system and obtaining, within its framework, a permanent seat at the UNSC, and as a response to an initiative led personally by the Minister Antonio Patriota with the support of the President but without any apparent broader domestic consultation.[13]

Following this process, the only organized UN dialogue on RwP thus far was an informal discussion at the UN, coordinated by the Permanent Mission of Brazil on February 21, 2012. The consensus was that RwP was welcomed as a means of enhancing RtoP's implementation, but RtoP's framework, as set out in the World Summit Outcome Document, was not to be renegotiated (Prawse, 2014: 205).

Responsibility while Protecting: The Criticisms

Stuenkel notes that the initial reception of RwP in the West was marked by skepticism, while the reaction in the Global South "*has been far more muted that in the West*" (Stuenkel, 2013a). However, even if RwP did not receive overwhelming support upon introduction, there has been a generally positive response to the proposal over the last couple of years. Obviously, Western states have overall been less supportive of RwP than non-Western states, who are more wary of intervention (Prawse, 2014: 203).

The stronger criticisms and rejection came from the Western powers and its capitals – Washington, Berlin, Paris and London.

One of the main criticisms was about conceptual differences and the lack of conceptual clarity of RwP (Benner, 2013). German UN Ambassador Peter Wittig stated that the Brazilian approach lacked "*a precisely defined concept of its own*" as well as criticizing the "*prescription of a strict chronological sequencing, the mandatory exhaustion of all peaceful means, and the introduction of 'exceptional circumstances' as an additional qualifying trigger*" for the use of force. Overall Wittig considered that the RwP concept "*limits the scope for timely, decisive and tailor-made solutions to situations of extreme gravity*".[14] On a more operational and political perspective, the United States was critical of the "*higher thresholds for the legitimacy of military intervention, such as the requirement that [RtoP's] three pillars follow a strict line of political subordination and chronological sequencing.*" Even if the US agreed with RwP's notion that "'*prevention is always the best policy' and [that] preventative diplomacy needs to be strengthened,*" Washington highlighted two of the elements of RwP with which it disagrees. First, the United States argued that it was a mistake to "*equate 'manifest failure' with strict chronological sequence.*" There should instead be a "*comprehensive assessment of risks and costs and the balance of consequences*" (Prawde, 2014: 2005) when making decisions, rather than just "'*temporal' considerations.*" Second, the United States disagrees with the idea that in "*circumstances where collective action is necessary, diplomacy should be considered 'exhausted*" (Prawde, 2014: 2005).

As argued by Alex Bellamy in his chapter in this volume, conceptual criticisms, particularly from Western countries, came additionally from RwP emphasis on "sequencing" the use of Pillars I, II and III, in a Brazilian effort to respond to the Global South reluctance to accept external intervention, arguing that the use of force should be the last resort in a situation when the Security Council face the escalade of any of the four crimes considered by RtoP *vis a vis* the incapacity of the State to deal with it.

The second criticism from the West was that the RwP note was a sort of "tit-for-tat" response to the Libyan RtoP intervention, as it showed a late remorse for supporting it.

But perhaps the most revealing negative reaction by the Western powers related to the Brazilian proposal was, as point out by Benner, the one that:

> "*...goes deeper and has to do with how the Euro-Atlantic established powers see the process of global norm evolution. Political elites and academics alike mostly argue that norm entrepreneurship is (and as some would even add should be) the domain of the West. There is little room for agency of non-Western actors in the stages of the "norm cycle". Advocacy for a norm, so the argument goes, originates in the West (from governments or NGOs). A norm is then codified in an international forum at the initiative of Western powers. After that, "global norm diffusion" and the implementation of the norm follows. During this process, the content of the norm remains unchanged. Non-Western countries can only decide whether they want to implement or reject the norm (...) In these models, there is little space for non-Western norm entrepreneurs who seek to shape a particular norm*" (Benner, 2013: 6).

Within this framework, notwithstanding the imperfections and flaws of RwP, one of the main reasons for its rejection by the Western powers seems to be the fact that Brazil was aspiring to assume a role of norm entrepreneur which is usually restricted to the West.

Another source of criticism came with regards to the lack of consultation with its regional neighbors, which Brazilian foreign policy had portrayed as being representative of yet did not engage with in an open dialogue on the issue of RtoP, humanitarian intervention and the development of the RwP note. In part this may be the result of Brazil´s differentiated engagement, in which it behaves differently in different spheres of the international system, or as Federico Merke puts it: "*Brazil appears as a conservative state in the region but a reformist in the world, especially in regards to the role of international organisms. This reformist agenda seems to be channeled through its partners in BRICS rather than UNASUR*" (Merke, 2014: 8). In this regard, some analysts argue that RwP gave Brazil the opportunity of becoming a key protagonist as a Latin American voice in the promotion of human rights at the international level, as other regional actors were gradually displaced from a central role on this issue. While Chile - a historical

"champion" of RtoP – lost momentum during the 2005-2010 presidential period, giving less attention to the issue; México – one of the other key supporters of RtoP – exited the international arena due to domestic priorities,[15] and Argentina – a staunch supporter of human rights as part of its foreign and domestic policy – was leaning towards a Bolivarian prone skepticism, Brazil seized the opportunity to raise its profile as an international human rights promoter and as a new international rule innovator (Rodrigues, 2012: 183). In any event, in launching the RwP note, Brazil didn´t resort to its apparent regional leadership in Latin America as it happened with the creation of UNASUR and CELAC and didn´t build expressly a regional support for its initiative. Instead, it seemed to present the note with an eye on playing a global role and receiving the support of the BRICS as a Global South player which wouldn´t disdain a UN reform that opened the possibility for a permanent seat at the Security Council, an aspiration which was not necessarily shared by most of the Latin American countries and particularly, its closest trade partner and neighbor – Argentina.

Nevertheless, as shown in some of the chapters of this issue, RwP received initial support from a broad spectrum of Latin American countries – from the traditional champions of RtoP such as Argentina and Guatemala to radical skeptics such as Bolivarian Venezuela. The *ex post facto* alignment of several Latin American countries seems to respond more to an automatic regional solidarity and the identification with the Brazilian proposal rather than to a building up of consensus and support by Itamaraty. In this regard, on the regional level, it is difficult to assess how the initiative resonated in such organizations as MERCOSUR or UNASUR, not to mention the case of the already polarized OAS in terms of human rights and the reform or even the rejection and denunciation of the Inter-American Human Rights System (IAHRS) by members of the Bolivarian Alliance (Anaya and Saltalamacchia, 2013).

Also, though including aspects of prevention and accountability, Brazil did not engage with civil society in the elaboration of the note, being that civil society movements had been a major component in promoting and advocating for aspects of accountability and strengthening mass atrocity prevention capabilities as key elements in RtoP principle (Serbin and Rodrigues, 2011). In this regard, it should be noted that while the Northern NGOs, active in New York and Geneva, reacted quickly

to RwP and were involved in the interactive dialogue that followed the launching of the initiative, the role of Brazilian and Southern NGOs was also clearly a *ex post facto* involvement (Hamann and Muggah, 2013).

Notwithstanding the generalized sympathy to the initiative, the fellow members of the BRICS also reacted to RwP in different ways. Initially, China and India "welcomed" RwP, and Russia committed itself to "*participat[ing] constructively in developing [the] idea*" of RwP (Prawse, 2014: 205). Yet China and Russia were also skeptical, since Brazil´s RwP contained an endorsement of the need to intervene in grave cases. Fellow emerging powers India and South Africa had little to say on the RwP initiative even if the IBSA group signaled stronger interest in the concept and seemed open to suggestions that this bloc countries get together to further promote and develop the concept (Benner, 2013: 8-9).

It is important to note, that all five BRICS members, as aptly noted by Garwood-Gowers (2013) share similar but not identical perspectives on RtoP, as there were significant differences rooted in distinct historical, cultural and values experiences, as well as differentiated national interests. While some of them were open to pillars I and II they also were cautious about coercive pillar III measures. The cautious approach or the open reluctance over pillar III implementation reflected a deeper contestation over RtoP's content, scope and implications for international order, and the lack of a monolithic consensus in the international community, particularly among the Global South, with regards to external intervention and the use of force. This contestation reflected both pragmatic and normative concerns over pillar III, mostly related to the risk of abuse by powerful Western states, the emphasis on the role that regional organizations could play, the scepticism about the efficacy of military force, and the preference for non-coercive civilian protection measures, including dialogue. Overall, this contestation was associated with a pluralist resistance to an assertive, liberal vision of RtoP.

After Brazil´s RwP note, China followed suit with the presentation of a document on "Responsible Protection" (RP), which was part of the display of criticisms and contestation from the Global South to the norm,[16] but it was clear that there was no monolithic response of support by the BRICS bloc. However, the different nuances expressed in their criticisms or the full rejection by the members of the bloc of the

RtoP norm, and particularly pillar III, after Libya, reflect the disparity of positions and national interests by the members of the BRICS, but also marked an important step in the terms of the contestation of a global norm mostly promoted by the Western countries, as a relevant dimension of the reconfiguration of power relations in the international system. Within this context, Brazil's RwP and China's RP initiatives represented more restrictive interpretations of pillar III.

However, the BRICS' positions on Syria must be assessed in two separate phases. The first– from April to November 2011 – saw all five members assume a unified stance in opposition to proposed Western responses to the crisis. In the second phase – from December 2011 onwards – the IBSA states shifted their positions, gradually becoming more receptive to proposed civilian protection measures. Instead of continuing to act as a bloc the BRICS split into two sub-groups: on one side, Russia and China remained strongly aligned in its opposition to any coercive measures against Syria, while on the other, the IBSA states adopted more flexible, though not always identical, stances towards proposed international action (Garwood-Gowers, 2013: 24).

Divergences between the Russian and China position with that of IBSA states can be explained by numerous factors. First, national interest of BRICS do not coincide being that Russia's sustains a strong opposition to intervention due to strategic interests in Syria and China´s strategy is based on alignment with Russia in the Security Council, especially after the Libyan intervention while IBSA countries have less at stake in the case of collapse of the Syrian regime. A second factor has been the differing internal governance structures of the BRICS as IBSA states have a democratic nature and the Syrian crisis had increased domestic media and civil society pressure for international action, while these internal pressures are non-existent or less relevant in China and Russia. Thirdly, IBSA states are seeking to gain permanent seats in the Security Council and therefore need to establish credentials, assume more relevant roles in international affairs, and obtain the support of Western countries while for China and Russia these factors do not influence their position and they can afford to pose a strong opposition to Western initiatives. Overall, these factors help to explain why the IBSA states have gradually moved away from the Russian and Chinese positions on Syria (Garwood-Gowers, 2013: 32-33).

RwP: Officially pronounced dead?

After the discussion organized by the Permanent Mission of Brazil on RwP in February 2012 had generated an unusual amount of interest and debate on a global scale, the general expectation was that Brazil would continue to prioritize RwP in its multilateral agenda. The concept had gained substantial backing from several traditional RtoP supporters and was being debated in multiple capitals. However, as observed by Stuenkel, February 21st 2012 turned out to be the apex of Brazil´s activism (Stuenkel, 2013b).

Before that date, RwP had benefitted significantly from Antonio Patriota's personal support related to his personal interest in issues of sovereignty and intervention, and the former Foreign Minister not only contributed to the drafting and presentation of the RWP note but frequently spoke about the concept both in Brazil and abroad. In the months following RwP's presentation, the concept gained currency in UN circles, setting the agenda on a major international peace and security challenge. In many ways, RwP symbolized the very strategy Brazilian foreign policy-makers aspired to pursue: it acted as a bridge-builder, mediator and consensus-seeker through thought leadership (Stuenkel and Tourinho, 2014: 18-19).

Yet after February 2012, the concept lost momentum within UN circles and diplomats. While RwP continued to be mentioned during debates, there was no longer the sense that Brazil prioritized the matter. As some analysts pointed out, Brasilia "*refrained from issuing an official follow-up note to deal with some of the most convincing critics. In some ways, this was problematic: Brazil had distanced itself from the rigid sequencing approach that appeared in the original concept note, but many commentators continued to read the only document available and believed that Brazil's official position has not changed. It appeared that the Brazilian Government had decided not to turn RwP into the foreign policy signature issue of Dilma Rousseff's first term. The Brazilian President mentioned, but declined to explain the issue better during her opening speech of the UN General Assembly in September 2012 (…) In the same way, the Brazilian President did not mention the RwP concept during her opening speech at the UN General Assembly in September 2013*" (Stuenkel and Tourinho, 2014: 19).

There are several interpretations to explain Brazil´s retreat from the RwP initiative. One of them relates this retreat to internal divergences within the Brazilian government, as the initiative was launched without extensive consultation with different domestic sectors and was mostly promoted by Patriota himself, who persuaded President Rousseff to further advance the initiative. Consequently, once he left the post of Minister of Foreign Affairs, even if moving to the UN Mission, his position was weakened. The exit of Patriota as Foreign Minister and his replacement with a colleague with a lesser predilection for security issues, coupled with President Rousseff's notorious disinterest in foreign policy, especially in an election year, appears to have doomed the RwP initiative (Kenkel, 2014: 22-23). The second one relates to the resistance and the criticisms that the initiative confronted once presented, and the lack of preparation of Brazilian diplomats to deal with them. As pointed out by Benner "*Brazil seems to have been unprepared for the criticism and pushback after it launched the RwP concept. (…) Engaging in the business of norm entrepreneurship means taking risks and dealing with setbacks and criticisms - especially in a charged and contested political environment such as the debate on intervention and the use of force*"(Benner, 2013: 8-9). Another plausible interpretation – related to the previous one – is Brazil´s foreign policy cautious approach to controversial international issues and the associated risk aversion of its decision-makers. In an eventual balance of costs and benefits of trying to become a global player fostering the debate on a global norm – which touched such a sensitive issues as intervention and use of force–, the reaction by Western powers and the lack of a united support from the Global South may have become a deterrent for the Brazilian initiative.

Yet, even if the RwP concept was an important discussion starter and a catalyst, raising some of the concerns of the Global South regarding intervention and the use of force and opening the debate with the Western powers, at the time when the discussion should have started to tackle the serious open questions, Brazil seemed to retreat from the initiative.

Nevertheless, notwithstanding Brazil´s retreat from a continued support and promotion of the initiative, some aspects of the RwP proposal remain relevant. Stuenkel and Tourinho point to three aspects that "*are worth highlighting. First, the proposal was the first concrete articulation in at least a decade about the further specification and regulation of the*

use of military force under Chapter VII by the Security Council. On this issue the proposal goes beyond situations in which RtoP is invoked, and while the Council is certainly sovereign in its decisions, tighter normative oversight may be in order to increase global consensus about its Chapter VII activities. Second, as the UN membership continues to debate reform of the working methods and procedures of the Security Council, RwP gives some concrete suggestions on the need for greater transparency and accountability in the workings of the Security Council. Third, the question of internal hierarchy and lack of sufficient information within the Council (between the permanent and elected members) is implicit in RwP's claims for greater transparency and information, and for the ultimate authority to remain with the Council as an institution (and not just of some of its members)". Adding that, *"In this sense, while RwP is an important stand-alone diplomatic initiative to adjust current international practices on RtoP, it is also part of a broader and more long-standing debate about the use of force as authorized by the UN Security Council. Brazil might have refrained from pushing for its broad acceptance, but if the UN Security Council is to remain legitimate as the centrepiece of global order in relation to issues of international peace and security, at least some elements of the proposal will ultimately have to be revisited"* (Stuenkel and Tourinho, 2014: 19-20).

As noted by Kenkel, despite the efforts of civil society and the academy to revitalize the process, it appears that proponents of prominent participation by states from the global South in the RtoP conversation will need to look beyond the "Responsibility while Protecting". Nevertheless, during its short journey, the RwP paper went a surprisingly long way towards laying bare the basic tenets of discord over RtoP's implementation, as well as providing the spaces necessary for future debate. It is to be hoped that in the future the domestic and international contexts will intertwine to allow Brazil to play its crucial role as a global mediator on issues of RtoP and intervention (Kenkel, 2014). However, RwP is unlikely to have a lasting impact on the debate on RtoP without a powerful and credible sponsor like Brazil (Stuenkel, 2013b). As a result, what was once a promising bridgehead between North and South has perhaps met with a premature end (Kenkel, 2015: 9).

Nevertheless, to end on a positive note, with all its drawbacks the RwP initiative illustrate the potential for a growing aspiration of an emerging

Global South power to assert its own normative preferences in the global agenda, as an emerging norm entrepreneur or rule innovator. This aspiration increasingly demands from the Western powers to accept, adapt and accommodate to a set of non-Western approaches and perspectives on sovereignty, intervention and global governance, within a changing international order. However, in the case of Latin America it shows once again, that even having developed, as a region, a substantial background and political capital as rule innovator, without a consistent leadership and a unified regional approach changing existing global norms can become a difficult task.

NOTES

1. Statement by H.E. Dilma Rousseff (2011). President of the Federative Republic of Brazil, at the Opening of the General debate of the 66th. Session of the United Nations General assembly, New York, 21 September 2011, http://www.un.in/brazil/speech/11d-Pr-Dilma-Rossef-opening- of-the-66th-general-assembly.html
2. Letter dated November 9th 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary General, general assembly, Sixty-sixth Session agenda items 14 and 117, http://www.globalr2p.org/media/pdf/Concept-Paper_RwP.pdf
3. United Nations General Assembly, '2005 World Summit Outcome', United Nations Document A/60/1, 16 September 2005, paragraphs 138-139.
4. Permanent Mission of the Federative Republic of Brazil to the United Nations. "Responsibility while protecting: elements for the development and promotion of a concept", 9 November 2011, United Nations Document A/66/551-S/2011/701, accessed 23 July 2015, http://cpdoc.fgv.br/sites/default/files/2011%2011%2011%20UN%20conceptual%20paper%20on%20RwP.pdf, paragraph 3.
5. Ibidem, paragraph 6.
6. As noted by Wojcikiewicz Almeida "… the ambiguity of the concept of non-indifference, the difficulty of translating it into tangible actions

capable of guiding foreign policy, and the desire for a more active role in decision-making processes under the UN, together led Brazil to create what appears to be a new label for an already well-established idea (…) This 'new' notion is 'Responsibility with Protection' (RwP) (Wojcikiewicz Almeida, 2013:10).

7. Permanent Mission of the Federative Republic of Brazil to the United Nations. "Responsibility while protecting: elements for the development and promotion of a concept", 9 November 2011, United Nations Document A/66/551-S/2011/701, accessed 23 July 2015, http://cpdoc.fgv.br/sites/default/files/2011%2011%2011%20UN%20conceptual%20paper%20on%20RwP.pdf
8. Ibidem.
9. ICISS, 7.26
10. ICISS, 7.27
11. ICISS, 7.29
12. As noted by Benner "The RWP initiative is a major departure in Brazilian foreign policy in two respects. First, it is one of the rare cases where Brazil has forcefully advanced a new concept related to a contested key aspect of the global order – the understanding of sovereignty (…) Second, until 2011 Brazil had mostly pursued a skeptical if not outright negative course vis-à-vis the concept of a RtoP. The RWP concept, however, marks a clear departure from this position because it acknowledges the responsibility to intervene, in certain circumstances militarily", in Benner 2013: 2.
13. RwP had benefitted significantly from Antonio Patriota's personal support, and the former Foreign Minister frequently spoke about the concept both in Brazil and abroad. In September 2012 President Dilma Rousseff referred to RwP as a necessary complement to R2P (Stuenkel and Tourinho, 2014: 15).However, as noted by Rodrigues (2012: 174) "*la formulación de la RwP ha seguido el patr*ón clásico de la diplomacia brasileña: ha sido elaborada a partir del estado brasileño y centrada en *Itamaraty, sin ningún proceso de consulta específico con la sociedad civil del país o de la región*".
14. Informal discussion on "Responsibility While Protecting" Hosted by the Permanent Mission of Brazil, New York, 21 February 2012, Remarks of Ambassador Dr. Peter Wittig, Permanent Representative of Germany to the UN, www.globalr2p.org/resources/RwP.php

15. Arturo Sotomayor argues, interestingly enough, that "Mexico's position vis-à-vis the RtoP debate can be described as "domestically instrumental"; it instrumentally and conveniently used the international framework to induce domestic change and justify national policies", adding that "Mexico is effectively split into two irreconcilable domestic agendas that impede and constraint any norm entrepeneurial role overseas. On the one hand, Mexico has been traditionally supportive of human rights initiatives and has used RtoP concepts to frame domestic debates (…) domestically, Mexico's RtoP/human rights agenda is more strictly controlled by diplomatic bureaucrats in the Foreign Ministry. On the other hand, its security agenda is dominated by military (specifically Army) interests, which have been traditionally opposed to RtoP proposals on intervention (…) these two domestic positions have not been reconciled in a coherent and consistent way. As a result, Mexico's foreign policy, especially as it pertains to the RtoP debate, is inherently contradictory, disjointed, and confused. The Mexican strategy has thus consisted of picking and chosing between different notions entailed in RtoP debates, often favoring a human rights and preventive issues at the expense of the broader debate on intervention. The strategy might have worked in the early 2000s, when democratization dictated an emphasis on human rights. But increasingly, Mexico's RtoP policy is undermined by its own national security agenda. Until Mexico resolves its domestic contradictions, it will not be able to play a norm entrpeneurial role at the UN or in RtoP circles" (Sotomayor, 2014: 2;20).

16. As noted by Laskaris and Kreutz (2015: 154) "In October 2013, during a closed conference organized by the China Institute of International Studies, China's foreign minister presented the "Responsible Protection" to a group of experts mainly coming from BRICS states (Zongze, 2012). According to this, six principles are to be adhered to: the object of an intervention should be clear and people of the target country should be protected by all means; the legitimacy of the protection must be established; the means of protection must be limited; the purpose of protection must be clear; the "protectors" should be responsible for the post-intervention and post-protection reconstruction of the state concerned; and the UN should establish mechanisms of supervision, outcome evaluation and post factum accountability to ensure the means, process, scope and results of protection.

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Ecuador and the Responsibility to Protect: A case for constructive engagement

Dolores Bermeo Lara

Introduction

In order to fully understand the Ecuadorian government's position towards the Responsibility to Protect it is important to start by pointing out some characteristics of the country´s political context.

The concept of the Responsibility to Protect from genocide, war crimes, ethnic cleansing and crimes against humanity was approved by the General Assembly of the United Nations in September 2005, as part of the *2005 World Summit Outcome* (A/RES/60/1).[1] In April of the same year, the president of Ecuador, Lucio Gutiérrez, left the presidential palace pressed by the protests against his administration, and the National Congress, acting under the constitutional norm of

"*abandono del cargo* ", put an end to his presidency.[2] As a result, the Congress proclaimed Vice President Alfredo Palacio as the country's new President. This was the closing event of one of the most convulsive decades the country had lived through since the instauration of democracy in 1979.[3]

As a result of the political mobilization that lead to the appointment of the new President and general political instability, a new political movement called *Alianza País* was born. Its leader, Rafael Correa, won the presidential elections on 26 November 2006 and took office in January 2007, directing, up to the present, the process of the so-called *Revolución Ciudadana* (Citizen´s Revolution).[4]

Since then, Ecuador has gone through a vast transformation in all aspects of its political, economic, social and institutional life in the context of a process based on the idea of the "*Socialismo del Buen Vivir*" (Socialism of Good Living) and on the Constitution. This process has been developed and implemented through the documents that represents the political position of the government, called "Plans": *National Plan of Development 2007-2010, National Plan for the Good Living 2009-2013* and the *National Plan for the Good Living 2013-2017.*[5]

In the eight years since this new political and economic model was established in the country, it would be expected that Ecuador's foreign policy position would be consistent, including its position regarding the Responsibility to Protect. Given that the official information about the Ecuador's political position on the Responsibility to Protect is limited, the purpose of this article is to analyze that position, through an observation of the political guidelines drawn from the country's Constitution, the National Plan for Good Living 2013-2017 and, mainly, through a review of the statements of the Ecuadorean delegation at the General Assembly's annual RtoP dialogues.

Ecuador and the Responsibility to Protect

According to the country´s current Constitution, Ecuador is a State of rights and justice, Article 1 of the Constitution state that: "*Ecuador es un Estado constitucional de derechos y justicia, social y democrático, soberano, independiente, unitario, intercultural, plurinacional y laico. Se organiza en forma de república y se gobierna de manera descentral-*

izada."[6] Among the fundamental duties of the State is guaranteeing its inhabitants the right to a culture of peace, to integral security and to live in a democratic society free of corruption (art. 3 num. 8). As for human rights, they are at the core of the constitutional text, hence the relevance of international treaties on human rights:

> *La Constitución y los tratados internacionales de derechos humanos ratificados por el Estado que reconozcan derechos más favorables a los contenidos en la Constitución, prevalecerán sobre cualquier otra norma jurídica o acto del poder público. (art. 424). Los derechos consagrados en la Constitución y los instrumentos internacionales de derechos humanos serán de inmediato cumplimiento y aplicación. (art. 426).*

The *National Plan for Good Living 2013-2017* -a document that reflects the position of the government policy through twelve national objectives- reaffirms the notion of the Ecuador as a *Constitutional State of justice and fundamental rights*, established in the Constitution, and explains that this idea "lays in the center of its justification: the rights and guarantees of the people".[7] Human rights are considered "the core of the public, the very reason for having a State", and they are the "foundation of the Plan, its purpose, essence and reason for being". Simply put, human rights are a substantive part of the Plan.[8]

It is important to note that there has been a deep commitment by Ecuador to the norms of human rights and International Humanitarian Law (IHL). This is confirmed by the adoption of almost all international legal instruments in this regard.[9] In this sense and with respect to the international instruments that were pointed out by the UN Secretary-General in his report of 2013, Ecuador currently has ratified almost all of them[10] (see Graphic I).

An example of the commitment Ecuador has made with respect to the fulfillement and diffusion of the IHL, came in 2006, per Executive Order No. 1741, when the *Comisión Nacional para Aplicación del Derecho Internacional Humanitario del Ecuador (CONADIHE)* [National Commission for the Application of International Humanitarian Law of Ecuador],[11] was created with the goal to promote the cooperation between the Government and the International Organizations to reinforce the basic principles of the IHL.[12]

CONADIHE is a permanent organism consisting of the Ministry of Foreign Affairs and Human Mobility (Presidency); the Ministry of

National Defense (Vice Presidency); the Ministry of the Interior; the Ministry of Economic and Social Inclusion; the National Assembly; the General Office of the Magistrate of the State; the National Court of Justice; and the Ecuadorean Red Cross (Secretary).

Undoubtedly, the commitment to the IHL by the members of the Armed Forces is remarkable. Hence, the measures that have been taken regarding this institution are considered positive, such as the subscription of various agreements with the International Committee of the Red Cross (CICR). In 2013 the Ministry of Defense of Ecuador, the National Society of the Ecuadorean Red Cross and the International Committee of the Red Cross, subscribed the Inter-Institutional Agreement of Cooperation to promote the integration of the IHL and the principles on the use of force in the doctrine, instruction and training of the Armed Forces of Ecuador.[13]

The IHL is also considered an essential element of the defense policy of Ecuador, as established in the Political Agenda of Defense *2014 – 2017 [Agenda Política de la Defensa*]:

> *"La obligación de respetar el Derecho Internacional Humanitario (DIH), tanto convencional como consuetudinario, es de carácter estricto para el Ecuador, como Estado Parte de los Convenios de Ginebra de 1949 y sus Protocolos Adicionales, y un parámetro ineludible de comportamiento para los miembros de las Fuerzas Armadas del Ecuador. La obligación de integrar de manera permanente el Derecho Internacional Humanitario se refleja en la actualización de la formación y entrenamiento, y especialmente en la actualización de la doctrina militar conforme a las normas del DIH y los principios elementales de humanidad, de manera que las Fuerzas Armadas cuenten con mecanismos suficientes para su efectiva publicación."*[14]

With reference to genocide, war crimes, crimes against humanity and ethnic cleansing (Key aspects of the Responsibility to Protect[15]), the Constitution of Ecuador establishes that there is no statute of limitations of these actions or for the punishments for such crimes.

> *Las acciones y penas por delitos de genocidio, lesa humanidad, crímenes de guerra, desaparición forzada de personas o crímenes de agresión a un Estado serán imprescriptibles. Ninguno de estos casos será susceptible de amnistía. El hecho de que una de esas infracciones haya sido cometida por un subor-*

> *dinado no eximirá de responsabilidad penal al superior que la ordenó ni al subordinado que la ejecutó.* (art. 80).

Additionally, genocide and crimes against humanity are among the 70 new transgressions established in the Organic Comprehensive Criminal Code [*Código Orgánico Integral Penal*, COIP] effective since 10 August 2014.[16] It is important to point out the criminalization of ethnocide, which is based on cultural identity. With respect to the rules of the IHL, COIP develops in 28 articles the crimes against persons and property protected by the IHL (see Graphics II and II.a).

Overall, it can be said that according to the Constitution and the *Plan for the Good Living*, Ecuador is a State that assumes its responsibility to protect its population based on the empowerment of its society, and based on the promotion and guarantee of fundamental human rights. This responsibility was recognized in the UN Secretary-General's General Secretary's report of 2013, *Responsibility to Protect: State Responsibility and Prevention* (A/67/922-S/2013/399).

> "In Ecuador, the Constitution serves as the foundation for social protection policies and more inclusive economic growth. The adoption of a national development plan has paved the way for the promotion of inclusiveness and transparency by incorporating social actors in the development process" (para. 46).

In order to proceed with the aim of this chapter –to explain the position of Ecuador with respect to the Responsibility to Protect– and since it is not expressly mentioned in any other document of public policy, what follows is a review of the statements of the Ecuadorean Delegation at the General Assembly's annual RtoP dialogues.

Since 2009, the UN General Assembly has held six interactive dialogues on the Responsibility to Protect, based on the Annual Reports of the Secretary-General.[17] The Ecuadorean delegation to the UN has participated in three of the mentioned dialogues, conducted in 2009, 2013 and 2014.[18]

In order to understand Ecuador's position, the perspectives will be analyzed through two aspects of the concept of the Responsibility to Protect: institutional and operational.

Institutional Aspects

With regards to the institutionalization of the RtoP in the framework of the United Nations, the concept of Responsibility to Protect has not been rejected by Ecuador. On the contrary, in the debate of 2013, the Ecuadorean delegation explicitly stated: "My country recognizes that the Responsibility to Protect is intrinsic to the notion of a sovereign State". In addition Ecuador agreed on the respect of the three pillars strategy established by the Secretary-General, as it has not manifested a negative opinion regarding this point and has expressed: "*Es importante asegurar que los tres pilares sean abordados de manera balanceada puesto que cada uno de ellos se refiere a temas de gran importancia para nuestros Estados*" (Debate 2009).

However, the Ecuadorean delegation has reiterated that the concept is still in discussion and still being debated until the UN General Assembly decides otherwise (Debate 2013). For Ecuador, the recommendations of the General Secretary, like those in the Report of 2013,[19] will be accepted when an agreement is reached in the General Assembly on the following aspects:

- The definition of the Responsibility to Protect and its scope
- The manner in which the motives can be determined as sufficient to legitimize an international intervention
- The manner in which the military strength would be used, eventually and as a last resort.

Such aspects would relate to the elements that the Ecuadorean delegation has signed reiteratively, on which the concept of legitimacy of the Responsibility to Protect would be sustained:

1) The clear establishment of the motives that can be considered sufficient to legitimize international intervention.
2) The establishment of clear case-by-case support on the eventual intervention excluding the usurpation of State or natural resources.
3) The use of force should be the last possible option after having exhausted all peaceful dispute settlement mechanisms and under the exclusive authorization of the Security Council under Chapter 7.

4) There must be a clear follow up on the mechanisms that are established in the Resolution on the use of force, in order to avoid excesses as set by the Security Council.

5) There must be compliance with the provisions of the UN Charter on the way in which the military would act on behalf of the international community.

I must highlight the statement made by Ecuador about the *protection of the civil population* which was made in the context of the 6th Annual Ministerial Meeting on the Responsibility to Protect of 27 September 2013, co-hosted by the Ministers of Foreign Affairs of the Netherlands and Nigeria:

> "*Concebimos a la protección a la población civil como un compromiso racional, indeclinable y firme de la comunidad de Estados, basado estrictamente en normas internacionales y defendemos el rol de la Corte Penal Internacional como el único medio por el cual se puede terminar con la impunidad de aquellos criminales que asesinan a su propio pueblo o a pueblos ajenos por lo cual demandamos que el Estatuto de Roma sea ratificado sin demora por todos los Estados miembros de Nacionales Unidas*" [20]

Operational Aspect

This section is intended to explain the political position of Ecuador regarding the phases of the Responsibility to Protect: *early warning*, *prevention*, and *use of force*. With respect to the first two, there is no objection. What the Ecuadorean Delegation has pointed out is that "the prevention of conflicts through the use of peaceful dispute settlement is the only legal and efficacious manner of avoiding the crimes that are set forth in paragraphs 138 and 139 of Resolution 60/1 of 24 October 2005 come about", and besides, that Ecuador "firmly believes in the roles of regional and sub-regional organizations in the prevention of the aforementioned crimes" (Debate 2013).

It is important to note that regarding the use of force, the Delegation of Ecuador, initially contested the legitimacy of the Security Council to act and to adopt collective measures according with Chapter VII of the Charter.

> "*Debemos aceptar que lamentablemente el Consejo no ha sido un actor objetivo, eficaz e imparcial y que sus decisiones no han tenido la transparencia y la neutralidad deseadas. Es entonces legítimo preguntarnos si en realidad el Consejo de Seguridad en su composición actual y los mecanismos de toma de decisiones vigentes debe ser la autoridad encargada de autorizar intervenciones militares para propósitos de protección humana o si se debería antes avanzar en una reforma profunda e integral del Consejo que lo revista de legitimidad y eficacia?*" (Debate 2009)

However, this statement was eventually surpassed in the next two debates, when Ecuador asserted the role of the Security Council with respect to the adoption of collective measures. Specifically in the debate of 2013, the following was expressed:

> "The commitment of the international community to adopting the collective measures mentioned above can only come about through the Security Council and in step with the UN Charter. Any use of force outside of this framework is illegal and illegitimate, and is a mere act of aggression against a sovereign State, regardless of who commits it and the pretext used to justify it."

Besides, in the above mentioned Ministerial Meeting of 2013, the Ecuadorean delegation expressed their rejection of the unilaterally use of force without authorization of UN Security Council, and the preventive use of force as part of the concept of the Responsibility to Protect, considering that this idea contradicts the third pillar. It draws attention, since none of the official documents concerning RtoP; particularly the reports of the Secretary-General, refer to preventive use of force to protect populations or the possibility that any State can intervene without authorization.

However, it is important to recognize that the use of force in the context of the Responsibility to Protect is a complex issue that creates ambiguity and contradictions. For this reason, it is essential that the United Nations bodies in charge of the doctrinal development of the RtoP, to address the concerns that exist on the subject, in order to clarify the doubts and avoid misperceptions and misinterpretations that arise from a lack of a clear explanation.

Considerations Regarding Ecuador's Statements at the UN

It is possible to affirm that Ecuador has implicitly accepted RtoP. However, Ecuador believes it is necessary to establish the mechanisms of the application and implementation of RtoP, especially when related to the use of force to protect a population. This can be drawn from the remarks on a series of elements that are considered necessary for legitimating an intervention with the purpose of protecting the population.

Despite the theoretical, juridical and operative gaps that still involve the concept of Responsibility to Protect, Ecuador recognizes that the UN must act to protect people from atrocities. This was expressed in the debate of 2009, which pointed out that the UN must not remain in silence, but must address the perpetration of atrocities and act based on international law.

As we can observe, for Ecuador, the principles of international law, especially the ones such as non-intervention, abstention from the use of force, and sovereign equality, are of vital importance, not only for the relations between the States, but also as the axis that guide domestic policies. The principle of sovereignty in Ecuador is conceived in two dimensions: human and territorial. Evidence of this is the insertion of a plural notion of sovereignties contained in the Constitution.[21]

It can be concluded that Ecuador understands *sovereignty as responsibility* as one of the theoretical fundaments of the Responsibility to Protect. The issue which worries Ecuador, according to the statements of its delegation in the UN's, is the notion of *intervention for human protection purposes*. This component of Responsibility to Protect, is problematic, given Ecuador's concerns that these can be "interventions disguised as humanitarianism" (Debate 2013). Still, Ecuador has not denied the possibility of the use of force to protect the population whenever it is authorized by the Security Council.

Despite Ecuador's concern with the complex problem of Responsibility to Protect and the use of force, its delegation did not participate in the interactive debate of 2012, where the Report of the Secretary-General *Responsibility to Protect: Timely and Decisive Response* (A/66/874-S/2012/578) was used as a reference for the discussion in which the utilization of military force, in accordance to Chapter VII of the Charter was discussed.

It must also be observed that – however extensive the analysis about the prevention of mass atrocity crimes developed in the reports of the General Secretary, including the 2013 report which explained some of the risk factors related to atrocity crimes and the difference between conflict prevention and atrocity prevention – thus far, the Ecuadorean delegation has been centered exclusively in the prevention of conflicts, which doesn't contribute to the debate and the generation of proposals to strengthen mass atrocity prevention.

Conclusion

On the basis of the examination of the principal documents that define the political guidelines in Ecuador, like the Constitution and the *National Plan for Good Living 2013-2017*, and considering the statements of the Ecuadorean delegation has made in debates about the Responsibility to Protect and which have been conducted at the General Assembly, it can be concluded that -at least implicitly- Ecuador has not denied the validity and promotion of Responsibility to Protect. Ecuador accepts the strategy of the three pillars developed by the General Secretary and supports the possibility of to the use of force when authorized by the Security Council.

What Ecuador reiterates is the necessity to clarify the application and implementation of the concept, especially when force is used to protect the population, a preoccupation which is not new on the global stage. This is confirmed by the diversity of analyses, debates and opinions that have been generated about the subject. In this respect, it is pertinent to note the opinion of Navi Pillay, former UN High Commissioner for Human Rights, who, regarding the intervention in Libya in 2011, stated:

> "Since the Security Council resolution authorized the use of force under the mantle of protection of civilians and RtoP, in an operation that ended in regime change, questions were raised as to whether regimen change is a means of giving effect to the legitimate principles of RtoP and protection of civilians. [...] It is clear that the concept itself cannot be faulted. As far as I can see, no objection has been raised to the concept itself but to its application and implementation. RtoP, like human rights, must never become politicized, employed selectively or be the weapon for double standards and regime change."[22]

In relation to the Ecuadorean's statements at the General Assembly, they are repetitive, without any concrete proposals to advance the discussion of the theoretical and juridical development of the concept, or any possible ways that permit the adequate and effective implementation of the Responsibility to Protect when it is related to the use of force or other coercive measures.

An element that is considered negative is the limited information about the position of Ecuador regarding Responsibility to Protect, which generates confusion in some cases and misunderstanding in others. One example of this is the false perception of Ecuador as an adversary of Responsibility to Protect seen in some scholars' work.[23]

Additionally, Ecuador's occasionally divergent position in the cases where it is evident that atrocities exist generates a negative perception about Ecuador's role as a promoter of human rights in the international arena. An example of this is Ecuador's vote against the draft resolution about the situation of human rights in the Democratic People's Republic of Korea, approved in 18 November 2014.[24]

In general, the political position of Ecuador in regards to the Responsibility to Protect is considered *ambivalent*. To answer to this characterization, it is important that Ecuador specifies its position about the Responsibility to Protect with a clear and precise explanation of its position. Additionally, it would be expected that the Ecuadorean delegation's statements were not repetitive at the General Assembly. Rather, Ecuador should contribute with specific proposals about the measures that the international community can carry out in order to prevent, or respond to the suffering of millions of people, victims of irrationality.

Graphic I
Ecuador And The International Legal Instruments Indicated By Un Secretary-General

Instruments	Signature	Ratification Accession (a)	Entry into force
Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9,1948)	11 Dec 1948	21 Dec 1949	12 Jan 1951
International Covenant on Civil and Political Rights (16 December 1966) Second Optional Protocol (15 December 1989)	4 Apr 1968	6 Mar 1969 23 Feb 1993 (a)	23 Mar 1976 11 Jul 1991
International Covenant on Economic, Social and Cultural Rights (16 December 1966)	29 Sep 1967	6 Mar 1969	3 Jan 1976
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (10 December 1984)	4 Feb 1985	30 Mar 1988	26 Jun 1987
Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979)	17 Jul 1980	9 Nov 1981	3 Sep 1981
International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966)		22 Sep 1966 (a)	4 Jan 1969
Convention of 1961 on the Statute of the Refugees and its Protocol of 1967		17 Aug 1955 (a) 6 Mar 1969 (a)	22 Apr 1954 4 Oct 1967
Convention on the Rights of the Child (20 November 1989)	26 Jan 1990	23 Mar 1990	2 Sep 1990
Statute of Rome of the International Penal Court (17 July 1998)	7 Oct 1998	5 Feb 2002	1 Jul 2002
Arms Trade Treaty (2 April 2013)*			24 December 2014

Source: Information based on the information contained in CHAPTER IV: Human Rights, available in <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, and <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf0506>.

*** The Ecuadorean Delegation abstained from voting regarding to the draft resolution entitled "The Arms Trade Treaty", (A/67/L.58) , 71st. Plenary meeting General Assembly, 2 April 2013. Official Records (A/67/PV.71) see <http://www.un.org/disarmament/ATT/>*

Grapihc II
Organic Comprehensive Criminal Code (COIP)

<table>
<tr><th>Crimes Against Humanity</th><th>Penalty</th></tr>
<tr><td>Art.79 Genocide.- The person who, in a systematic and generalized manner, and with the intention to destroy in whole or in part, a national, ethnic, religious or political group, commit any of the following acts:
1. Killing members of the group.
2. Causing serious bodily or mental harm to members of the group.
3. Deliberately inflicting to conditions of life calculated to bring about its physical destruction in whole or in part
4. Adoption of forced measures intended to prevent births within the group
5. Forced transferring children or adolescents of the group to another group.</td><td rowspan="6">26-30 yrs</td></tr>
<tr><td>Art. 81 Extermination</td></tr>
<tr><td>Art. 86 Persecution</td></tr>
<tr><td>Art. 87 Apartheid</td></tr>
<tr><td>Art. 88 Aggression</td></tr>
<tr><td>Art.89 Crimes against humanity. Crimes against humanity are those that are committed as part of a widespread or systematic attack directed against any civilian population: the extrajudicial execution, the enslavement, the forced displacement of population that has not the purpose to protect their rights, the illegal or arbitrary privation of the freedom, torture, rape and enforced prostitution, insemination not permitted, enforced sterilization and the enforced disappearance.</td></tr>
<tr><td>Art. 82 Enslavement</td><td rowspan="4">22 – 26 yrs</td></tr>
<tr><td>Art.83 Deportation of forcible transfer of populations</td></tr>
<tr><td>Art. 84 Enforced disappearance</td></tr>
<tr><td>Art. 85 Extrajudicial execution</td></tr>
<tr><td>Art. 80 Ethnocide.- The person who deliberated, generalized and systematic manner destroys in whole or in part the cultural identity of towns in voluntary isolation.</td><td>16 – 19 yrs</td></tr>
<tr><td>Art. 90 Penalty for a legal entity. When a legal entity is found to be responsible of any of these crimes it will be sanctioned with its extinction.</td><td></td></tr>
</table>

Source: Código Orgánico Integral Penal. R.O. No. 180, February 10, 2014. Unofficial translation.

Grapihc II. A.

Organic Comprehensive Criminal Code (COIP)

Crimes against persons and property protected by the International Humanitarian Law	**Penalty**
Murder of protected person (art.115)	22 – 26 yrs
Mutilations or experiments in protected person ((art 118) Torture , cruelty and degrading treatments to protected person (art 119) Collective Punishments to protective persons (art.120) Use of prohibited methods in armed conflict (art. 121) Use of prohibited weapons (art. 122) Attacks to protected property (art.123)	13 - 16 yrs
Obstruction of sanitary and humanitarian work (art. 124) Freedom privation of protected person (art. 125) Attack to protected person with terrorist purpose (art. 126) Recruiting of children and adolescents (art. 127) Taking of hostages (art. 128) Infractions against the active participants in armed conflict (art. 129)	10 – 13 yrs
Arbitrary and illegal transfer (art. 130) Abolition of rights of the protected person (art.131) Environmental modification with military purposes (art.132)	7 – 10 yrs
Denegation of juridical guarantees of protected person (art.133) Omission of measures of aid and humanitarian assistance (art.134) Omission of measures of protection (art. 135) Arbitrary Contributions (art 136) Prolongation of hostilities (art. 137)	5 – 7 yrs
Destruction or appropriation of goods to the adversary part (art.138)	3 – 5 yrs
Abuse of emblems (art.139)	1 – 3 yrs
Transgression to sexual and reproductive integrity of protected person (art 116) *	
Damage to physical integrity to the protected person (art 117)	5 – 7 yrs + 1/2

** Punishment increased in one third, respect of the transgressions against the sexual and reproductive integrity (art. 164 – 175).*

NOTES

1. The draw resolution A/60/L. 1, entitled *2005 World Summit Outcome* was adopted without vote. Meeting Record, 8th plenary meeting of the UN General Assembly, September 16 2005 (A/60/PV.8). Available at <http://research.un.org/en/docs/ga/quick/regular/60>.
2. *Constitución del Ecuador de 1998*, art. 167 No. 6. Available at <http://www.cancilleria.gob.ec/constituciones-del-ecuador-desde-1830-hasta-2008/>
3. During ten years three elected Presidents were overthrown: Abdalá Bucaram in 1997; Jamil Mahuad in 2003 and Lucio Gutierrez in 2005. See, G. Fontaine, J.L. Fuentes "*Transición hacia el Centralismo Burocrático*". *Estado del País. Informe Cero. Ecuador 1950-2010*. First Edition May 2011. pp. 247-262.
4. For more information about Citizen Revolution <http://www.movimientoalianzapais.com.ec/mas-publicaciones>.
5. *Secretaría Nacional de Planificación y Desarrollo SENPLADES*, available at <http://www.buenvivir.gob.ec/>.
6. The text of the Constitution was approved by Referendum on September 2008. See <http://www.cancilleria.gob.ec/constituciones-del-ecuador-desde-1830-hasta-2008/ >
7. National Plan for Good Living 2013-2017, *Secretaría Nacional de Planificación y Desarrollo SENPLADES* [National Secretariat of Planning and Development]. Summarized Version [English], 2013. p.26.
8. Ibid., p. 48.
9. See Chapter IV: Human Rights available at <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>. Regarding the important treaties for the International Humanitarian Law, see *Report 2012-2013. Apply DIH. Participation of the American* States in the important treaties for the international humanitarian rights and its national application. Report from International Committee of the Red Cross (CICR) for the OEA, 2013, available in <http://www.oas.org/es/sla/ddi/docs/dih> Report 2012-2013. Apply pdf.
10. The Secretary-General refers to the juridical accountability through the ratification, domestication and implementation of relevant in-

ternational legal instruments. Report: *The Responsibility to protect: State responsibility and prevention* (A/67/929-S/2013/399). July 9, 2013. Footnote 4, par. 40, p. 9.

11. Published in the *Registro Oficial* No. 344 of 29 August 2006.

12. *Comisión Nacional para la aplicación de Derecho Internacional Humanitario del Ecuador* (CONADIHE), 2013.

13. Information based on CICR, Press Release 07-02-2013 "*Fuerzas Armadas del Ecuador promoverán integración de reglas internacionales del uso de la fuerza*".

14. *Ministerio de Defensa Nacional, Agenda Política de la Defensa 2014-2017*, p. 50. available in: <http://www.defensa.gob.ec/biblioteca/ >

15. As was mentioned in the Report of the UN Secretary-General: The Responsibility to protect: State responsibility and prevention (A/67/929 – s/2013/399). July 9, 2013, Footnote 2, p.3. "Ethnic cleansing, while not defined as a distinct crime under international criminal law, is often a result of a combination of acts that could constitute genocide, war crimes or crimes against humanity".

16. *Código Orgánico Integral Penal. Suplemento – Registro Oficial No. 180*. February 10, 2014.

17. Dates of the interactive dialogues in the General Assembly: July 23 24 and 28, 2009; August 9, 2010; July 12, 2011; September 5, 2012; September 11, 2013; and September 8, 2014. Available at <http:www.un.org/es/preventgenocide/advaiser/responsibility.shtml>, and in <http://www.globalr2p.org/about_r2p>

18. Nevertheless, in reiterated occasions information was requested to the Mission of Ecuador in the United Nations, with Head Office in New York, about the position of Ecuador in relation to the Responsibility to Protect, just as the statements of Ecuador in the debates at the General Assembly, but the author did not obtain any response. The statements of 2009 and 2013 were obtained at <http://www.globalr2p.org/our_work/united_nations_engagement > and the statement in 2014 was transcribed from the record of the session [min. 1:28:20] <http://webtv.un.org/meetings-events/watch/part-1-the responsibility-to-protect-general assembly-68th -session-informal-interactive-dialogue/3773866832001>.

19. In the report of 2013, the Secretary-General exhorted the Member States a list of specific measures regarding to the prevention of atrocities. Chapter V. *The way to forward*, pp. 15–16.

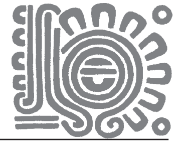
20. *Ministerio de Relaciones Exteriores y Movilidad Humana de Ecuador*. News "*Ecuador rechaza el uso preventiva de la fuerza como un concepto de la Responsabilidad de Proteger*". September, 27 2013, available at <http://www.cancilleria.gob.ec/ecuador-rechaza-el-uso-preventivo-de-la-fuerza-como-un-concepto-de-la-responsabilidad-de-proteger/>.

21. Constitution of Ecuador incorporates the following sovereignties: The popular sovereignty (arts. 1 and 96); people's sovereignty (arts 3, 158, 276, 290 and 423), food sovereignty (arts 13, 15, 281, 284, 304, 318, 334, 410 and 423), economic sovereignty (Chapter IV), energetic sovereignty (arts 15, 284, 304 and 334) and the sovereignty within international relations (art 416). National Plan of Good Living 2013-2017 p.27.

22. Speech "Stopping mass atrocities and promoting human rights. My work as the UN High Commissioner for Human Rights" by Navi Pillay 29 October 2014 at the CUNY Graduate Center in New York City. Available <http://www.globalr2P.org/publications/346>.

23. R. Arredondo (2014). "La responsabilidad de proteger: la perspectiva latinoamericana", in C. Márquez Carrasco (coord.) *Problemas actuales sobre la guerra y la paz en el orden internacional contemporáneo* (Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades) 2014 vol. 16 no. 32 p. 269-290. In the article Venezuela, Nicaragua, Bolivia, Cuba and Ecuador, were identified as countries that express a strong rejection to RtoP, pp 281-282.

24. The Draft Resolution (A/C.3/69/L.28/Rev.1*), *Situation of human rights in the Democratic People's Republic of Korea* was adopted by vote of 116 in favor to 20 against, with 53 abstentions, on Third Committee General Assembly. After, the resolution was adopted by General Assembly on December 18, 2014. The Assembly encouraged the Council to take appropriate action to ensure accountability, including through consideration of referral of the situation in that country to the International Criminal Court and consideration of the scope for effective targeted sanctions against those who appeared to be most responsible for acts that the Commission of Inquiry had said could possibly constitute crimes against humanity. <http://www.un.org/press/en/2014/ga11604.doc.htm>.



The Sceptics

Has Brazil's *Responsibility while Protecting* changed Venezuela's skepticism about the *Responsibility to Protect*?

Alfredo Toro Carnevali

On October 22nd 2011, images of the murder of Muammar Kaddafi by rebel forces -posted on YouTube- reached the world stage. NATO's *Unified Protector Operation*, authorized by the Security Council (see UN Document S/Res/1973, 17 March 2011) to protect civilians on the ground had gone beyond its mandate by toppling the Libyan government. Though deeply concerned with the humanitarian situation in Libya, many Security Council members felt deceived by the way in which the operation had unfolded. In their view, they had not authorized an operation to carry out a regime change in Libya.

Since its adoption, Resolution 1973 had been received by important Member States of the Security Council with skepticism and suspicion. On 17 March 2011, Ambassador Viotti of Brazil, while explaining why

her country had decided to abstain from voting on Resolution 1973, stated that she was "… not convinced that the use of force as provided for in paragraph 4 of the resolution will [would] lead to the realization of our common objective - the immediate end to violence and the protection of civilians." Ambassador Viotti furthermore expressed concerns that "… such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting" (UN Document, S/PV.6498, 17 March 2011, p. 6).

China, Russia, India and Germany also abstained from voting on Resolution 1973, citing a lack of information on the real situation on the ground and on how the Resolution would be implemented. Ambassador Churkin of Russia had been prescient in saying that: "If this comes to pass, then not only the civilian population of Libya but also the cause of upholding peace and security throughout the entire region of North Africa and the Middle East will suffer" (Ibid, p. 8).

As NATO led *Operation Unified Protector* unfolded it became evident that its objectives were not restricted to protecting civilians and achieving a cease-fire among the warring factions in Libya, but included destroying the infrastructure and replacing the government of Muammar Kaddafi. As predicted by Brazil and Russia, the Operation exacerbated the precarious security and humanitarian situation both in Libya and in the Sahel region.

As Secretary General Ban Ki-Moon reported in January of 2012, "… large quantities of weapons and ammunition from Libyan stockpiles were smuggled into the Sahel region… rocket-propelled grenades, machine guns with anti-aircraft visors, automatic rifles, ammunition, grenades, explosives (Semtex), and light anti-aircraft artillery (light calibre bi-tubes) mounted on vehicles… surface-to-air-missiles and man-portable air defense systems…" (UN Document S/2012/42, 18 January 2012, p. 10) The Secretary General further reported that these weapons had been smuggled by former fighters who had been in the regular Libyan army or mercenaries during the conflict, and warned that they could be sold to terrorist groups like Al-Qaida or criminal organizations like Boko-Haram (ibid, p. 11-12).

A year later, in early 2013, heavily armed Tuaregs expelled from Libya -who had returned to their homeland-, would team up with jihadist groups such as Al Qaida, to topple the Government in Mali. This unleashed a new Security Council authorized intervention, this time in Mali (See UN Document S/RES/2085 of 20 December, 2012). The worst fears of countries like Russia and Brazil had indeed materialized.

The implementation of RtoP under Resolution 1973 of the Security Council had, in the view of many, gone far beyond its call to protect the Libyan population, and had exacerbated insecurity in both the country and the region. If RtoP was to work effectively, it needed to be revised.

It was in this light that Brazil introduced a new approach to the implementation of RtoP, labeled: the *Responsibility while Protecting*. As has been duly explained in the chapter by Alex Bellamy of this volume, this new approach is meant to regulate and monitor the implementation of the third pillar of RtoP (see the *use of force* in UN Document A/63/677, 12 January 2009, page 22-28), while making those in charge of the execution accountable for their actions.

By all accounts, Brazil's contribution has sparked a serious debate surrounding the implementation of the third pillar of RtoP, both among States and civil society. It is understood to be an attempt to refashion RtoP as a more focused tool that would avoid repeating the mistakes of Libya. It seems to pursue the double objective of reinforcing the convictions of those who are already committed to RtoP and also to win over those who have remained skeptics of RtoP all along.

The purpose of this paper is to evaluate whether Brazil's the *Responsibility while Protecting*, has been effective in achieving the second of these objectives: winning over the skeptics. Paramount among these skeptics has been the Bolivarian Republic of Venezuela, hereby referred to as Venezuela.

Methodologically this paper will proceed to look into Venezuela's position regarding RtoP before and after the introduction of Brazil's *Responsibility while Protecting*. In this regard it will compare and contrast statements made by Venezuelan authorities in the framework of the United Nations from 2005 until 2013.

Venezuela's Position Regarding RtoP, Before the Introduction of the *Responsibility While Protecting*

In 2005, the United Nations General Assembly adopted the World Summit Outcome Document. Paragraphs 138 and 139 of the Document established a general working understanding of the *Responsibility to Protect* (RtoP). While recognizing the fundamental principles of equal sovereignty among States and non-interference in their internal affairs, it opened the possibility for the Security Council to intervene –under Chapter VII of the Charter– if a State manifestly failed to protect its population from genocide, war crimes, ethnic cleansing or crimes against humanity. Seven countries, among them Venezuela, opposed the inclusion of paragraphs 138 and 139 in the Outcome Document.

In the 2005 Summit negotiations, President Hugo Chávez Frías of Venezuela had expressed deep concern regarding RtoP, stating: "…Oh do they threaten us with that pre-emptive war! And what about the "Responsibility to Protect" doctrine? We need to ask ourselves: Who is going to protect us? How are they going to protect us? (…) these are very dangerous concepts that shape imperialism, interventionism as they try to legalize the violation of national sovereignty." President Chávez had further added that the, "… full respect towards the principles of International Law and the United Nations Charter must be, (…) the keystone for international relations in today's world and the base for the new order we are currently proposing." (http://www.un.org/webcast/summit2005/statements.html, 2013).

Later that day, Venezuela's Minister of Foreign Affairs, Ali Rodriguez Araque, would further delineate his country's position regarding RtoP. Speaking before the General Assembly he denounced the lack of transparency in the negotiation of the Summit's Outcome Document and underscored his country's fears about the potential political manipulation of RtoP for political reasons. In line with the statement made by President Chávez, he asked: "Who is in a position to ´protect´ according to the terms of this document? Who is in a condition to send troops miles away from its country? Who has the financial resources, the armament and the logistics to undertake these actions to protect?" (UN Document, A/60/PV.8, September 16, p. 48)

President Chavez and Minister Rodriguez Araque had struck at the cord of the *Responsibility to Protect*, that is: which countries where both willing and able to protect populations that where victims of the four crimes typified in the 2005 Outcome Document? The fact is that due to the world's inaction in Rwanda many of the proponents of RtoP had intended to devise a doctrine that would compel major powers, the only ones capable of acting in faraway territories, to intervene consistently in every situation where one of the four crimes -previously cited- where being committed (see The Responsibility to Protect, supplementary volume to the Report of the International Commission on Intervention and State Sovereignty, 2005).

What the promoters of RtoP seemed to have missed was that those countries with the capacity to mobilize great military contingents across oceans, had been doing so for centuries for purposes that had nothing to do with the protection of populations. Thus, it seemed inevitable that a group of countries, among them Venezuela, would become skeptic of the real motives of those major powers.

Despite its strong criticism of RtoP, Venezuela's position should not be construed as indifferent to the crimes typified in paragraph 139 of the 2005 Outcome Document. It must be pointed out that Venezuela is a signatory of the Convention on the Prevention and Sanction of the Crime of Genocide, all Geneva Conventions of 12 August, 1949, and its additional protocols I and II, the Rome Statute and the Palermo Protocol, among others. In fact, Venezuela's representative before the United Nations, Jorge Valero, in a statement made on July 24, 2009, at the General Assembly Debate on the Secretary General's report on RtoP, asked the question: "Who can remain indifferent to such ignominious crimes as those which took place in Rwanda and other places of the world?" and went on to express that his country, "… condemned, without equivocation, the acts of genocide, crimes of war, crimes against humanity and ethnic cleansing, regardless of who commits them" (UN Document, A/63/PV.99, 24 July 2009, p.4).

However, reflecting on the interventions made by a group of panelists that day, Ambassador Valero of Venezuela restated the skepticism previously expressed by President Chavez and Minister Rodriguez Araque about the real intentions of major powers. Valero argued that the panelists had put forward two different visions of RtoP:

> *One, very enthusiastic, calls upon us to have faith and to forget the oppression exercised by stronger countries against weaker ones; the other one offers us an analysis based on irrefutable historical facts and invites us to reflect on the structural causes and the hegemonic imperial domination exercised throughout history, by imperial Western powers, as the elements determining the most grievous conflicts that humanity has suffered and suffers today* (Ibid, p.4).

While reinforcing the position previously expressed by Venezuela's highest authorities in 2005, Ambassador Valero went further in his statement by introducing a whole range of new questions on the implementation of RtoP. Some went counter to the agreements reached in the 2005 Outcome Document by challenging the Security Council's prerogative to decide when to intervene: "Will the 192 States that comprise this Organization have the same right to participate and classify a situation as an emergency [requiring intervention]?" The Venezuelan representative went on to answer his own question: "Some argue that the Security Council is the most adequate body to implement an armed or coercive action when the need arises to implement, as a last resort, the responsibility to protect. In this point my delegation wants to make clear our strong disagreement" (Ibid, p.5).

A second set of questions introduced by the Venezuelan representative, partly related to his country's skepticism about the good intentions of Western powers, dealt with the potential political manipulation of RtoP. For example, he asked: "Who can guarantee that intervention will not be carried out for political reasons? (…) Who can guarantee that the ´responsibility to protect´ cannot become a pretext for imperialistic countries to intervene, in weaker countries, for political motivations?" (Ibid, p. 5) These set of questions helped to reinforce the apparently ingrained distrust towards major Western powers, while introducing the idea of potential political manipulation.

An additional question introduced by Ambassador Valero of Venezuela had to do with the possibility that RtoP would be implemented following double standards. Thus he asked: "Who can guarantee that there will not be a selective implementation of this approach [RtoP]? (Ibid, p. 5)

All these questions could only lead towards a request for more time to study and reflect on the viability of RtoP, and so the Venezuelan representative asked for a, "… frank and good faith discussion of the 'Responsibility to Protect' in the General Assembly", as a way to move forward (Ibid, p.5).

The position of the Venezuelan government on RtoP before the events in Libya unfolded, and before Brazil had introduced the concept of the *Responsibility while Protecting*, can be summarized as follows:

> First, there was a strong skepticism on the real motivations of Western powers to implement RtoP, including the fear of political manipulation.
>
> Second, there was a strong disagreement with the decision to bestow upon the Security Council the power to determine when a situation had reached the level of emergency requiring an intervention under RtoP. Additionally, there was a strong preference for a more democratic decision making process in the framework of the General Assembly.
>
> Third, it feared that RtoP could be used selectively, by intervening in some cases but not others, depending on the interests of the major powers.
>
> Fourth, it expressed an interest in continuing to discuss the concept of RtoP in the framework of the General Assembly.

The Introduction of *the Responsibility While Protecting*

On November 9, 2011, in the framework of an Open Debate of the Security Council on the Protection of Civilians, Ambassador Viotti of Brazil presented the concept of the *Responsibility while Protecting* (http://www.responsibilitytoprotect.org, July 2013). As expressed before, this new concept, which was emerging in the midst of growing international frustration with the implementation of Security Council resolution 1973 on the situation in Libya, was meant to regulate, monitor and make RtoP more accountable. A discussion of the new approach soon followed in the context of the United Nations.

In an informal debate in the United Nations chaired by Brazil's Minister of Foreign Affairs, Antonio de Aguiar Patriota, on February 21st, 2012, participating Member States where asked to voice their opinion on the viability of the *Responsibility while Protecting*.

The remarks made by Gert Rosenthal, Permanent Representative of Guatemala to the United Nations, in the context of the informal debate, rightly captured the spirit of the Brazilian proposal. Referring to the Security Council's intervention in Libya, he pointed out:

For some countries, the execution of resolution 1973 (2011) has been traumatic, and it must be recognized that its implementation has poisoned the environment regarding the 'responsibility to protect', to the point that it is compromising the important progress achieved regarding the acceptance and implementation between 2005 and the present (http://www.responsibilitytoprotect.org, 2013).

The "traumatic" implementation of resolution 1973 (2011) on the situation on Libya seems, in fact, to have inspired Brazil –a Security Council Member during the time- to devise a new approach to RtoP. Yet, as Ambassador Rosenthal rightly suggested, Brazil's proposal was not meant to restrain the development of RtoP, but to move it forward:

> *Far from pursuing substituting the original conception for something new, it builds on the that concept (...) Brazil is providing constructive ideas (...) its initiative (...) aims at a more nuanced and careful management of the responsibility to protect, but at no time does it back off from what was agreed in paragraphs 138 and 139 of the 2005 Summit Outcome Document (Ibid).*

Brazil would most likely agree with Ambassador Rosenthal's characterization of the *Responsibility while Protecting*, as a way of moving RtoP forward, rather than a tactic to stall its path towards broader acceptance by UN Member States.

Venezuela's Position Regarding *the Responsibility While Protecting*

The adoption of Security Council's resolution 1973 on the situation on Libya seemed to have confirmed some of Venezuela's worst fears on the implementation of the third pillar of RtoP. In his statement, in the framework of the informal debate chaired by Brazil's Minister of Foreign Affairs, Antonio de Aguiar Patriota, on February 21st, 2012, Venezuela's Permanent Representative to the UN, Jorge Valero, while recognizing the initiative promoted by the "brother country of Brazil", went on to reiterate some of the same points made in his July 24, 2009 statement:

> …But who guarantees that there will not be a selective implementation of the 'responsibility to protect'? (…) Why isn't the 'responsibility to protect' mentioned when the Palestinians people are slaughtered? Why isn't the 'responsibility to protect' mentioned when imperial powers assassinate, with impunity, Iraqis, Afghans, and Pakistanis? (…) Who guarantees that the 'responsibility to protect' will not be used as an excuse by imperial powers to conduct interventions in weaker countries, for political and economic reasons? (Ibid)

Venezuela continued to insist on the perils of the selective implementation of RtoP and its political manipulation by major powers. The Libyan experience had, to some degree, substance some of those criticisms. Venezuela might have felt emboldened to insist on its long held view that, "the mandate from the Final Document of the 2005 World Summit is that the 'General Assembly continues examining the responsibility to protect …" (Ibid). In Venezuela's view, if the *Responsibility while Protecting* was to be considered, it would have to take place through intergovernmental negotiations in the framework of the General Assembly of the United Nations and with the participation of the 193 Members States.

A year after the introduction of the *Responsibility while Protecting*, Venezuela's skepticism regarding RtoP remained unchanged. In a statement dated September 5th 2012, Venezuela insisted that the events in Libya had fatally wounded RtoP:

> *We should bear in mind that Resolution 1973 did not authorize the overthrow of Kaddafi, much less his murder. NATO went far beyond the mandate of the Security Council of the United Nations (…) The traits of good intentions and dignity that once could have been attributed to the 'responsibility to protect' have been muddled by the crimes and the media manipulation that occurred in Libya* (http://www.responsibilitytoprotect.org, 2013) (translated by the author)

A year later, on 11 September 2013, in the framework of the informal interactive dialogue that takes place every year at the United Nations, the Venezuelan delegation insisted, once again, on the "establishment of an intergovernmental process within the General Assembly for this issue to be formally discussed", while expressing its concern "that UN authorities may be moving ahead, using resources from the Organization for implementing measures that have not been agreed by Member States" (http://www.responsibilitytoprotect.org, 2013).

As Venezuela's latest statements show, it is unlikely that it will fully engage in a debate on the *Responsibility while Protecting*, as long as the concept of RtoP is not fully reassessed through intergovernmental negotiations in the framework of the General Assembly. This leads to the conclusion that there has not been any substantive change in Venezuela's official position regarding RtoP, as a consequence of Brazil´s introduction of the initiative: the responsibility while protecting.

For Venezuela, RtoP remains a work in progress and intergovernmental negotiations are a prerequisite to reach a common basis for its implementation in the framework of the United Nations.

If these negotiations were to take place, Venezuela would likely continue to contest the selective application of the third pillar of RtoP, including the impunity enjoyed by major powers, the risk of political manipulation, and the discriminatory decision making process when choosing when to intervene. Merging these concerns with the precepts of the *Responsibility while Protecting*, is the challenge posed to those political and diplomatic entrepreneurs who want to make of RtoP a universal tool.

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UN Document A/63/677, Report of the Secretary General: "Implementing the responsibility to protect", 12 January 2009, 33 pages.

UN Document A/RES/60/1, 16 September 2005.

UN Document, A/60/PV.8, September 16, 2005.

http://www.responsibilitytoprotect.org, accessed July 23, 2013.

Cuba and RtoP: A critical approach from a humanitarian anti-hegemonic Global South powerbroker

Carlos Alzugaray Treto

In his most recent book on the concept of "responsibility to protect", one of the world's leading experts on the issue, Alex Bellamy, has characterized the Cuban position as part of "a tiny handful of doctrinaire states" who do it "for ideological reasons (it suits the anti-imperialist rhetoric of Venezuela and Cuba, for instance)"(Bellamy, 2014: 4 & 12).

In the present paper I will attempt to deconstruct this narrative that paints Cuba in the worst possible light. I will argue that the position of Havana can better be explained on the basis of the general characterization of its foreign policy as having the following main features:

> As a significant member of the Global South, which takes into account not only its narrow national interests and preferences, but also the interests of the Non-Aligned countries of the so-called Third World.

As an anti-hegemonic actor that opposes the domination of the world order by a sole superpower or a small combination of powers who claim to have a monopolistic, morally based set of values and norms that must be applied by and to the rest of the international community. This conception of a main principle of Cuban foreign policy is deeply embedded in the political culture of Cuba as the result of bitter historical experiences.

As a State that has incorporated into its international practice the best legacies of humanitarianism, demonstrated by its contribution to the ending of apartheid and colonialism in Africa, to South-South Cooperation and to the common toil against natural disasters.

As a small but significant powerbroker who has been ready to build bridges and contribute to the solution of major conflicts and crisis involving threats to large populations.

Cuba's historical experience has made it a victim and/or potential victim of genocidal policies carried out by great powers, who have used coercion and threats to impose their will on Cuban society with terrible consequences for its people, mostly using humanitarian excuses for their attitudes. Many authors, including Bellamy, contend that one of the historical sources of RtoP lie in the United States involvement in Cuba's War of Independence in 1898, misinterpreting the real sources of that unilateral self-interested intervention and underestimating the negative consequences it had for the Cuban nation. See for example the essay by Mike Sewell, titled "Humanitarian intervention, democracy, and imperialism: the American war with Spain, 1898, and after" in one of the most consulted works on humanitarian intervention, the concept that lies at the origin of "responsibility to protect" (Simms and Trim, 2011: 303-322).

Many authors, including Bellamy himself, have recognized that "responsibility to protect" was a development of the controversial concept of "humanitarian intervention" elaborated by the International Com-

mission on Humanitarian Intervention and Sovereignty, which failed dismally in attempting to undermine the main principle of international law (state sovereignty) in favor of the so-called "human security". That argument is present in works by Johnson (2014), Pattison (2010), Simms &Trimm (2011), and Weiss (2013).

As Noam Chomsky has shown, "virtually every use of force in international affairs has been justified in terms of RtoP, including the worst monsters" (Cunliffe, 2011: 11). Chomsky points out that historically, "Japan's 1931 attack on Manchuria, Mussolini's 1935 invasion of Ethiopia, and Hitler's occupation of parts of Czechoslovakia in 1938," were"all accompanied by lofty rhetoric about the solemn responsibility to protect the suffering populations, and factual justifications"(Chomsky, 2011: 11).

I will also demonstrate that the Cuban position on RtoP has also been the object of an updating between 2005 and 2014. In 2005-2006 and to a certain extent in July, 2009, at the Plenary Meeting of the 63rd Session of the General Assembly of the United Nations regarding the report of the Secretary General A163167 "Implementing the Responsibility to Protect", Cuba's position was radical, criticizing not only the concept but also the general tendencies of global governance present at the time, when the Bush administration was carrying out what some authors have characterized as "America Unbound" (Daalder and Lindsay, 2003).

The Cuban position on the issue was manifested for the first time in the Non Aligned Movement Statement on Responsibility to Protect delivered by Malaysia to the United Nations in April 2005 (Non Aligned Movement, 2005: 1):

> "On the intended concepts of 'responsibility to protect' and 'human security', Cuba's position has not changed. In the present world's condition they would only facilitate interference, pressures and intervention in the internal affairs of our States by the big powers, in overt and constant threat to our peoples' right to self-determination. Cuba reiterates its firm repudiation to the attempt of approval of these concepts, which only serve the interest of those who make millionaire profits with wars. Lately, there has been a trend to designate the so-called 'failed

> states', whose political instability could put the security of the rich and powerful at risk, and which would have to be applied the naive recipe of 'responsibility to protect' and respect for 'human security'. These so-called 'failed states' appear on a list recently published by a well-known magazine on international politics, where 60 of us, including some that will be surprised for being included in such an exclusive group, appear as threats according to 12 arbitrarily manipulated indicators" (Non-Aligned Movement, 2005: 1).

Three aspects of the above statement should be commented in the framework of the present article. In the first place the reference to the conditions existing at the time in world politics, a context in which, in Cuba's view, the acceptance of the idea of "responsibility to protect" could only serve to"facilitate interference, pressures and intervention in the internal affairs of our States by the big powers, in overt and constant threat to our peoples' right to self-determination."

In 2005, the American war in Iraq had been going on already for two years. The way that the war was unleashed and conducted proved the point that Cuba was making. The United States acted unilaterally without approval from the United Nations Security Council and alleging, among other things, the human rights violations of which the Saddam regime was responsible.The war in Iraq was not only justified under false pretenses, but also caused enormous human suffering. (Chomsky and Achcar, 2007: 83-122).

Cuba felt threatened when the George W. Bush administration insinuated that Havana would be in a category of countries very similar to the Axis of Evil. In 2003, the same year that the U.S. launched the invasion of Iraq, Washington created a *Commission for the Assistance to a Free Cuba*, presided over by Colin Powell. The following year, Assistant Secretary of State for Arms Control and International Security Affairs, John R. Bolton, falsely accused Cuba of maintaining a biological weapons program, an accusation very similar to the one made against Iraq. And in 2006 Bush created the position of Coordinator for a Cuban Transition in the State Department.

The latter step seemed to be designed to have already in place an official that would play in Cuba the same role that General Jay Gardner

did in Iraq during the initial stage of the military occupation. If there was any doubt, Bob Woodward's third installment of his **Bush at War** trilogy in 2006 confirmed that at the White House the President and some of his advisers had towards Havana a similar mindset that led to the invasion of Iraq. The following dialog was included in Woodward's book when Gardner returned from Baghdad and was invited to the Oval Office to pay his respects to the President:

> "As Garner got up to leave, (Condoleezza) Rice stopped him and extended her hand. 'Jay, you've got to stay in touch with us,' she said.
>
> "'I'd like to,' Garner said, thinking to himself, *How the hell am I going to do that?* After all, he only talked with Rumsfeld.
>
> "On the way out, Bush slapped Garner on the back. "Hey, Jay, you want to do Iran?
>
> "'Sir, the boys and I talked about that and we want to hold out for Cuba. We think the rum and cigars are a little better . . . The women are prettier.
>
> "Bush laughed. 'You got it. You got Cuba"' (Woodward, 2006: 224).

As shown, what Bellamy calls the ideological anti-imperialist rhetoric of Cuba was really a practical conclusion from the available evidence: the country could be invaded alleging any excuse and the "responsibility to protect" could be the perfect alibi with the right manipulation of the information.

The second point raised by the Cuban statement was precisely related to the issue of media control and manipulation. By pointing out that an influential foreign policy journal had drawn a list of 60 failed states, mostly from the Global South, public opinion could be maneuvered into accepting military intervention, in violation of sovereignty, under the pretext of humanitarian action.

Cuban historical experience pointed in that direction. Most historians of the Spanish-Cuban-American War of 1898 coincide in pointing

out that the American intervention in Cuba's War of Independence (1895-1898) was made possible because the advancement of this clearly imperialist project was masked under the shroud of what was seen then as a responsibility to protect the small countries of the Caribbean, and in that way, turn public opinion in favor of a war that was not considered initially necessary. Cuban-American scholar Louis A. Pérez Jr. has argued:

> "Central to the proposition of the American imperial project was precisely the notion of duty: the necessity to discharge a higher moral obligation mandated by providential design for the greater good of humanity"(Perez, 2008: 264).

The last point raised by the Cuban statement was more implicit than explicit. It was the questioning of the proposition that an idea like the "responsibility to protect" could be effectively implemented in an international system in which the asymmetries of power give broad possibilities of action to large Nation-States which, in general, determine the course of events. And this idea is neither really new nor doctrinaire. As political philosophers have emphasized over time, the old dictum that "it is the law of nature that the strong do what they can and that the weak do what they must" is very much the standard procedure of power politics (Ryan, 2012: 24).

This reality of world politics was clearly demonstrated when the concept of "responsibility to protect" was presented in paragraphs 138 and 139 of the **2005 World Summit Outcome**. The circumstances of this decision and document approval have been controversial. There was no concrete and specific discussion of these paragraphs. They were included in a 40 page, 178-paragraph document that was adopted hastily under the pretext that the Millennium Summit had to be brought to a close. The Cuban delegation, headed by Ricardo Alarcón, complained about this decision, but the Venezuelan President, Hugo Chávez, formulated the strongest criticism.[1] As Cuban delegates have argued again and again in different United Nations reviews and debates, the approval of that document does not constitute necessarily the acceptance of the "responsibility to protect" as a new norm in international relations. For it to be so, it would require a concrete approval by the General Assembly of the United Nations.

It is paradoxical that in 2005 two events demonstrated Cuba's altruistic internationalist solidarity foreign policy. One was the sending of 2,400 physicians and health workers to Pakistan to help with the humanitarian crisis provoked by the Kashmir earthquake. The second one was the offer to send a similar amount of emergency assistant medical teams to New Orleans to help with the wake of the Katrina Hurricane. It could be argued that in this latter case the U.S. government demonstrated incapacity in assuming the "responsibility to protect" a large human group from a natural disaster.

In 2006, Cuba's position on the subject hardened. Inaugurating a meeting of Foreign Ministers of Non-Aligned countries in Havana in September, Vice-president Carlos Lage was radical in his criticism of "human security" and the "responsibility to protect" describing them as "concepts that hide the intention of violating sovereignty and mutilating Independence, of poor countries, of course, never of the powerful" (Lage, 2006).

From that early beginning, Cuban officials have been making important contributions to the debate on "responsibility to protect", as shown in the above-mentioned contribution of 2009 and in positions explained by the Cuban Mission to the United Nations in 2012, 2013 and 2014. The following paragraphs will highlight the questions raised by Cuba in documents supplied to the author by the Cuban Ministry of Foreign Affairs (MINREX) listed in the sources below.

At the Plenary Meeting of the 63rd Session of the General Assembly, on July 23, 2009, discussing the report of the Secretary General (A1631677), the First Secretary of the Cuban Mission, Anet PinoRivero, began by pointing out the obvious: "The notion of responsibility to protect does not exist as a legal obligation provided in any instrument of the International Law or in the Charter of the United Nations" (Cuban Mission to the UN, 2009: 1).

She immediately raised the main objection of Cuba to the concept in the following terms:

> "Although we recognize the responsibility of each State to promote and protect all the human rights of its people, we are concerned about the proliferation of ambiguous and similar

> terms that, under an indiscriminate humanitarian image,entail in practice a violation of the principle of sovereignty of States, and in general of the Charter of the United Nations and the International Law. The so call 'humanitarian intervention' as well as the ancient 'temporary interposition' from the beginning of XX century should be remembered" (Cuban Mission to the UN, 2009: 1).

Reaffirming that "Sovereignty" lies as the cornerstone of the international system as on of the main principles contained in the Charter of the United Nations, the Cuban delegate went on to state: "Without it, there could be no United Nations and the small countries of the Southwould be abandoned at the mercy of the large and strong ones" (Cuban Mission to the UN, 2009: 1).

Challenging the idea that a new concept was required to make the United Nations more effective in cases of humanitarian crises, Ms. Pino argued:

> "Claiming the principle of Sovereignty has hindered the actions of the United Nationsto come to the aid of suffering humanity is to distort the truth. The inefficiency of the Organization is sometimes caused by, inter alia, the lack of political will, selectivity and double standards, development resources constraints, and dysfunction in the working of some of its bodies as the Security Council" (Cuban Mission to the UN, 2009: 1).

The Cuban delegate pointed out a clear procedural precedent, namely that issues of humanitarian character are in the purview of the General Assembly and its Economic and Social Council and not in the Security Council, whose composition and activities have been challenged anyway. Assigning to the Security Council the attribute of deciding on humanitarian crises, which is what the concept of "responsibility to protect" entails, would be a significant modification of the spirit and the letter of the Charter, a step that cannot be accomplished without a broad and profound debate at the General Assembly.

Cuba repudiates genocide, war crimes, ethnic cleansing and crimes against humanity, but believes that the General Assembly is the proper

forum to deeply analyze and take decisions on them. Only through that procedure can the United Nations approach these issues in a legitimate and consensual manner (Cuban Mission to the UN, 2009: 1-2).

The Cuban delegate then went on to raise some questions, among them the following:

> Who is to decide if there is an urgent need for an intervention in a given State, according to what criteria, in what framework, and on the basis of what conditions?
>
> Who decides it is evident the authorities of a State do not protect their people, and how is it decided?
>
> Who determines peaceful means are not adequate in a certain situation, and on what criteria?
>
> Do small States have also the right and the actual prospect of interfering in the affairs of larger States?
>
> Would any developed country allow, either in principle or in practice, humanitarian intervention in its own territory?
>
> How and where do we draw the line between an intervention under the "Responsibility to Protect" and an intervention for political or strategic purposes, and when do political considerations prevail over humanitarian conditions?
>
> How can we believe the 'good faith' of the powers which wage wars of aggression against othernations?
>
> Is saving an ethnic group from an ethnic cleansing by killing the other party, legal and ethical?
>
> When do foreign forces of occupation withdraw?
>
> When does the violation of the sovereignty of a countrycease? (Cuban Mission to the UN, 2009: 3).

Cuba also pointed out the following evident fact: "The language agreed at the 2005 World Summit on the responsibility to protect did not turn said term into a concept or a standard of law."At the same time, Ms. Pino underlined the ambiguity of the term and the questions it raised, proposing a two step approach to consider and adopt it: "First, we should provide a joint answer to its legal loopholes, and then review

the viability of the concept if theMember States so consider" (Cuban Mission to the UN, 2009: 3).

On 12 July 2011, Ambassador Rodolfo Benítez Verson, Cuban Deputy Permanent Representative to the United Nations participated in the interactive debate on the responsibility to protect at the Plenary Meeting of the General Assembly. Once more, the Cuban delegation objected to the attempts at implementing the concept "even before it is clearly defined and agreed on by the General Assembly. The debates on this matter held in recent years by the General Assembly and the procedural resolution adopted in 2009 have clearly revealed the diversity of positions."

Ambassador Benítez reminded the General Assembly the legal issues raised by Cuba in 2009 and went on to state: "It is obvious there is still a long road ahead in order to achieve a consensus on this matter. The General Assembly must continue to be the center of future discussions. The other bodies of the system, including the Security Council and the Secretariat, must refrain from taking steps on their own in this regard."

Once more, he pointed out the main risk in giving to the Security Council such an interventionist instrument: "There is a real danger that the Responsibility to Protect may end up being manipulated by covered interventionists seeking to justify in different manners interference and the use of force.History has repeatedly shown us examples of wars of conquest waged with thepretext of protecting civilians."

The examples that the Cuban delegate pointed out were evident in the cases of Iraq and Afghanistan, but especially in Libya:

> "Over one million innocent civilians in Iraq and more than 70 thousand in Afghanistan have died as a result of these actions. Civilian deaths in these wars account for over 90% of the casualties. The proportion of children in this data is horrendous and unprecedented. Undoubtedly, the concept of Responsibility to Protect can be easily manipulated; suffice it to observe the current situation in Libya.Without exhausting all diplomatic instruments, and without even trying to use peaceful means, at present NATO is unjustifiably using its most state-of-the-art and lethal armaments in Libya. The

> bombing by the Alliance kills the very civilians they are supposed to protect.”

He also recalled another issue raised by Cuba before, the question of double standards:

> “Selectivity and double-standards prevailing today only reinforce our concerns on the Responsibility to Protect. While NATO attacks Libya, the Security Council abandons its responsibilities and remains indifferent to the constant aggression and the mass atrocities in the occupied Palestinian Territories.It is evident that, by maintaining its current composition and working methods, theSecurity Council can in no way ensure a non-abusive and non-selective action when implementing the Responsibility to Protect.”

He ended by summarizing the essence of the Cuban position in the following paragraphs:

> “The principles of sovereignty, territorial integrity and non-interference in the internal affairs of States, must be upheld at all cost, for without them, the United Nations cannot survive, and small and weak nations would be left at the mercy of larger and stronger nations.
>
> “Cuba opposes, and will categorically oppose, any use of force that is not included in the provisions of the Charter, for which there can be no justification. A more primitive one, based on the reinterpretation of the Charter and the International Law, cannot succeed the current unjust and deeply unequal global order” (Cuban Mission to the UN, 2011).

The final document that reflects Havana’s position on this purported new international norm is the Official Statement of the of the Delegation of Cuba at the Interactive Dialogue on Responsibility to Protect as presented at the General Assembly Plenary Session of 8 September 2014 (Ministerio de RelacionesExteriores, 2014). On this occasion the Cuban delegation chose to begin with an unprecedented sharp declaration: “Cuba reaffirms its strong condemnation of the crimes denounced by the 2005 Summit (Paragraphs 138 and 139): genocide,

war crimes, ethnic cleansing and crimes against humanity, anywhere that they might happen or in any of its manifestations."

However, Cuba reiterated its opinion that "there is no clearly negotiated or consensual intergovernmental agreement by the Member States on the scope, implications and possible forms of implementation of the concept 'responsibility to protect'." Therefore, in the opinion of Havana, until that happens, it is not possible to invoke it in any kind of military actions by single or multiple actors.

In the present world context, according to Cuba, there are not objective or subjective conditions that would prevent the use by major powers of "responsibility to protect" as a pretext to interfere in the internal affairs of smaller states or for the use of force and military intervention with hegemonic pretenses. The document subject to the debate (A/68/947–S/2014/449) does not solve some very important legal issues that would guarantee objectivity, impartiality and non-selectivity in its application.

The Cuban delegation insisted in its previous demand for a broad, honest, inclusive and transparent debate on this issue at the General Assembly and on the defense of the position that "the responsibility to protect" concept should be based in the express recognition of sovereignty, self-determination, independence, territorial integrity and non-interference in the domestic affairs of Nation States. That is the only way in which small nations with limited resources can be protected from the free action of more powerful states.

Conclusion

Far from been doctrinaire and ideologically motivated, the Cuban position on the "responsibility to protect" concept is solidly based in legal, historical and political considerations associated with its historical experience and traditional anti-hegemonic foreign policy. It also represents a valid criticism from the Global South.

The risks of implementing the "responsibility to protect" are evident in the last 10 years, Libya been the example that reflects what can

happen if its use is left to the powerful countries that have been trying to impose an hegemonic order in the world which can have only one result: the same kind of humanitarian crises and crimes that it is supposedly designed to prevent.

In the period object of this analysis, Cuba has demonstrated that it is an active member of the international community with humanitarian concerns and with a humanitarian practice that is rarely seen in countries with similarly limited resources. Examples abound: Havana has cooperated, even with big nations like the United States, in solving humanitarian disaster in countries like Pakistan, Haiti, Sierra Leone, Liberia and Guinea. At the same time it has promoted the proclamation of Latin America and the Caribbean as a Zone of Peace at the Summit of the Latin American and Caribbean Community of States in Havana in January 2014. Finally, it is actively cooperating with Norway in mediating a peace agreement that will end the long conflict in Colombia, which has caused much human suffering.

One important concluding point is that Cuba has not shied away from been an active participant in the debates on the subject and has been constantly renovating its position, demonstrating once more the main trait that has emerged from the conduct of its foreign police in the last ten years, its constant updating. In the last debate on "responsibility to protect", while Havana recognized the importance of condemning and addressing the crimes described in paragraphs 138 and 139 of the **2005 World Summit Outcome** document, it underlined the main risk in not having a broad, honest, transparent and profound debate on the issue at the General Assembly.

That continuous updating of Cuba's position on "responsibility to protect" will undoubtedly be reinforced with the new stage opened by Presidents Raúl Castro and Barack Obama on 17 December 2014. On that occasion, both leaders emphasized that they will search for ways to cooperate in multilateral organizations on the basis of mutual respect for their differences. That is a positive development.

NOTES

1 See Cumbre de la ONU y su declaración final defraudaron al mundo, http://www.ain.cu/2005/septiembre/sep16iggonu05.htm

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Dossier sobre El Salvador

Dossier sobre la situación de los derechos humanos en El Salvador

Ana Bourse

Introducción

Los horrores que han tenido lugar a lo largo del siglo XX y en los comienzos del nuevo milenio, han sido la piedra angular de una nueva conciencia sobre la necesidad de, por un lado, generar mecanismos para evitar la ocurrencia o la recurrencia de ciertos abusos sistemáticos y masivos a los derechos humanos, tipificados en el actual Derechos Penal Internacional -como son el genocidio, los crímenes de guerra, crímenes de lesa humanidad y limpieza étnica; y por otro lado, de repensar el concepto de soberanía, para centrarla en la responsabilidad que tienen los Estados de proteger a sus poblaciones de los flagelos antes mencionados.

Casos como el Holocausto, Camboya, Ruanda, Srebrenica, Kosovo, Somalia, Sierra Leone, Darfur, entre otros, enfrentaron a la comunidad internacional con sus propias limitaciones para responder a tiempo y

adecuadamente ante situaciones donde poblaciones enteras o parte de ellas fueron sujetos de atrocidades y violaciones graves al Derecho Internacional de los Derechos Humanos y al Derecho Internacional Humanitario.

América Latina, bajo los regímenes militares y durante los enfrentamientos armados en Centroamérica entre 1970 y principios de la década de 1990, no escapó tampoco a la violencia. Con el fin de la Guerra Fría, la firma de acuerdos de paz, y el advenimiento generalizado de la democracia, se dieron diversos procesos de justicia transicional, cuyos resultados varían en cada contexto nacional.

Algunos analistas, consideran que, en la actualidad, los países de la región están libres de estos crímenes[1]. Sin embargo, la posibilidad de recurrencia persiste debido a déficits institucionales, que combinados con nuevas problemáticas, generan una paz aparente, y por lo tanto, precaria.

Es por ese motivo, que resulta fundamental el análisis y el debate sobre el principio de la "Responsabilidad de Proteger" (RdP), y el desarrollo de una agenda preventiva y mecanismos a nivel nacional, subregional y regional, para responder de manera efectiva y a tiempo frente a los indicios de procesos que puedan conducir a nuevas violaciones flagrantes y masivas a los derechos humanos, tal como ocurrió en el pasado.

En el año 2012, a partir de la creación de una red global de gobiernos, coordinada por el *Auschwitz Institute for Peace and Reconciliation* (AIPR), con apoyo de la Oficina del Asesor Especial para la Prevención de Genocidio de la Organización de las Naciones Unidas, nació la Red Latinoamericana para la Prevención de Genocidio y Atrocidades Masivas, con el propósito de generar capacidades y diseñar políticas y medidas adecuadas para hacer frente a situaciones presentes y futuras de potenciales crímenes de masa. Esta actitud pro-activa por parte de los gobiernos, ha sido un indicio de la importancia que reviste el tema, y del interés por sentar bases sólidas para que situaciones pasadas no se repitan, y contribuir hacia una paz sustentable.

CRIES, sobre la base de un acumulado de trabajo de investigación y análisis, y una trayectoria de esfuerzos vinculados a la sociedad civil regional, puso en marcha un programa con organizaciones de derechos

humanos de El Salvador, para poder iniciar un debate sobre mecanismos de prevención de violencia a gran escala, empoderar a los actores sociales, y contribuir a fortalecer los esfuerzos que realizan los puntos focales de gobierno en el marco de la red latinoamericana.

Esta iniciativa se basó en la convicción de que la prevención es una empresa que requiere de la colaboración de una multiplicidad de actores a nivel local, nacional, regional y global, dado el amplio abanico de recursos y capacidades que cada uno puede aportar en el proceso.

Este *dossier*, presenta distintos aspectos de los desafíos que aún tiene por delante El Salvador, pero ambos vinculados, de un modo u otro, a cultura de impunidad presente en el país, producto, en parte, de un fallido proceso de justicia transicional en el escenario del post-conflicto.

Por un lado, tal como describe Alejandro Díaz en su artículo, la Ley de Amnistía General para la Consolidación de la Paz de 1993, sancionada días después de que se conociera el detallado informe final preparado por la Comisión de la Verdad, ha imposibilitado, durante más de 20 años, investigar, juzgar y sancionar a los responsables de las violaciones de derechos humanos cometidas en tiempos del conflicto armado interno. Esto ha implicado para las víctimas, familiares y para el conjunto de la sociedad salvadoreña, la denegación del derecho a la verdad y a la justicia.

Uno de los mecanismos más efectivos para prevenir la recurrencia de crímenes contra la humanidad ha sido la rendición de cuentas frente a la sociedad y la justicia, y en algunos casos, el castigo correspondiente a los abusos perpetrados. Sin embargo, en un contexto de impunidad, son mayores los riesgos de que vuelvan a cometerse actos aberrantes contra la población civil, o contra grupos específicos de la sociedad.

Suele afirmarse, que es preferible prevenir a reparar o curar. Sin embargo, cuando se han producido violaciones graves a los derechos humanos, la reparación y el cierre de heridas son parte de la rehabilitación social, que permite luego, poder enfocarse en la prevención.

Decía Primo Levi, que "si comprender es imposible, conocer es necesario, porque lo sucedido puede volver a suceder"[2].

La cultura de la impunidad, además de tener el efecto de re-victimización de quienes han sido vulnerados en sus derechos más fundamentales, genera la percepción de que, en caso de cometer crímenes similares, también podrán evadirse las responsabilidades que dichos actos conllevan.

En El Salvador, tal como lo presenta Celia Medrano en su artículo, la violencia continúa siendo una constante, heredada de un tiempo pasado no resuelto, junto a los nuevos componentes que aportan el crimen organizado transnacional, las maras y pandillas, y el narcotráfico. Esta combinación de factores, junto a la falta de respuestas adecuadas, lo ha llevado a ubicarse entre los cinco países más violentos del globo[3], y a que, como en tiempos de los enfrentamientos armados, miles de salvadoreños se desplacen internamente, o busquen protección internacional en otros países, huyendo de la muerte o del reclutamiento por parte de actores no-estatales que tienen un dominio *de facto* sobre crecientes porciones del territorio nacional.

En ambos trabajos incluidos en el *dossier*, queda en evidencia la inacción o la incapacidad de las instituciones del Estado de resolver problemáticas, que aunque diferentes, tienen puntos de contacto en el clima de impunidad en el que se haya sumergido el país; y para lo cual debería ejercer la soberanía con responsabilidad, honrando las obligaciones contraídas en los instrumentos legales internacionales de derechos humanos que ha ratificado, y adoptar una perspectiva de prevención a mediano y largo plazo que ponga fin a la impunidad de la cual gozan hoy diversos actores estatales y no estatales en El Salvador.

NOTAS

1. Cfr. Pace, William (2012). "Civil Society, Latin America and the Development of the Responsibility to Protect" en *Pensamiento Propio*, número 35, Enero-Junio 2012/Año 17. Buenos Aires: CRIES
2. Primo Levi (2003). *Si esto es un hombre*. Barcelona: Muchnik Editores.
3. De acuerdo con el *Informe Global de Homicidios* que publicó la Organización de las NacionesUnidas en el 2013.

El muro infranqueable de impunidad en El Salvador

Alejandro Lening Díaz Gómez

Introducción

Para comprender en El Salvador las causas; responsables y consecuencias de la impunidad es necesario conocer previamente la situación político-institucional que ha permitido su instauración desde su nacimiento como país.

Las violaciones a los derechos humanos en contra de los más vulnerables y la falta de justicia; verdad y reparación obedecen a políticas estatales diseñadas para encubrir a los responsables, y que los casos aberrantes ocurridos queden bajo una total impunidad.

Haciéndose un breve proceso evolutivo de El Salvador, es evidente que, en la historia nacional,estas políticas de encubrimiento han permitido que los crímenes cometidos durante los regímenes militares,

a pesar de resoluciones e informes que han demostrado sus acciones criminales,hayan sido amnistiados y blindados legalmente; y se les rindan honores y homenajes a reconocidos criminales de guerra.

El Estado de El Salvador se ha caracterizado inveteradamente por ser un estado garante de impunidad; con un débil sistema de justicia que se ha convertido en cómplice, favoreciendo a los responsables de hechos atroces, especialmentelos ocurridos durante la guerra civil salvadoreña de 1979 a 1992.En esta etapa se cometieron graves violaciones a los derechos humanos como parte de las estrategias militares de contrainsurgencia basadas en la política de la Seguridad Nacional, lo que generó persecuciones y ataques generalizados y sistemáticos con fines genocidas, configurándose un estado terrorista.

La implementación del Estado terrorista dejóel saldo de miles de asesinatos, desapariciones forzadas de personas, masacres y torturas contra la población civil, así como la ejecución de miembros de la Iglesia Católica cuyo martirio se simboliza en el asesinato de Monseñor Oscar Arnulfo Romero, el 24 de marzo de 1980; quien fuera recientemente beatificado el 23 de mayo de 2015.

La continuidad de la impunidad ha perpetuado el dolor y re-victimización; convirtiendo a las víctimas en ciudadanos de segunda categoría; cuyos casos no han podido acceder a la justicia; u obtener verdad y reparación.

Dicho sufrimiento también se agrava con la indiferencia del Estado y supolítica de homenajes a los criminales de lesa humanidad, a quienes en El Salvador se los considera todavía “héroes”.[1]

Los Acuerdos de Paz y los objetivos incumplidos

Los Acuerdos de Paz en El Salvador, parecieron constituir la oportunidad de superar la impunidad en El Salvador. En los Acuerdos firmados en Ginebra el 04 de abril de 1990, se contemplaron los grandes objetivos que habrían de estar presentes en los Acuerdos de Paz definitivos, que serían: a) la democratización del país; b) la vigencia irrestricta de los derechos humanos y; c) la reunificación de la sociedad salvadoreña.[2]

Para cumplir con estos grandes objetivos en los posteriores acuerdos de México en abril de 1991 y de Chapultepec el 16 de enero de 1992, se contempló también una amplia "reforma judicial" y se incluyó el principio de superación de la impunidad para investigar las violaciones a los derechos humanos ocurridas durante el conflicto armado.

El principio de superación de la impunidad señalaba el reconocimiento de la necesidad de esclarecer y superar la inimputabilidad de los oficiales de las Fuerzas Armadas, especialmente en casos donde estuviese comprometido el respeto de los derechos humanos, remitiendo la consideración y resolución de este punto a la Comisión de la Verdad.[3]

La Comisión de la Verdad se constituyó con el objetivo de aclarar los actos atroces de la violencia ocurridos durante el conflicto armado interno de El Salvador. La Comisión hizo público su informe en el mes de marzo de 1993, revelando hallazgos respecto de algunos casos emblemáticos que conmocionaron a la sociedad salvadoreña, entre los cuales se encontraba el asesinato de Mons. Oscar Arnulfo Romero. Asimismo, señaló que los graves hechos de violencia cometidos en El Salvador, provenían de causas de gran complejidad en el país; que existían relaciones de injusticia antiguas y arraigadas que no podían atribuirse sólo a un sector de la población o a un grupo de personas.[4]

Adicionalmente, la Comisión de la Verdad hizo recomendaciones destinadas a superar la impunidad; fortalecer las instituciones del Estado; eliminar las causas estructurales de la violencia; evitar la repetición de los hechos de violencia pasados y lograr la reconciliación de la sociedad. Al mismo tiempo, recomendó una profunda reforma del sistema judicial que le otorgara la capacidad de investigar y castigar las violaciones a los derechos humanos, y se introdujeran reformas constitucionales para la creación de la Procuraduría para la Defensa de los Derechos Humanos; el Consejo Nacional de la Judicatura, reformar a las Fuerzas Armadas y crear una nueva institución de Seguridad Pública del país.

Con el pasar del tiempo, se fueron cumpliendo las reformas referentes a los cambios institucionales y legislativos, aunque no se ratificaron tratados internacionales muy importantes sobre derechos humanos.[5]

En lo relativo a las medidas de reconciliación nacional, la investigación de grupos armados ilegales o escuadrones de la muerte, encaminadas a

alcanzar una justicia real, la verdad y la reconciliación, fueron desoídas y se les cubrió con el manto de la impunidad. A las víctimas nunca se les reconoció como tales, ni mucho menos se dictó para ellas medidas de dignificación, ni de reparación o indemnizaciones morales y materiales.

Respecto a este tema, la Comisión de la Verdad planteó levantar un monumento nacional para las víctimas; fijar feriado nacional en su memoria; y establecer un Foro Nacional de la Verdad y la Reconciliación.[6]

El incumplimiento de las recomendaciones de la Comisión de la Verdad fue un duro golpe a los intentos por cumplir disposiciones que figuraban en los Acuerdos de Paz, y prevalecieron las voces que sostenían que la búsqueda de la justicia ponía en riesgo la "transición a la democracia".

El rechazo claro a los Acuerdos de Paz y a las recomendaciones de la Comisión de la Verdad se cristalizó con la aprobación de una amplia Ley de Amnistía[7] pocos días después de la publicación del informe de la Comisión de la Verdad, poniendo de manifiesto la falta de voluntad política de investigar y llegar, como mínimo, a conocer la verdad acerca de los aberrantes abusos que tuvieron lugar en tiempos del conflicto armado.

De este modo, se garantizó la total Impunidad y su continuidad en la historia de El Salvador,perdiéndose la oportunidad que representó la Comisión de la Verdad. De allí que no han habido progresos importantes en la eliminación de la misma para construir un estado que respete los derechos humanos de la mayoría de la población.

Como muchos sostienen, los Acuerdos de Paz fueron un acuerdo entre dos partes en donde las víctimas y la población no estuvieron presentes.

Principios contra la impunidad y su inaplicación en El Salvador

El sufrimiento de las víctimas y la necesidad de hacer frente a estos hechos que las re-victimizan en este y otros casos,llevaron a la aprobación en el año 2005 por las Organización de las Naciones Unidas

(ONU), de los principios de lucha contra la impunidad y el derecho de las víctimas a obtener reparaciones por violaciones a los derechos humanos y al derecho internacional humanitario, que se derivan de la obligación general de todos los Estados de respetar y hacer respetar los mismos.

Los principios internacionales sobre la impunidad y reparaciones,han sido recopilados recientemente por el derecho internacional público, como parte de un esfuerzo de la ONU para codificar las obligaciones internacionales de los Estados en esta materia. Pueden clasificarse en dos grupos: el "Conjunto de principios actualizados para la protección y la promoción de los derechos humanos mediante la lucha contra la impunidad"; y los "Principios y directrices básicos sobre el derecho de las víctimas de violaciones manifiestas de las normas internacionales de derechos humanos y de violaciones graves del derecho internacional humanitario a interponer recursos y obtener reparaciones"[8].

Los principios condensan las obligaciones estatales internacionales sobre la lucha contra la impunidad y obtención de reparaciones, que se encuentran vigentes de acuerdo a las fuentes del derecho internacional público, tal como lo estipula el artículo 38 del Estatuto de la Corte Internacional de Justicia que se refiere a las fuentes del Derecho Internacional Público.

En El Salvador, se han realizado recomendaciones para la aplicación de los mismos en informes de la Procuraduría para la Defensa de los Derechos Humanos (PDDH) y en resoluciones internacionales de la Corte y de la Comisión Interamericana de los Derechos Humanos (CIDH) en casos emblemáticos presentados por víctimas y representantes.

En cuanto a la práctica de desapariciones forzadas de personas, la PDDH, se ha pronunciado claramente al respecto y ha solicitado al Estado de El Salvador el cumplimiento y la aplicación de estos principios.[9]

También las organizaciones de derechos humanos se han mantenido activas tratando de abrir los caminos que permitan investigar y juzgar a los perpetradores de los abusos, y se han apoyado en las resoluciones del Sistema Interamericano, y los principios internacionales sobre impunidad y reparaciones. En el año 2009 la Comisión de Trabajo en Derechos Humanos de El Salvador, conformada por organizaciones

de derechos humanos que trabajan en el tema de memoria histórica, presentó al gobierno de una propuesta de Política de Garantía de los Derechos de las víctimas de violaciones a los Derechos Humanos, en donde se establecían líneas y acciones estratégicas para la construcción de una política de verdad, justicia y reparación.[10]

Posteriormente a esta propuesta, a partir del 2010, el Presidente Constitucional de El Salvador, efectuó un acto de desagravio y pedido de perdón en el contexto del pasado conflicto interno, marcando el inicio de algunas acciones estatales para la reparación de las víctimas. También ha impulsado la iniciativa del Programa de Reparaciones, con medidas en el ámbito de la salud, la educación, alimentación, participación en la vida económica, y otras de contenido simbólico como el reconocimiento de lugares de masacres o asesinatos colectivos como Sitios Históricos Culturales.

Asimismo, se ha desarrollado en dos etapas, un registro de víctimas, con las organizaciones civiles representativas de las víctimas; construyéndose una fuente de información de beneficiarios de medidas de reparación,que permitiera la incorporación de nuevas víctimas ante un Consejo Directivo responsable de su administración en el que también participan dos delegados de las organizaciones de víctimas y representantes del Estado.Han avanzado a paso lento las medidas mencionadas.

El elemento distorsionador de la impunidad. Casos emblemáticos sin respuesta de los órganos de investigación y justicia

Las acciones de búsqueda de justicia, promovidas por organizaciones de la sociedad civil salvadoreñas e internacionales que actúan en representación de las víctimas y sus familiares, se han enfocado hasta la actualidad, en cuanto al procedimiento interno, en impulsar acciones legales de doble vía. La primera sobre los casos denunciados ante los tribunales salvadoreños antes de la reforma penal de 1998, en donde cabe la intervención de las víctimas por medio de la figura de un "acusador particular", como parte dentro de un proceso inquisitivo-penal en que el investigador es el Juez de la causa. Y en segundo lugar, sobre

casos denunciados posteriormente a esta reforma penal y en la que no cabe la figura anterior y el monopolio de la investigación se encuentra a cargo del Fiscal General de la República.

En estas dos formas de denuncia y acusación, el procedimiento hasta el momento ha sido la aplicación de determinadas normas de derecho que generan impunidad[11], como la señalada Ley de Amnistía General para la Consolidación de la Paz de 1993. Asimismo, en los casos denunciados se han utilizado otras medidas la aplicación de normas que generan impunidad, pero que de acuerdo al Derecho Internacional de los Derechos Humanos (DIDH) deberían aplicarse restricciones a las mismas[12], como en el caso, por ejemplo, de la figura de la prescripción, [13]ya que generan efectos análogos a la impunidad.

Otra forma, de generar impunidad en estos casos, ha sido la falta de impulso de diligencias efectivas de investigación a través del archivo de los casos denunciados ante la Fiscalía General de la República. Ejemplo de ello, el 30 de agosto de 2006, el Comité de Familiares Victimas de Violaciones a los Derechos Humanos "Marianella García Villas" (CODEFAM) presentó ante la instancia gubernamental, la denuncia de seis casos de desapariciones forzadas de personas ocurridas entre los años de 1980 y 1983. Asimismo, el 29 de enero de 2008, miembros de la Fundación de Estudios para la Aplicación del Derecho (FESPAD), en calidad de apoderados de los padres del sacerdote Octavio Ortiz Luna, presentaron una denuncia penal sobre el asesinato de este sacerdote y cuatro jóvenes más (conocida como la "Masacre de El Despertar"), ocurridos el día 20 de enero de 1979.[14]

Con el fin de distorsionar la aplicación de la justicia, se continúan omitiendo normas de derechos humanos y aplicando subterfugios jurídicos que vanen contra de los principios establecidos por la Comisión de Derechos Humanos de Naciones Unidas y sus relatores especiales, como el señor Louis Joinet.

El mismo caso del magnicidio de Monseñor Oscar Arnulfo Romero, sufrió la aplicación de la Ley de Amnistía General de 1993.[15] Pero en este caso, como en otros crímenes de lesa humanidad, tales como las desapariciones de niños y niñas durante el conflicto armado interno; el de Lucio Parada Cea y otras personas caso No 1/99;el Asesinato de seis sacerdotes jesuitas, caso No136/99 Ignacio EllacuriaS.J y otras personas;

la Comisión Interamericana de Derechos Humanos ha señalado al Estado de El Salvador que las figuras de la Amnistía y la Prescripción son incompatibles con la Convención Interamericana de Derechos Humanos. De igual forma lo ha manifestado la Corte Interamericana de Derechos Humanos en el caso Hermanas Serrano Cruz Vs. El Salvador del 29 de marzo de 2005; Contreras y otros Vs. El Salvador, del 31 de agosto de 2011; las Masacres de El Mozote y Lugares Aledaños Vs. El Salvador, del 12 de octubre de 2012, entre otras.

Hasta la fecha,con el fin de seguir aplicando la Ley de Amnistía, el Estado ha mantenido premisas falsas sobre la misma, como considerarla parte importante del proceso de paz o que es el producto de las negociaciones entre el gobierno de El Salvador y la antigua guerrilla del Frente Farabundo Martí para la Liberación Nacional (FMLN); así como la invocación del Protocolo II de los Convenios de Ginebra.

En el ámbito interno, la Fiscalía General de la República ha mantenido el criterio de invocarla, a pesar de que esta ley ha sido declarada violatoria de Tratados Internacionales de derechos humanos como la Convención Interamericana de Derechos Humanos; y, que también ha sido declarada inaplicable por la Sala de los Constitucional de la Corte Suprema de Justicia el 26 de septiembre del año 2000 por violar la constitución. Incluso se han ignorado los informes especiales emitidos por la Procuraduría para la Defensa de los Derechos Humanos, en los que se establece con claridad y contundencia la incompatibilidad de esta Ley con la Constitución de la República y con las obligaciones internacionales asumidas por el Estado salvadoreño.

En esa línea, la jurisprudencia de la Corte Interamericana de Derechos Humanos, ha establecido internacionalmente que "son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretenden impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos".[16]

No obstante, las anteriores resoluciones internacionales del Sistema Interamericano de Derechos Humanos y pronunciamientos de

la PDDH en los casos de violaciones a los derechos humanos en el contexto del conflicto armado interno, ha prevalecido la omisión de deberes y de investigación de los mismos por parte del Órgano Judicial y de la Fiscalía General de la República.

Esto ha implicado, que a pesar de la lucha infranqueable contra la impunidad, todas las resoluciones y recomendaciones para hacer justicia, permanecen sin cumplir.

Desafiando la impunidad en instancias de investigación y los tribunales de justicia interna

El 20 de marzo de 2013, fue introducida por organizaciones de derechos humanos, una nueva demanda de inconstitucionalidad en contra de La Ley de Amnistía General de 1993, la cual fue admitida por la Sala de lo Constitucional de la Corte Suprema de Justicia a las trece horas y cincuenta minutos del 20 de septiembre de 2013.[17]

En la demanda, se solicitó a la Honorable Sala de lo Constitucional de la Corte Suprema de Justicia, que se declarara nula dicha Ley o decreto No. 486. Asimismo, se ha solicitado declararlainconstitucional por vicios de forma, en el sentido que la Asamblea Nacional Legislativa habría incumplido el proceso legislativo de formación de ley según los artículos 85 y 135 de la Constitución; y por vicios de contenido, puesto que la Ley de Amnistía en sus artículos 1,2 y 4, vulnera disposiciones tanto constitucionales como de tratados internacionales de derechos humanos vigentes en el país, al establecer una amnistía "amplia, absoluta e incondicional" a todas las personas independientemente del sector al que pertenecieron", violentando el deber del Estado salvadoreño de investigar y sancionar violaciones a los derechos humanos y crímenes de lesa humanidad.

Hasta la fecha, no ha sido emitida resolución respecto a esta demanda de inconstitucionalidad. Esto afecta especialmente a víctimas y familiares de víctimas de graves violaciones a los derechos humanos en El Salvador; puesto que su vigencia y efectividad a pesar de no ser absoluta, todavía permite que violadores de derechos humanos se escuden en jueces y fiscales que sienten temor de inaplicar la misma[18];

tomando en cuenta lo ya dicho por la Sala de los Constitucional de la Corte Suprema de Justicia en la Sentencia de inconstitucionalidad del 26 de septiembre de 2000.[19]

El 24 de marzo de 2014, fecha importante para la lucha contra la impunidad en El Salvador debido a que se conmemora el día "*Internacional del derecho a la verdad en relación con violaciones graves de los derechos humanos y de la dignidad de las víctimas*[20]"; organizaciones de derechos humanos firmantes de la demanda de inconstitucionalidad del 20 de marzo de 2013 y otras, en representación de víctimas y familiares de graves crímenes internacionales ocurridos durante el conflicto armado interno, acompañadas de la PDDH, presentaron un escrito de reiteración de la demanda de inconstitucionalidad de la Ley de Amnistía, (Ref. 44-2013) exigiendo a la Sala de lo Constitucional de la Corte Suprema de Justicia una sentencia definitiva al respecto.

El mismo 24 de marzo de 2014, la Procuraduría para la Defensa de los Derechos Humanos, recibió denuncia escrita por representantes de Asociación Pro Búsqueda de Niñas y Niños (Pro Búsqueda); Tutela Legal Dra. María Julia Hernández; Instituto de Derechos Humanos de la Universidad Centroamericana José Simeón Cañas (IDHUCA), la Comisión de Derechos Humanos (CIDH), el Centro para la Defensa del Consumidor (CDC) y la Fundación de Estudios para la Aplicación del Derecho (FESPAD) en relación a la falta de investigación y seguimiento por parte de la Fiscalía General de la República a graves violaciones a derechos humanos representados por las instituciones mencionadas, y que han sido denunciados desde hace muchos años.

Las víctimas también denunciaron ante la Procuraduría para la Defensa de los Derecho Humanos y ante la Comisión Interamericana de Derechos Humanos, en casos del conflicto armado interno, tratos inadecuados y que generan re-victimización e impunidad por parte de agentes de la Fiscalía General de la República, en donde presuntamente esta institución ha entrado a investigar estos casos con el fin de cumplir alguna de las resoluciones internacionales, como el caso de las Masacres de El Mozote y lugares aledaños, caso sentenciado en el mes de octubre de 2012, por la Corte Interamericana de Derechos Humanos.

Actualmente, la Fiscalía General de la República se encuentra realizando diligencias diversas que no responden a la exhaustividad de la investigación, ni a estándaresinternacionales de atención a víctimas.[21]

En cuanto a la vía constitucional, en casos de masacres del conflicto armado en El Salvador: como las masacres del Cantón "El Calabozo", en San Vicente: en donde se asesinaron más de 200 hombres, mujeres y niños el 22 de agosto de 1982 y la Masacre de San Francisco Angulo,del municipio de Tecoluca en el departamento de San Vicente, cometida por la Fuerza Armada el 25 de julio de 1981[22] se han interpuesto recursos de amparo,ante la Sala de lo Constitucional de la Corte Suprema de Justicia en El Salvador, con el objetivo de que el máximo tribunal nacional ordene la investigación de los delitos.

En los casosa los que se hizo referencia, fueron admitidos recursos o procesos de Amparo, y uno de ellos, el de San Francisco Angulo, tiene resolución (Amparo Ref. 665-2014) del 05 de febrero de 2014, en la que se determinó que se ha violentado el derecho a la verdad de las víctimas sobrevivientes y de la sociedad salvadoreña en general, ordenando al Fiscal General de la República dentro de un plazo razonable, una investigación seria, exhaustiva, diligente y concluyente, con el fin de esclarecer la verdad de esta masacre. La Sala de lo Constitucional en esta sentencia señala que el Derecho a la Verdad le asiste a las víctimas y la sociedad en su conjunto y deja expedita a éstas, la promoción de un proceso por los daños materiales y morales resultantes de la omisión fiscal de investigar.

En estos casos,y otras masacres del conflicto armado, se han presentado también solicitudes de información a la Oficina de Acceso a la Información y Respuesta del Ministerio de Defensa; ordenando dicha oficina al Ministerio de Defensa, realizar una nueva búsqueda sobre documentos y archivos de las unidades militares que pudieran estar involucradas en estos crímenes de lesa humanidad y específicamente en las masacres de Tenango y Guadalupe, cometidas por miembros del Ejército en el municipio de Suchitoto, el 28 de febrero de 1983.

La respuesta a ello; por parte del Ministerio de la Defensa ha sido manifestar que dicha información solicitada era "inexistente", por lo que los demandantes apelaron ante el Instituto de Acceso a la Informa-

ción Pública (IAIP) en busca de una respuesta sobre dicha situación. Procesos que todavía se encuentran en trámite.

Organizaciones de la sociedad civil en este tema señalan que, aunque es posible que no existan documentos, el Ejército puede iniciar un proceso de reconstrucción de los hechos para poder identificar qué es lo que pasó, quiénes cometieron los hechos, cuándo se emitieron las órdenes para los operativos en contra de la población civil, y dónde estaban las víctimas en ese momento, ya que pareciera que nunca existieron.

En suma, todas estas acciones judiciales están minando poco a poco el muro infranqueable de la impunidad en El Salvador.

Conclusión

A pesar de que han existido avances recientes, a través de resoluciones de la Corte Suprema de Justicia, en las que se ha pronunciado sobre la violaciones de los derechos a las víctimas, respecto al derecho a la Protección Jurisdiccional y aconocer la verdad, así como la puesta en marcha de medidas de dignificación para la víctimas por parte del gobierno de El Salvador y algunas medidas de reparación; existe una fuerte barrera para la aplicación de una justica imparcial, completa y efectiva tal comose ha pronunciado la CIDH en muchos casos, llevados por las organizaciones de derechos humanos de El Salvador a dichas instancias.

El 21 de mayo de 2015, dos días antes de la beatificación de Mons. Oscar Arnulfo Romero, organizaciones de la sociedad civil y ciudadanos en general marcharon hacia la Fiscalía General de la República, para pedir justicia y verdad en dicho caso, después de 35 años de cometido el asesinato, y 22 años después de que le fue aplicada la ley de amnistía.

Si en este caso emblemático para el mundo, no se garantiza el derecho a la verdad, es evidente que el manto de impunidad es aún más difícil de correr hasta elmomento para los demás casos de violaciones a los derechos humanos no sólo del conflicto interno, sino algunos sucesos actuales donde están implicados funcionarios con poder político.

Sin embargo, de a poco, dicho muro está siendo minado por acciones valientes y decididas de las víctimas y defensores y defensoras de derechos humanos.

El 21 de mayo, el Fiscal General de El Salvador, Lic. Luis Martínez, aprovechando la coyuntura de beatificación de Mons. Oscar Arnulfo Romero, ante una madre del Comité de Víctimas Monseñor Romero (COMADRES) se ha declarado romerista, y cumplió la formalidad de recibir la denuncia para investigar el Magnicidio del Arzobispo de los pobres. Otros,que al igual que él, nunca han reflejado acciones de justicia para las víctimas de violaciones de derechos humanos, mostraron "júbilo" por su beatificación.

Todavía es el momento para destruir la continuidad o perpetuidad de la impunidad en nuestro país. El 23 de mayo de 2015, por las calles de San Salvador, miles de personas no han dejado de caminar hacia el Monumento al Salvador del Mundo, lugar donde se realizó la ceremonia de beatificación de nuestro San Romero de América[23]; quien estátocando el corazón de las nuevas generaciones que caminan hacia la verdad, hacia la justicia y la verdadera reconciliación que ha sido negada en El Salvador.

NOTAS

1. En casos de graves violaciones a los Derechos Humanos como el Magnicidio de Mons. Oscar Arnulfo Romero y masacres como las del Mozote y lugares aledaños, las víctimas y sus representantes han solicitado se suspendan o cesen los homenajes a los criminales de guerra, como una medida de Reparación y Dignificación a las víctimas.

2. Acuerdo de Ginebra (04 abril de 1990). Este es el primer acuerdo que se firma y establece como objetivo fundamental, terminar con el conflicto bélico por la vía política y a corto plazo, prever la democratización del país y la apertura de espacios para la participación de los partidos políticos y de otras organizaciones civiles, así como el irrestricto respeto de los Derechos Humanos.

3. Cfr. Acuerdos de Chapultepec, Capitulo 1.5.
4. Ver Informe de la Comisión de la Verdad, Capítulo V. "Recomendaciones".
5. Todavía se encuentra pendiente la ratificación de tratados internacionales como: Convenio No 169 de la OIT; Convención Relativa a la Lucha contra las Discriminaciones en la Esfera de la Enseñanza; Protocolo Facultativo de la Convención contra la Tortura y otros Tratos Crueles inhumanos y Degradantes; el Protocolo Facultativo de la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer; el Estatuto de Roma de la Corte Penal Internacional;y la Convención Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas; adhesión y ratificación de la Convención sobre el Estatuto de los Apátridas de 1954 y la Convención para Reducir los Casos de Apatridia, de 1961.
6. El monumento a la Memoria y la Verdad de Víctimas Civiles de Violaciones a los Derechos Humanos fue construido a partir del año de 1998, por organizaciones de derechos humanos al ser desoídas las recomendaciones de la Comisión de la Verdad, en el que se incorporaron más de 28 mil nombres.
7. El Salvador: Decreto No. 486 de 1993 - Ley de Amnistía General para la Consolidación de la Paz, 20 de marzo de 1993, disponible en: http://www.refworld.org/docid/3e50fd334.html
8. Cfr. Comisión Colombiana de Juristas, *Principios Internacionales sobre Impunidad y Reparaciones; Compilación de documentos de la Organización de Naciones Unidas (ONU) Aprobados por la Comisión de Derechos Humanos de la Organización de Naciones Unidas (ONU)*, Pág. 215, (AG Res. 60/147 del 16 de diciembre de 2005).
9. Ver *Informe Especial de la Señora Procuradora para la Defensa de los Derechos Humanos sobre la práctica de Desapariciones Forzadas de personas en el contexto del conflicto armado interno ocurrido en El Salvador entre 1980 y 1992*. Emitido el 07 de marzo de 2005. Págs. 68-69.
10. Ver *Propuesta para una política de Garantía de los Derechos de las víctimas de violaciones a los Derechos Humanos*, de la Comisión de Trabajo Pro Memoria Histórica de El Salvador (2009).
11. Cfr. Comisión Colombiana de Juristas, Principios internacionales sobre impunidad y Reparaciones, Pág. 69. De acuerdo a M. Joinet en el

Informe Final ante la Comisión de Derechos Humanos, Subcomisión de Prevención de Discriminaciones y Protección de las Minorías, en aplicación a la decisión 1996/119 de la Subcomisión. Las medidas restrictivas justificadas por la lucha contra la impunidad, no deben de ser "*utilizadas de tal manera que se conviertan en una prima a la impunidad, impidiendo así el curso de la justicia*".

12. Uno de los autores de los *Principios Internacionales sobre la lucha contra la impunidad*, M. Joinet, en Informe final acerca de la cuestión de la impunidad de los autores de violaciones a los derechos humanos, , señala en el *Principio* 26, que deberán adoptarse medidas contra desviaciones a que pueda dar lugar el uso de la prescripción, la amnistía, el derecho de asilo, la denegación de la extradición, la inexistencia de procesos en rebeldía, la obediencia debida, las leyes sobre "arrepentidos", la competencia de los tribunales militares, así como el principio de la inamovilidad de los jueces con el fin de promover la impunidad.

13. Dicha figura ha sido aplicada en el caso de asesinato de seis sacerdotes jesuitas y dos colaboradoras, cometido por la Fuerza Armada el 16 de noviembre de 1989. Informe de la Señora Procuradora para la Defensa de los Derechos Humanos, sobre la impunidad respecto a la ejecuciones de Ignacio Ellacuría, S.J ; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J; Armando López, S.J: Segundo Montes, S.J; Juan Ramón Moreno, S.J; Elba Julia Ramos y Celina Mariceth Ramos. Emitido el día 30 de octubre de 2002.

14. Por la situación de impunidad en los casos mencionados y otros ocurridos durante el conflicto armado, organizaciones de derechos humanos, presentaron el 24 de marzo de 2014, una denuncia ante la Procuraduría para la Defensa de los Derechos Humanos por vulneración al derecho de acceso a la justicia; derecho a una pronta y cumplida justicia y derecho al respecto a las garantías judiciales; derecho a la verdad en perjuicio de diferentes victimas del conflicto armado interno, atribuidas a la Fiscalía General de la República.

15. El 31 de marzo de 1993, se dictó acto de Sobreseimiento Definitivo, a favor del imputado Capitán Álvaro Saravia o Álvaro Rafael Saravia Merino, aplicándose al mismo la Ley de Amnistía General para la Consolidación de la Paz de 1993, argumentándose que el Asesinato de Mons. Oscar Arnulfo Romero tenía un fin político, (adecuándose a los artículos 2 y 4 literal c) de la Ley de Amnistía, de conformidad al Art. 119 ordinal 2 del Código Penal, de 1973 (ya derogado), por lo

que dicho imputado fue puesto en libertad sin necesidad de fianza, por haberse revocado su detención provisional.

16. Caso Barrios Altos (Chumbipuma Aguirre y Otros vs. Perú) sentencia del 14 de marzo de 2001. Citada en Informe sobre la impunidad en el asesinato de Monseñor Oscar Romero, en ocasión del XXII Aniversario de su ejecución arbitraria. Procuraduría para la Defensa de los Derechos Humanos, 20 de marzo de 2002.

17. Inconstitucionalidad de Ref. 44-2013. Aún en estudio por la Corte Suprema de Justicia de El Salvador.

18. De acuerdo al Art. 185 de la Constitución de El Salvador, los jueces de la República tienen la facultad de inaplicar las leyes o dsiposiones contrarias a los preceptos constitucionales.

19. Dicha sentencia sobreseyó al Estado Salvadoreño, por considerar que la Ley de Amnistía *per se* no era inconstitucional; pero estableció que en casos de violaciones a derechos humanos y al afectarse el derecho de protección u defensa de las víctimas, la aplicación de la Ley de Amnistía devenía en inconstitucional, para lo cual la inaplicabilidad de la misma debía ser ventilada por los juzgadores (jueces de instancia) ante casos concretos.

20. Cfr. Consejo de Derechos Humanos de la ONU. Proclamación del 24 de marzo como Día Internacional del Derecho a la Verdad en Relación con Violaciones Graves de Derechos Humanos y de la Dignidad de las víctimas. http://www.un.org/es/comun/docs/?symbol=A/HRC/RES/14/7.

21. Específicamente en el caso de la Masacre de El Mozote, en la que fueron asesinados más de mil campesinos entre el 09 y el 13 de diciembre de 1981 por miembros de la Fuerza Armada, Tutela Legal Dra. María Julia Hernández, la Asociación Promotora de Derechos Humanos de El Mozote y la Procuraduría para la Defensa de los Derechos Humanos solicitaron a los tribunales de justica la suspensión de diligencias de exhumaciones a víctimas de la masacre, debido a que no se estaban realizando sobre la base de la resolución de la Corte Interamericana de Derechos Humanos, emitida sobre el caso, el 25 de octubre de 2012, y los estándares internacionales de atención a víctimas. Suspendiéndose las mismas hasta el final del presente año.

22. En estos hechos fueron exterminadas cruelmente unas 45 personas, todas civiles, en su mayoría niños, niñas y mujeres habitantes de la comunidad San Francisco Angulo, siendo perpetrado el crimen por un Escuadrón de la Muerte conformado por efectivos de la Fuerza Armada y miembros de la Defensa Civil de Tecoluca en aquella época. La masacre está plenamente probada mediante evidencia testimonial, así como por la exhumación de los restos de 30 víctimas, diligencias que fueron practicadas por el Instituto de Medicina Legal durante los años 2005 y 2006, a requerimiento del Señor Juez Primero de Paz de Tecoluca.

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La problemática de desplazamiento interno y migración forzada de víctimas de violencia generalizada y crimen organizado en El Salvador y Centroamérica: realidades y nuevos escenarios que demandan protección y reajustes para la acción humanitaria

Celia Medrano

En enero 2015, en el marco del aniversario de la firma de los Acuerdos de Paz, El Salvador recibió la visita oficial Ban Ki-moon, actual Secretario General de la Organización de las Naciones Unidas (ONU). El acontecimiento generó, tanto para los salvadoreños como para la

comunidad internacional, diversas reflexiones sobre el alcance real de dicho proceso 23 años después de su principal logro: la finalización del conflicto armado.

El mismo funcionario, luego de su visita, en un artículo publicado por el periódico "El Nuevo Herald", escribió que "*los países de la región, especialmente del Triángulo Norte formado por El Salvador, Guatemala y Honduras, están sometidos a la amenaza de la violencia armada impuesta por la delincuencia organizada transnacional, las pandillas y el tráfico de drogas….Hoy en día, la región registra los índices de homicidios más altos del mundo. Desde el final de la guerra civil han muerto casi tantos salvadoreños como los que perdieron la vida durante el conflicto…Las guerras en Centroamérica pueden haber terminado, y el aniversario de los acuerdos de paz debe ser celebrado. Pero las personas de la región siguen esperando la paz y la estabilidad plenas que merecen…*"[1].

El Salvador figuró como uno de los cinco países más violentos del mundo con una tasa de homicidio promediado de 41.2 por cada 100,000 habitantes[2], según reportes correspondientes al 2013. Se han contabilizado 73.000 homicidios desde la firma de los acuerdos de paz en 1992 hasta el año 2013, un número que se compara al dato oficial de 75.000 muertos durante el conflicto armado[3]. Las bandas criminales controlan territorios específicos en casi todos los departamentos del país, y las acciones estatales han sido insuficientes para frenar las tendencias delictivas y garantizar la seguridad ciudadana. En el contexto de América Central, las pandillas pueden tener control directo sobre la sociedad y ejercen poder de facto en las zonas donde operan.

La violencia letal ha sido un desafío constante a lo largo de la etapa del post-conflicto. Después de más de dos décadas, la ausencia de un enfrentamiento armado no ha representado para el salvadoreño común vivir en paz.

Los datos de la Policía Nacional Civil (PNC) en El Salvador en los primeros cinco meses del año 2015, han registrado no menos de diez muertes violentas al día. La cifra mayor fue alcanzada el pasado mes de mayo con 635 homicidios[4], es decir, 20 muertes violentas por día, un dato que supera el número registrado diariamente en los últimos diez años y caracterizado por un aumento progresivo y constante, a excepción de la disminución durante el período de vigencia de una

iniciativa conocida como "tregua" impulsada por diferentes actores sociales con conocimiento del Poder Ejecutivo entre el 2012 y 2013.

En dicho contexto, el 89% de los homicidio se concentra en la población de 15 a 19 años de edad. Ban Ki-Moon, en el artículo ya citado, enfatizó que "*…la mitad de la población del país nació después de los Acuerdos de Paz de 1992 y los jóvenes, sin trabajo ni esperanza, son los más vulnerables a la violencia. Un 40% de las víctimas de los homicidios son niños y jóvenes. Cada tres horas, una mujer o una niña es víctima de violencia sexual*".

El Fondo de las Naciones Unidas para la Infancia (UNICEF) afirma que El Salvador tiene la tasa de homicidios de niños y adolescentes más alta del mundo y ha reportado el asesinato de 6.300 niñas, niños y adolescentes entre el 2005 y 2013[5]. El representante de UNICEF en el país, Jonathan Gordon Lewis, manifestó en noviembre 2014 la preocupación de este organismo internacional ante el recrudecimiento de la violencia, y sostuvo que El Salvador está alcanzando cifras inaceptables de homicidios contra este grupo dentro de la población. Por lo tanto, el organismo internacional, ha recomendado al Estado salvadoreño reforzar las medidas de protección de la integridad de las niñas, niños y adolescentes.

Una de las consecuencias de la violencia generalizada ha sido un aumento en los intentos por salir de los países que integran Triángulo Norte centroamericano, por parte de personas que aseguran huir vía migración irregular a otros países, principalmente a los Estados Unidos.

Los países centroamericanos registraron fuertes desplazamientos de población entre 1980 y 1992 como consecuencia de los conflictos en Guatemala, El Salvador y Nicaragua, en momentos en que ciertos sectores de la población eran perseguidos por motivaciones políticas. El Alto Comisionado de Naciones Unidas para los Refugiados (ACNUR) cerró en la década de los noventa los campamentos de refugiados que tenía en México, Honduras y Panamá, en virtud de que la población regresó a sus lugares de origen tras los Acuerdos de Paz que se firmaron en la región.

Más de 20 años después, nuevos escenarios de violencia marcan dramas humanos comparables a los vividos durante la conflictividad armada en

Centroamérica. ACNUR ha identificado que, luego de los conflictos de los años setenta y ochenta, y de una reducción de refugiados y asilados, a partir del 2009, se presentan nuevamente un incremento de salidas en los países del Triángulo Norte. Sin embargo, al no producirse este fenómeno en un contexto de guerras o conflictos internos, los mecanismos de ayuda y de acción humanitaria tradicionales, encuentran dificultades para activarse.

Para ACNUR, las amenazas provenientes de pandillas o "maras", narcotráfico y crimen organizado transnacional son la principal causa actual de migración irregular en El Salvador[6]. En su mayoría, la población huye de las comunidades para evitar que se cumplan amenazas de muerte; impedir que sus hijos sean reclutados por estructuras de crimen organizado, que niñas y adolescentes se conviertan en servidoras sexuales obligadas de líderes mareros, o bien para librarse de las extorsiones de los pandilleros.

Datos registrados por el Alto Comisionado en el año 2012, indican que en total 3.735 hondureños, salvadoreños y guatemaltecos solicitaron asilo en otras naciones, de los cuales alrededor de 1.600 eran salvadoreños. A su vez, se han identificado 17.129 personas centroamericanas que han salido en calidad de refugiadas. Dentro de esa cifra global, 8200 ciudadanos de El Salvador, recibieron el estatus de refugiados en el 2012.[7] Esta tendencia se acentúa con el incremento de solicitudes de asilo, que pasó de 6.900 en 2009, a cerca de 15.700 en el año 2013.

El lugar de destino en la búsqueda de protección, se orienta, en gran parte, hacia Estados Unidos, Canadá y México, aunque también hay un crecimiento de solicitudes de asilo y refugio dirigidas a Nicaragua, Costa Rica y Panamá.

En Estados Unidos, el número de niñas, niños y adolescentes no acompañados provenientes de Centroamérica y México ha aumentado de un promedio de 6.000 niños por año en 2010 a más de 24.000 en el 2013. El mayor porcentaje de éstos menores proviene, en este orden, de Honduras, El Salvador y Guatemala. De un estudio realizado por ACNUR en el 2014 con 400 niños, niñas y adolescentes migrantes pendientes de procesos de reunificación o deportación en Estados Unidos, un 58% de niños y adolescentes entrevistados aseguraron que fueron desplazados forzosamente de su hogar, indicando una potencial

o actual necesidad de protección internacional[8]. Los jóvenes dentro del rango de edad de 8 a 18 años pueden ser particularmente vulnerables al reclutamiento de pandillas, encontrándose su integridad y vida en riesgo al resistirse a ingresar a estos grupos.

En los primeros meses del 2015, diversas fuentes estatales salvadoreñas, hondureñas y estadounidenses han afirmado que el número de niños, niñas y adolescentes migrantes irregulares detenidos en frontera sur de Estados Unidos se ha reducido considerablemente en comparación a la alta cifra registrada a mediados del 2014 que obligó a decretar una "emergencia humanitaria" en ese país. No obstante, dicha reducción no implica que la migración irregular de centroamericanos se haya reducido, al menos no estimada a partir de número de deportaciones registradas. Más bien, conforme ha señalado Oscar Chacón, líder de la Alianza Nacional de Comunidades Latinoamericanas y Caribeñas (NALACC) con sede en la ciudad de Chicago, "…*hay una relación directa entre la baja de menores detenidos en territorio estadounidense y los que están siendo devueltos desde México.*[9]"

Al migrar irregularmente, las víctimas se convierten en objetos de persecución por la corrupción de agentes migratorios y bandas de crimen organizado de otros países, creando una situación aún más precaria. Al solicitar asilo los países receptores no aplican análisis diferenciados, sino que generalizan la multicausalidad de la migración (razones económicas y reunificación familiar como causas más frecuentes), subestimando casos legítimos de persecución y riesgo.

Por otro lado, en los países receptores difícilmente se considera el crimen organizado como agente de persecución, sino como agente delincuencial y no evalúan los casos bajo la óptica de los instrumentos internacionales aplicables o criterios más flexibles para su aplicación. En consecuencia, un gran porcentaje de las víctimas salvadoreñas son deportadas a pesar de que expresan temores fundados y se amparan en el derecho internacional de no retorno, lo que al menos implicaría en primera instancia posponer la deportación hasta tanto se verifiquen los hechos que los migrantes argumentan.

El término "personas desplazadas", se refiere a aquéllas que han tenido que abandonar su país debido a persecución, violencia generalizada, violación masiva de derechos humanos, conflictos armados u

otras situaciones de similar naturaleza. Este fenómeno, a menudo, se manifiesta en masa. En principio, no aplicarían para ser reconocidas como refugiados bajo una aplicación rigurosa de la Convención sobre el Estatuto de Refugiado de 1951 y el Protocolo de 1967. Se les ha llamado "refugiados de facto", conforme glosario sobre migración de la Organización Internacional para las Migraciones (OIM).

Para Thomas Lothar Weiss, Jefe de la Misión de la OIM en México, el desplazamiento obligado por condiciones de violencia en Centroamérica, los convierte en migrantes que enfrentan graves riesgos, dado que un creciente número de redes del crimen organizado, que operan en la ruta que atraviesan hacia el norte, hace que sean cada vez más vulnerables a secuestros, explotación laboral o sexual, violencia, robo, violaciones y asesinatos.

La ausencia de manifestaciones claras de un interés oficial por el tema en la región, ha influido en la falta de políticas nacionales e internacionales efectivas de protección para las familias afectadas. Por lo tanto, queda vulnerado así su derecho al asilo y los estándares internacionales de protección.

Las organizaciones locales que trabajan en el ámbito comunitario en asuntos de niñez, derechos humanos y migración, observan que el ciclo de desplazamiento por violencia en El Salvador comienza con desplazamientos internos que luego desencadenan un proceso de desplazamiento externo. En 2012, El Instituto de Opinión Publica de la Universidad Centroamericana "José Simeón Cañas" (IUDOP) realizó una encuesta nacional que indicó que un tercio las personas encuestadas fueron desplazados más de dos veces en el mismo año.

Es difícil encontrar estudios serios sobre el desplazamiento forzado causado por el crimen organizado y otras formas de violencia social en El Salvador, así como tampoco se cuenta con registros representativos e indicadores concretos sobre la magnitud real del fenómeno y sus características específicas en cada país de la región.

Los solicitantes de asilo salvadoreños a menudo carecen de evidencia para demostrar sus situaciones de persecución dentro de los requisitos que están establecidos. Por otra parte, a excepción de Nicaragua, los países receptores no están aplicando la definición regional de refugiado

recomendada por la *Declaración de Cartagena sobre los Refugiados* de 1984 (incorporada en la normativa interna de México y la mayoría de los países de Centroamérica) y más recientemente, la "*Nota de Orientación sobre las solicitudes de la condición de refugiado relacionadas con las víctimas de pandillas organizadas y Convención de las Naciones Unidas contra el Crimen Organizado Transnacional*", de ACNUR.

En abril 2015, el Consejo Noruego para los Refugiados (CNR), reportó que El Salvador, Honduras y Guatemala tienen en conjunto más de 550.000 desplazados internos, de los cuales 289 mil son salvadoreños. Para el caso de El Salvador, el CNR cita estadísticas del informe número 137 del Instituto Universitario de Opinión Pública (IUDOP) de la Universidad Centroamericana José Simeón Cañas titulado "*Evaluación del país a finales del 2014*".

En la presentación del informe del CNR, Jan Egeland, Secretario General de este organismo, señaló que "*…la tendencia en Centroamérica es ver a nuevos actores que causan desplazamientos masivos de población motivados por los beneficios económicos de su actividad criminal*". Por su parte, Volker Türk, Alto Comisionado Adjunto de ACNUR, ha planteado que "*…la nueva tendencia indica que los actores armados, que están motivados por ganancias criminales y económicas, están expulsando a personas en forma masiva porque usan violencia masiva…*".

La mayoría de los Estados en la región centroamericana aún no han reconocido el desplazamiento forzado interno y externo a causa del crimen organizado como una situación real y emergente, que requiere de respuestas apropiadas y a tiempo, desde una perspectiva humanitaria y de seguridad humana. Por ahora, únicamente el gobierno de Honduras estableció mediante Decreto Ejecutivo PCM-053-2013, la "Comisión Interinstitucional para la Protección de Personas Desplazadas por la Violencia".

Los Estados en la región cuentan con iniciativas para enfrentar a estructuras de pandillas y crimen organizado como una situación de seguridad nacional y regional, pero se desentienden de las consecuencias humanitarias y las necesidades de protección de las víctimas, y en particular se desconoce e invisibiliza el desplazamiento forzado que se ha generado. Si bien los diferentes países cuentan con leyes para la protección de víctimas y testigos, así como mecanismos de protección

de personas en condición de vulnerabilidad, no se hace mención en los marcos normativos existentes, a la prevención del desplazamiento y/o a la protección de personas desplazadas internamente.

A nivel regional, el desplazamiento tampoco es parte de la agenda del Sistema de Integración centroamericana (SICA), aunque debe señalarse que el Acuerdo de Colaboración suscrito entre SICA y ACNUR en abril 2014, abre espacio para tratar el tema desde este órgano de integración.

En referencia específica a El Salvador, en septiembre del año pasado, el viceministro de Justicia y Seguridad Pública, Juan Javier Martínez, planteó que el Gobierno no ha realizado las acciones necesarias para la atención de las víctimas. "*Estamos claros que no podemos estar viendo el fenómeno de los homicidios, de la violencia que se da, sin estar tratando el tema de las víctimas, y que nosotros estamos conscientes que no lo hemos abordado como se merece*", reconoció el funcionario[10]. Por su parte, el Procurador para la Defensa de los Derechos Humanos de El Salvador, David Morales, en un posicionamiento institucional sobre el tema de violencia y atención a las víctimas, señalo en el 2014 que "*…las acciones de las instituciones del Estado dirigidas a la protección y asistencia de las víctimas de la violencia sean, en el presente período, tan precarias e insuficientes como en el pasado…*"[11].

Esta situación permite que estructuras del crimen organizado continúen impunes y se siga generando desprotección debido a la falta de políticas públicas y legislaciones nacionales y regionales, que estén acordes a los instrumentos internacionales y que respondan adecuadamente a las necesidades humanitarias de quienes son víctimas del desplazamiento forzado.

No obstante el escenario salvadoreño no es el de un conflicto armado o guerra, la asistencia a familias forzadas al abandono de sus viviendas para salvaguardar la vida de sus integrantes a partir de amenazas de actores vinculados con el crimen organizado requeriría la aplicación de los "*Principios Rectores de los desplazamientos internos*", que define como desplazados internos a "…*Aquellas personas o grupos de personas que se han visto forzadas u obligadas a huir o dejar sus hogares o su residencia habitual, particularmente como resultado o para evitar los efectos de un conflicto armado, situación de violencia generalizada,*

violación de los derechos humanos o desastres naturales o humanos y que no han atravesado una frontera de un Estado internacionalmente reconocido…”[12].

Los principios rectores de los desplazamientos internos, recogen los derechos de éstas personas abarcados en las garantías más generales del Derecho Internacional Humanitario y el Derecho Internacional de los Derechos Humanos. Estos principios definen los derechos y garantías pertinentes a todas las fases del desplazamiento interno, que disponen la protección contra desplazamientos forzados, protección y asistencia durante los desplazamientos y durante el retorno o el reasentamiento y la reintegración.

A los desplazados internos les asiste una amplia gama de derechos económicos, sociales, culturales, civiles y políticos, incluido el derecho a asistencia humanitaria básica (tales como alimentos, medicamentos o alojamiento), el derecho a estar protegido contra la violencia física, el derecho a la educación, la libertad de movimiento y residencia, derechos políticos como el derecho a participar en los asuntos públicos y el derecho a participar en actividades económicas. Los desplazados también tienen el derecho a recibir asistencia de las autoridades competentes para un retorno, reasentamiento y reintegración dignos y en condiciones de seguridad, incluyendo la ayuda para recuperar las propiedades y posesiones que abandonaron o de las que fueron desposeídos. Si esa recuperación no es posible, deben ser indemnizados o recibir otra forma de reparación justa.

Las autoridades nacionales tienen la obligación y responsabilidad primarias de proporcionar protección y asistencia humanitaria a los desplazados internos que se encuentren en el ámbito de su jurisdicción. Las organizaciones humanitarias internacionales y otros partícipes competentes tienen el derecho y responsabilidad, de ofrecer protección y asistencia a los desplazados internos cuando el Estado no tiene la capacidad o la voluntad de dispensar dicha asistencia. El Estado no puede retirar arbitrariamente su aceptación a dicho ofrecimiento, y todas las autoridades competentes deben conceder y facilitar el paso libre de la asistencia humanitaria y permitir a las personas que prestan esa asistencia un acceso rápido y sin obstáculos a los desplazados internos.

Basados en los principios rectores, ACNUR ha recomendado a los gobiernos de El Salvador, Honduras y Guatemala que a nivel nacional se promueva la creación de marcos de protección para personas que se han desplazado forzosamente, así como fortalecer alianzas con otros actores que puedan brindar asistencia material y legal; y a nivel regional fortalecer redes de protección en toda la región, particularmente en fronteras, para la identificación y referencia de personas con necesidades de asistencia.

El reconocimiento de la categoría de desplazados internos por parte de las autoridades, abriría puertas para solicitar el apoyo de la comunidad internacional, incluyendo la asesoría técnica del ACNUR en los países de origen a través de programas específicos de atención y protección a la población desplazada o en riesgo de desplazamiento, y para coadyuvar en el fortalecimiento de los mecanismos nacionales de protección y la búsqueda de soluciones.

Por incidencia de organizaciones sociales que participaron en las mesas técnicas facilitadas por el Programa de Naciones Unidas para el Desarrollo (PNUD) y el Consejo Nacional de Seguridad Ciudadana y Convivencia, dentro del plan "El Salvador seguro" se planteó diseñar y aplicar un registro/censo permanente de personas en situación de desplazamiento interno por causa de delitos, así como creación de centros municipales de atención interinstitucional a personas, familias y comunidades víctimas de violencia. En este sentido, el reconocimiento de desplazados internos en El Salvador permitiría mayor margen para organismos humanitarios y el abordaje integral del fenómeno por medio de políticas y programas específicos.

Pese a los altos niveles de violencia actuales, funcionarios gubernamentales aseguran que la delincuencia en el país no es elevada, debiendo distinguirse entre "*la realidad y la percepción*"[13], o han señalado a medios de comunicación social como ejecutores de "*una campaña de intimidación sobre el tema de la violencia*"[14]. Con respecto a la relación entre la migración irregular y el desplazamiento forzado por violencia generalizada, autoridades del sistema nacional de protección a niñez y adolescencia han planteado que "*...atribuirle a la violencia la causa única para la migración es un error grave y eso puede generar la adopción de políticas equivocadas*"[15].

La falta de investigaciones e indicadores confiables, así como registro adecuado del fenómeno por instancias estatales, hacen difícil determinar si efectivamente la violencia no es la principal causa de migración irregular. No obstante, conforme datos de resultados de formularios aplicados por agentes de la Dirección General de Migración y Extranjería (DGME) a migrantes deportados vía aérea y terrestre en la que se les ha preguntado durante los años 2012, 2013 y 2014 sobre las razones por las que decidieron migrar irregularmente, de un total de 9.267 migrantes que respondieron, 7.720 aseguraron que fue por razones económicas, y sólo 808 por reunificación familiar.

La Mesa de sociedad civil contra el desplazamiento forzado por violencia y crimen organizado, de reciente formación, está integrada por 11 organizaciones e instituciones de derechos humanos, investigación, religiosas y de servicios sociales a las que, por la naturaleza de su misión, personas y familias que huyen de la violencia recurren buscando ayuda. Cada una de estas organizaciones reporta que en el 2014 dieron asesoría, asistencia y acompañamiento a un caso por semana[16].

Para el investigador Jaime Rivas, la actuación del Estado para brindar seguridad a sus ciudadanos y ciudadanas, es muy limitada, ya sea por el desconocimiento del fenómeno migratorio y su vinculación con la inseguridad; por limitaciones presupuestarias, burocráticas y de coordinación interinstitucional; o por intereses políticos que buscan promover la visión de un país seguro de cara a fomentar la inversión o garantizar fondos internacionales. Concluye Rivas que "*...el fenómeno migratorio, como el accionar del crimen organizado rebasan las capacidades de respuesta institucional para brindar protección y apoyo a las víctimas [...] Lo que se observa en la realidad son acciones fragmentadas y una intervención muy acotada al momento del retorno. Asimismo, hay escasa visión integradora por parte del Estado que coordine las diferentes competencias de las instancias que intervienen en el fenómeno; por tanto, cada institución comprende sus competencias respondiendo a la estrechez de su visión institucional.*"[17].

No debe pasarse por alto además que, aunque el impacto más visible de la violencia es la tasa de homicidios, deben abordarse también otros indicadores que demuestran la grave situación humanitaria en la región, el alto costo social y económico de la violencia que también impacta en problemas de acceso a la salud, a la educación, vivienda

y trabajo digno para la población afectada. Actualmente, la violencia afecta todos los derechos humanos de las personas.

En el marco del décimo aniversario de los *Principios Rectores*, diferentes actores recomendaron que se vincularan estrechamente con el principio de la Responsabilidad de Proteger (RdP). Sobre este tema, la experta en desplazamientos internos, Erin Mooney ha planteado que el concepto de RdP, sostiene que los Estados soberanos tienen la obligación de defender a su población del genocidio, y otras atrocidades masivas, pero, cuando no pueden o no quieren hacerlo, también entra en juego la responsabilidad del conjunto de la comunidad internacional. Para Mooney, inevitablemente, el genocidio, los crímenes de guerra, los crímenes de lesa humanidad y la limpieza étnica obligan a las personas a desplazarse. Sin embargo, la vinculación entre la responsabilidad de proteger y los desplazados internos trasciende los factores causales.

Aunque basada en el mismo cuerpo jurídico del Derecho Internacional Humanitario que los Principios Rectores, la responsabilidad de proteger se concibió con un objetivo distinto: superar un impasse político relativo, concretamente, a las cuestiones básicas de principio y procedimiento respecto a cuándo, cómo y con qué autoridad internacional debe producirse una intervención. El Secretario General de la ONU ha planteado que se trata aún de un concepto, no de una norma, aunque se ha logrado que en los acuerdos para lograr sus objetivos, se incorporen la prevención y medidas de persuasión diplomática.

Citando a Roberta Cohen como la primera en expresar que "*la soberanía conlleva la responsabilidad de los gobiernos de proteger a sus ciudadanos*"[18], referida a la responsabilidad de los Estados para con los desplazados internos en sus países, Francis Deng, Asesor Especial sobre Responsabilidad de Proteger y hasta el año 2012 Asesor Especial contra el Genocidio, acuño la frase de "*la soberanía como responsabilidad*".

Desde esta perspectiva, continúa Mooney, los impulsores de la RdP han trabajado arduamente a fin de explicar la amplia gama de medidas que ésta abarca, destacando, sobre todo, las preventivas y el desarrollo de la capacidad estatal. Estos objetivos están reflejados en los Principios Rectores, que "*…de este modo pueden convertirse en un potente instrumento y guía para aplicar tales aspectos de la responsabilidad de proteger en los casos de desplazamiento interno real o potencial.*"[19].

Desde la responsabilidad de los Estados para con desplazados internos, todas las fases del desplazamiento, desde la prevención, protección de la población frente a las atrocidades y el abuso de los derechos, hasta el aseguramiento de soluciones duraderas, constituye una estrategia integral, que recuerda a la triple dimensión de la RdP (prevenir, reaccionar y reconstruir).

La prevención constituye el pilar más importante de la RdP. Este incluye numerosos aspectos, no siendo el menor el de enfrentar las causas profundas de las inseguridades, como son, entre otras, la miseria, el analfabetismo, las discriminaciones, las violaciones masivas y sistemáticas de los derechos humanos, y los desplazamientos forzosos.

Otro aspecto fundamental, obligatorio para impedir la reiteración de los conflictos y guerras, es el fin de la impunidad por los agravios cometidos contra las personas durante las guerras o las dictaduras. Para el abogado Roberto Garretón, quien se ha desempeñado como integrante del Comité Asesor del Secretario General de las Naciones Unidas sobre Prevención de Genocidios y otras masacres, hoy tiene un enorme desarrollo el concepto de justicia transicional, que ha generado una nueva dimensión del derecho humano a la justicia, contemplado en todas las declaraciones y tratados internacionales. Se trata del derecho a obtener verdad, justicia y reparación por violaciones graves de los derechos humanos.

No es posible, plantea Garretón, *"-lograr una reconciliación sincera y permanente, si los pueblos ven las sociedades que nacen de las confrontaciones consagran un empate moral, en la que los verdugos de ayer aparecen como los demócratas de hoy, sin haber sido nunca sancionados. El término de la impunidad por las violaciones graves, masivas y sistemáticas de los derechos humanos debe incluir todas las forma de impunidad: la impunidad judicial o penal, la impunidad política, la impunidad moral y la impunidad histórica…"*[20].

Partiendo de esta relación, resulta positivo que el Estado salvadoreño haya aceptado la recomendación que se le hiciera en octubre 2014 durante la presentación de su informe correspondiente al Examen Periódico Universal presentado ante Naciones Unidas en Ginebra de "enmendar" la Ley de Amnistía General de 1993. Ya otros organismos supranacionales como la Comisión Interamericana y la Corte Intera-

mericana de Derechos Humanos se habían pronunciado también en el sentido de señalar incompatibilidad de las leyes de amnistía relativas a graves violaciones de derechos humanos con el derecho internacional y las obligaciones internacionales de los Estados. en el caso salvadoreño haciendo referencia, por ejemplo, a Sentencia sobre la Masacre de El Mozote ocurrida en 1981.

El Secretario General de la organización Amnistía Internacional, Salil Shetty, afirmó durante su visita a El Salvador en octubre del 2014 que "*la Ley de Amnistía está bloqueando el camino de la justicia y nuestras experiencias a nivel mundial nos han enseñado que la única forma de tener una paz sostenible así como desarrollo sostenible es a través de la justicia. La Ley de Amnistía no solo permite la impunidad, impide que las víctimas del conflicto, de la violencia, encuentren la justicia. Queremos que la Ley de Amnistía sea derogada. La ratificación del Estatuto de Roma […] está en contradicción con la Ley de Amnistía, por eso la Ley de Amnistía debe derogarse*"[21].

La impunidad institucionalizada, la discriminación de las víctimas de crímenes contra la impunidad durante el conflicto armado interno, el abandono de la reforma judicial y el espíritu fundacional democrático de la Policía Nacional Civil consignados en los Acuerdos de Paz, han marcado la debilidad estatal ante la violencia de la post-guerra. Ni la Fiscalía General de la República, ni la Policía Nacional Civil, ni el sistema judicial han sido capaces de luchar eficazmente contra el crimen y garantizar la aplicación de una pronta y debida justicia. Estas instituciones se han caracterizado por su debilidad, por permitir la impunidad e incluso han sido infiltradas por el crimen organizado y la corrupción.

En los primeros años de la etapa post-conflicto, cuando comenzó el fenómeno de las pandillas no se les dio la importancia y atención requeridas; no se les quiso abordar con políticas de prevención que en aquel momento hubieran podido desarticular su crecimiento y desarrollo. Cuando la presencia y poder real de estos grupos ya eran innegables, se aplicaron políticas conocidas como "Mano Dura" que provocaron un efecto contrario al pretendido.

La continuidad de modelos fracasados de "manodurismo" para enfrentar las problemáticas de violencia y seguridad parecía llegar a su fin

en el año 2009 al terminar veinte años consecutivos de gobierno del partido Alianza Republicana Nacionalista (ARENA). El nuevo gobierno manifestó un interés inicial por adaptar el modelo implementado en Guatemala para la investigación y persecución penal de la criminalidad organizada conocido como la Comisión Internacional contra la Impunidad en Guatemala (CICIG). Esta comisión, estableció un grupo de trabajo especializado de fiscales para combatir redes de criminalidad organizada infiltradas en el aparato estatal, pese a que sus labores enfrentaron férrea oposición de parte de las fuerzas armadas castrenses y del poder legislativo, resistencia de miembros de la estructura policial y batallas políticas al interior del gabinete de Seguridad.

Sin embargo, la posibilidad de construir un modelo similar a la CICIG fue dejado de lado en poco tiempo, retomando nuevamente criterios "manoduristas" cuyo máxima fue el nombramiento inconstitucional de oficiales militares a la cabeza del Ministerio de Seguridad Pública y de la policía en el año 2011.

En el marco del primer año de gobierno del Presidente Salvador Sánchez Cerén, la Fundación de Estudios Para la Aplicación del Derecho (FESPAD) expresó en junio de 2015 su preocupación por los altos índices de violencia en El Salvador, y exhortó a las autoridades a que busquen medidas integrales y no represivas[22]. La organización de derechos humanos, considera que sacar a la fuerza armada a las calles, realizar redadas masivas y aumentar las penas en contra de delincuentes, sólo abonan al juego de la violencia que genera más violencia.

Asimismo, el Procurador para la Defensa de los Derechos Humanos, David Morales, advierte que no puede obviarse la preocupación adicional por la perpetración de diversos homicidios en el 2014, que reúnen las características de las ejecuciones extrajudiciales y parecen haber sido motivados con el propósito de la llamada "limpieza social". Las víctimas han sido generalmente jóvenes a quienes se les atribuye pertenencia a pandillas.

Para el Procurador, "*…los llamados grupos de exterminio, han operado esporádicamente pero recurrentemente desde los primeros años de la posguerra en el país, y en el pasado se demostró la participación de miembros de la corporación policial en algunos de los casos. Tales grupos*

operan desde la clandestinidad y recuerdan la trágica experiencia de los "Escuadrones de la Muerte..."[23].

En el ámbito de la asistencia a las víctimas de la violencia, el Procurador Morales ha lamentado "*...la ausencia de programas efectivos que faciliten a éstas procesos de atención psicosocial, rehabilitación y compensaciones, indemnizatorias por el daño sufrido*[24].

La creación de políticas, programas y proyectos específicos para la atención integral a víctimas de la violencia. que cuenten con la asignación de recursos y apoyo suficiente en beneficio de las mismas, pese a algunos avances y esfuerzos relacionados con cumplimiento del Estado a observaciones, recomendaciones y sentencias emanadas del Sistema Interamericano de Derechos Humanos (SIDH), constituye un tema que se encuentra aún pendiente en lo que se refiere a víctimas del conflicto armado en el país.

A este perfil de víctimas de graves violaciones a derechos humanos ocurridas en un pasado relativamente reciente, se suma un nuevo perfil de víctimas de actuales niveles de violencia cuyos nuevos actores están vinculados en su mayoría a estructuras de crimen organizado. En ambos perfiles, se encuentra el factor común de la impunidad.

Una expresión de estas nuevas modalidades de violencia, es el drama humano del desplazamiento forzado interno cuyas características ya han sido desarrolladas al principio del presente trabajo, vinculando las mismas con un problema de impunidad histórico y un sistema económico inequitativo y excluyente.

La violencia de las pandillas puede afectar grandes segmentos de la sociedad, sobre todo cuando el estado de derecho es débil. Para ACNUR, "…normalmente las víctimas de la violencia de las pandillas no serían elegibles para la condición de refugiado si el Estado fuera capaz o estuviera dispuesto a proporcionar una protección eficaz…"[25].

Si bien la situación descrita no es comparable con experiencias como Colombia, por ejemplo, ¿qué niveles de gravedad es necesario que alcance el fenómeno para que se tomen acciones urgentes de ayuda humanitaria de emergencia y medidas programadas a mediano y largo plazo para la garantía de derechos y protección de éstas personas? En

muchas partes del mundo se pueden estar formulando esta misma pregunta.

Valdría, en el intento de dar respuesta, dejar para nuestra reflexión final una afirmación hecha en 1993 por Francis Deng, entonces Representante del Secretario General de las Naciones Unidas sobre los desplazados internos: "*Ningún gobierno puede invocar la soberanía de forma legítima con el fin deliberado de dejar que su población muera de hambre o negarles el acceso a una protección y unos recursos vitales para su supervivencia y bienestar. [...] si un gobierno es incapaz de proporcionar protección y asistencia, la comunidad internacional debe actuar para cubrir ese vacío, ya sea con la invitación del país receptor o con el consenso internacional*"[26].

NOTAS

1. Ver artículo de Ban Ki-Moon, "Centroamérica en la línea de fuego", publicado en *El Nuevo Herald*, de Miami, Estados Unidos.
2. Dato extraído del estudio global sobre homicidios 2013 de la UNODC (ONU).
3. Ver trabajo de Jeannette Aguilar (Coord.) (2014) sobre *La situación de la seguridad y la justicia 2009-2014. Entre expectativas de cambio, mano dura militar y treguas pandilleras*.
4. Cifras obtenidas de registros de Policía Nacional Civil y el Instituto Salvadoreño de Medicina Legal de San Salvador, de 2014 y 2015.
5. Samaniego, José Xavier (2014). *Desplazamiento Forzado en el Triángulo Norte de América Central. Desafíos en materia de protección*. Ponencia presentada en el Taller de Expertos Grupos Criminales y Nuevas Formas de Desplazamiento en América Latina, organizado por la Universidad Centroamericana "José Simeón Cañas" y *School of Advanced Study* de la Universidad de Londres, en San Salvador, los días 22 y 23 de mayo de 2014.

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7. Taller regional 'Introducción a desplazamiento forzado y necesidades de protección' (2014), del Sistema de Integración Centroamericana (SICA), realizado en San Salvador, El Salvador.
8. Ver documento del Alto Comisionado de Naciones Unidas para los Refugiados, de marzo, 2015) *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*.
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11. Resumen de prensa sobre "Posicionamiento del Procurador para la Defensa de los Derechos Humanos sobre la situación de Inseguridad en el país y las políticas estatales de seguridad"- del Lic. David Morales, Procurador para la Defensa de los Derechos Humanos. Publicada el 12 de mayo de 2014, en San Salvador. El Salvador. Disponible en: http://www.pddh.gob.sv/menupress/573-posicionamiento-del-procurador-para-la-defensa-de-los-derechos-humanos-sobre-inseguridad-en-el-pais-y-politicas-implementadas
12. Extracto de documento de OCHA (1998) "Principios Rectores de los desplazamientos internos" (E-CN 4/1998/53/Add.2)
13. Nota publicada por Carmen Rodríguez, el 05 de enero de 2015, en *Diario La Página*. "Benito Lara: la delincuencia en el país no es elevada". San Salvador, El Salvador. Puede consultarse en: http://www.lapagina.com.sv/nacionales/102666/alexa-wwwlapaginacomsv-noticias-de-el-salvador
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24. Idem.

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NORMATIVAS

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