



THE PRESIDENT
OF THE
GENERAL ASSEMBLY

17 July 2009

Excellency

With reference to my letter dated 6 July 2009, I am pleased to present additional information about the discussion in the General Assembly on the Responsibility to Protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, to be held in the United Nations on 21 and 23 July 2009.

On 21 July, the Secretary-General will present his report entitled "*Implementing the Responsibility to Protect*", document A/63/677, in plenary meeting at 10:00 am in the General Assembly Hall. This session will be followed immediately by an informal session, envisaged to last for an hour or so, for Questions and Answers. Member States are urged to make short interventions and to keep their questions focused on the report.

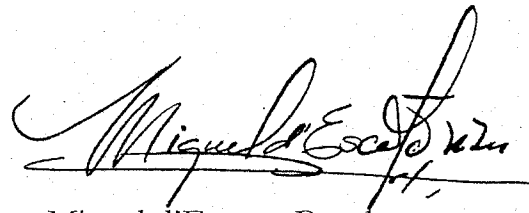
On 23 July, starting at 10 a.m. an informal interactive dialogue of the General Assembly on the Responsibility to Protect will be held in the Trusteeship Council Chamber. The meeting will consist of an opening segment with statements by me and the Secretary-General or his representative, followed immediately by a 15 to 20 minute presentation from each of the four panelists, and thereafter an interactive exchange. The panelists are key voices on this subject. They are Prof. Noam Chomsky from the United States; Prof. Jean Bricmont from Belgium, Prof. Gareth Evans from Australia and Prof. Ngugi wa Thiong'o from Kenya. I encourage Member States to avoid reading from prepared statements and to focus their comments on the issues raised. Interventions should not exceed 3 minutes, in order to allow the participation of as many Member States as possible.

All Permanent Representatives
and Permanent Observers to the
United Nations

The formal debate on the Responsibility to Protect will begin, in plenary meeting in the General Assembly Hall at 3 p.m. Interested Member States are invited to inscribe on the list of speakers with the Secretariat (1-212-963-5063).

Please find attached a two-day programme of meetings and a brief concept note to facilitate the discussions, as well as biographical information about the invited speakers. I look forward to a productive interactive debate on this important issue.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read "Miguel d'Escoto Brockmann". The signature is written in a cursive style with a horizontal line underneath.

Miguel d'Escoto Brockmann



**CONSIDERATION BY THE GENERAL ASSEMBLY
ON THE RESPONSIBILITY TO PROTECT**

(21, 23 July 2009, United Nations, New York)

Programme

Tuesday, 21 July 2009 - General Assembly Hall

10:00 am – Plenary meeting of the General Assembly

Presentation by the Secretary General of his report entitled “*Implementing the Responsibility to Protect*”, document A/63/677

Followed by an informal session, of one hour or so, for Questions and Answers.

Thursday, 23 July 2009

10 a.m. - Trusteeship Council Chamber

Informal Interactive Dialogue on the Responsibility to Protect

Opening Segment:

Statement by the President of the General Assembly

Statement by the Secretary-General (or his representative)

Panelists:

Prof. Noam Chomsky (United States)

Prof. Jean Bricmont (Belgium)

Prof. Gareth Evans (Australia)

Prof. Ngugi wa Thiong’o (Kenya)

Followed by an interactive discussion.

3 p.m. – General Assembly Hall

Plenary meeting of the General Assembly on the Responsibility to Protect (2nd item on the agenda)

Short biographies:

Avram Noam Chomsky is an American linguist, philosopher, cognitive scientist, political activist, author, and lecturer. He is an Institute Professor and professor emeritus of linguistics at the Massachusetts Institute of Technology. Prof. Chomsky is well known in the academic and scientific community as one of the fathers of modern linguistics. He is also considered a prominent cultural figure.

Jean Bricmont is a Belgian theoretical physicist, philosopher of science and a professor at the Université catholique de Louvain. He works on renormalization group and nonlinear differential equations. He is mostly known to the non-academic audience for his political work on various central issues to our time, including humanitarian intervention.

Gareth John Evans, AO, QC, was born in Australia and served as Attorney-General and Foreign Minister of Australia. He was President of the International Crisis Group from 2000 to 2009. He co-chaired the International Commission on Intervention and State Sovereignty (ICISS), which published its report, *The Responsibility to Protect*, in 2001. He was also a member of the UN Secretary General's Panel on Threats, Challenges and Change, whose report *A More Secure World: Our Shared Responsibility*, was published in December 2004. He is a member of the Commission on Weapons of Mass Destruction, and of the International Task Force on Global Public Goods. He is an endorser of the Genocide Intervention Network and serves on the International Editorial Board of the *Cambridge Review of International Affairs*. Evans is also member of the Board of Advisors of the Global Panel Foundation. In June 2008, he was appointed co-chair of the International Non-Proliferation and Disarmament Commission. In July 2008, Gareth Evans was selected as an inaugural fellow of the Australian Institute of International Affairs.

Ngugi wa Thiong'o is a Kenyan and is the greatest writer to have come from East and Central Africa and one of the most prominent intellectuals from Africa. His work includes novels, plays, short stories, essays and scholarship, criticism and children's literature. He taught at Yale University, and has since 1992 also taught at New York University, with a dual professorship in Comparative Literature and Performance Studies. He is currently a Distinguished Professor of English and Comparative Literature as well as the Director of the International Center for Writing and Translation at the University of California, Irvine. His novels show passionate commitment to the rights of ordinary people for which he has personally struggled and suffered.



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

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

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

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

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

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

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

In case a responsibility to protect type of situation becomes a threat to international peace and security, the question of the veto will arise. The veto ensures that any breach committed by a permanent member or by a member state under its protection would escape action. Member states, therefore, need to decide whether “a mutual understanding” among permanent members “to refrain from employing or threatening to employ the veto” in responsibility to protect situations is adequate or whether an amendment of the Charter is necessary. A “mutual understanding” implies no enduring obligation and therefore has no legal force. The problem is that if a veto has been cast, the General Assembly cannot overturn it; even without it, the General

Assembly cannot take up a matter that is on the agenda of the Security Council. The International Law Commissions draft Articles and the Third Report on responsibility of International Organizations states that internal rules provide no excuse for failing to discharge its obligations. If internal rules and the Charter [Article 27 (3) on the veto] prevent exercising any future responsibility to protect then should the veto go in such cases or should the responsibility be abdicated? The existence of the veto and the erosion of globalization strengthen the Westphalia paradigm as against the individual rights centered paradigm of responsibility to protect. Neither do the Councils procedures have any provision for due process of law nor are its decisions subject to judicial review. Moreover member states need to consider whether, as Secretary General Kofi Annan used to say, the political basis for Security Council decision making is far too narrow. The provisions of the Genocide Convention provide for a State to approach the appropriate organs of the United Nations to take action to prevent and suppress genocide, as well as actions in preparation thereof. It is the veto and the lack of UN Security Council reform rather than the absence of a responsibility to protect legal norm that are the real obstacles to effective action (in an article on the Rwanda genocide Under Secretary General Ibrahim Gambari reached a similar conclusion).

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

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

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

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

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

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

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