

INDIVIDUAL AND NATIONAL RESPONSIBILITY TO PROTECT

Dr. Jack D. Kem

“It is absolutely the responsibility of every U.S. service member, if they see inhumane treatment being conducted, to intervene to stop it.”

GEN Peter Pace, 29 November 2005¹

ABSTRACT

The "Responsibility to Protect," or R2P, as defined by the international community, is a sovereign obligation that relates directly to States to protect their citizens from genocide and mass atrocities. In the past decade, this "Responsibility to Protect" has extended to the international community when States fail to fulfill their obligation. R2P, therefore, is considered only at the "nation-state" level. This paper addresses how the concepts in R2P should also be considered as an individual obligation to intervene when instances of genocide or mass atrocities occur. The paper also compares and contrasts R2P with Just War Theory parallel concepts of Jus ad Bellum (as a nation-state concern) and Jus in Bello (as an individual concern).

BACKGROUND

On November 29, 2005, Secretary of Defense Donald Rumsfeld and the Chairman of the Joint Chiefs of Staff General Peter Pace conducted a press conference at the Pentagon. One of the key issues addressed at the press conference was the “growing reports of uniformed death squads” allegedly conducting assassinations and torture. These reports were dismissed as “hypothetical” by Secretary Rumsfeld. One reporter then asked a question “about excesses of the Interior Ministry, the Ministry of Defense, and that is in dealing with prisoners or in arresting people and how they're treated after they're arrested.” Acknowledging Iraq as sovereign country, he asked “...what is the U.S. obligation in addressing that, preventing that? And what can we do? And what are we doing?”²

Secretary Rumsfeld provided the following answer to the questions:

Any instance of inhumane behavior is obviously worrisome and harmful to them when that occurs. Iraq knows of certain knowledge that they need the support of the international community, and a good way to lose it is to make a practice of something that's inconsistent with the values of the international community. And I think they know that.

Now, you know, I can't go any farther in talking about it. Obviously, the United States does not have a responsibility when a sovereign country engages in something that they disapprove of; however, we do have a responsibility to say so and to make sure that the training is proper and to work with the sovereign officials so that they understand the damage that can be done to them in the event some of these allegations prove to be true.³

The reporter then asked a specific question to General Pace, which resulted in this fascinating dialogue:

Q: And General Pace, what guidance do you have for your military commanders over there as to what to do if – like when General Horst found this Interior Ministry jail?

GEN. PACE: It is absolutely the responsibility of every U.S. service member, if they see inhumane treatment being conducted, to intervene to stop it. As an example of how to do it if you don't see it happening but you're told about it is exactly what happened a couple weeks ago. There's a report from an Iraqi to a U.S. commander that there was possibility of inhumane treatment in a particular facility. That U.S. commander got together with his Iraqi counterparts. They went together to the facility, found what they found, reported it to the Iraqi government, and the Iraqi government has taken ownership of that problem and is investigating it. So they did exactly what they should have done.

SEC. RUMSFELD: But I don't think you mean they have an obligation to physically stop it; it's to report it.

GEN. PACE: If they are physically present when inhumane treatment is taking place, sir, they have an obligation to try to stop it.⁴

General Pace retired in October 2007; in October 2008 he was interviewed about the press conference and his “confrontation” with Secretary Rumsfeld. He provided the following clarification of his comments:

It was during a press conference where I countered Secretary Rumsfeld in public. Somebody asked the question about “if” an American service person saw torture or abuse of an Iraqi, what should he do? I was not comfortable with the answer Secretary Rumsfeld gave. So I spoke up and I said, “It is the absolute responsibility of every single person in uniform who sees anything that looks like torture, or in any other way sees mishandling of another human being, to do all in your power to stop it.” He then said something like, “What General Pace meant is ...” I countered, “No. I meant what I said.”⁵

Who has the responsibility to protect citizens when torture – or “mishandling of another human being” – during the conduct of war? Does the “responsibility to protect” apply only to sovereign governments or is it the responsibility of “every single person” who sees this take place? Secretary Rumsfeld clearly saw this as an issue to be addressed by sovereign governments whereas General Pace clearly saw this as an issue that must be addressed by all soldiers. As Secretary Rumsfeld acknowledged when asked what the U.S. obligation is in addressing mistreatment, “That’s a fair question.”⁶

THE RESPONSIBILITY TO PROTECT

The concept of the Responsibility to Protect became a major issue for the international community following the atrocities that took place in the Balkans and Rwanda. On 16 September 2005, the United Nations General Assembly adopted a resolution that addressed the 2005 World Summit Outcome. The resolution addressed the concept of the Responsibility to Protect:

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 to 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 are manifestly failing 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.⁷

This resolution addressed the concept of the Responsibility to Protect as the responsibility of sovereign states. The resolution also addresses action taken when states do not meet their obligations – but these actions are taken through “collective action” through the Security Council. The Responsibility to Protect, as defined by the United Nations, does not extend to individual combatants.

In January 2009, the Secretary General of the United Nations issued a report entitled “Implementing the Responsibility to Protect.” This report reinforced the concept of the “...enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.”⁸ The report continues to state that “one of the keys to preventing small crimes

from becoming large ones, as well as to ending such affronts to human dignity altogether, is to foster individual responsibility.”⁹ At this point in time, the concept of the Responsibility to Protect focused on the State as the primary actor, but acknowledged the role of individuals to play a part in preventing and responding to those conditions that result in atrocities and crimes against humanities.

In 2011, the United Nations General Assembly and the United Nations Security Council issued a Report of the Secretary-General entitled “The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect.” This report explicitly includes individuals (including soldiers) as having a “moral responsibility to protect.”

*13. Beyond the legal responsibilities of the State, individuals have a moral responsibility to protect. Mass crimes generally require the mobilization of large numbers of people — whether soldiers or civilians, police or wage earners — to turn on their neighbours and even their families with cold and calculated cruelty and callousness. They also require bystanders who pretend not to see or hear the anguish. On the other hand, those who refuse to look away or to participate, who shelter the vulnerable, and who speak out against the dehumanization of the targeted groups and for human rights and human dignity are exercising individual responsibility. We should honour and publicize such courageous acts, even as we learn from them.*¹⁰

This “moral responsibility to protect” for individuals is distinct from the concept of having the “legal authority” to act. Is the concept of “responsibility” analogous to the concept of “obligation” – where one must act and intervene to stop inhumane treatment? As General Pace stated, “*It is the absolute responsibility of every single person in uniform who sees anything that looks like torture, or in any other way sees mishandling of another human being, to do all in your power to stop it.*”¹¹ His understanding is that those in uniform have an obligation to act – not just the authority.

JUST WAR THEORY

General Matthew B. Ridgway assumed command of the Eighth United States Army in Korea in December 1950 after the death of Lieutenant General “Bulldog” Walker. He immediately stated to make an impact on the forces in Korea upon assuming command. One of his early acts was to write a memorandum to all of his field commanders entitled “Why We Are Here.” This memorandum was in response to two of the questions he had heard during his early tenure: “Why are we here?” and “What are we fighting for?” He answers those questions in his short memorandum:

*The answer to the first question, “Why are we here?” is simple and conclusive. We are here because of the decisions of the properly constituted authorities of our respective governments... The answer is simple because further comment is unnecessary. It is conclusive because the loyalty we give, and expect, precludes any slightest questioning of these orders.”*¹²

The question of “Why are we here?” was answered in the simplest terms – because we have been told to go to war by our nation. The second question, “What are we fighting for?” was answered by General Ridgway in terms of how each member of his command should act now that they have been sent to war.

The second question is of much greater significance, and every member of this command is entitled to a full and reasoned answer. Mine follows.

To me the issues are clear. It is not a question of this or that Korean town or village. Real estate is, here, incidental. It is not restricted to the issue of freedom for our South Korean Allies, whose fidelity and valor under the severest stresses of battle we recognize; though that freedom is a symbol of the wider issues, and included among them.

The real issues are whether the power of Western civilization, as God has permitted it to flower in our own beloved lands, shall defy and defeat Communism; whether the rule of men who shoot their prisoners, enslave their citizens, and deride the dignity of man, shall displace the rule of those to whom the individual and his individual rights are sacred; whether we are to survive with God’s hand to guide and lead us, or to perish in the dead existence of a Godless world...

...These are the things for which we fight. Never have members of any military command had a greater challenge than we, or a finer opportunity to show ourselves and our people at their best – and thus be an honor to the profession of arms, and a credit to those who bred us.¹³

In Just War Theory, Ridgway’s answer to the first question (“why are we here?”) related to the concept of *Jus ad Bellum*, or the justification for going to war (or when you go to war). This is, historically, a nation-state responsibility that requires certain criteria being met:

- ***Just Cause:*** to confront “a real and certain danger.”
- ***Competent Authority:*** war must be declared by those with responsibility for public order, not private groups or individuals.
- ***Comparative Justice:*** are the values at stake critical enough to override the presumption against war?
- ***Right Intention:*** intended only for the reasons set forth in *Just Cause*.
- ***Last Resort:*** all peaceful alternatives have been exhausted.
- ***Probability of Success:*** not an irrational resort to force or hopeless resistance.
- ***Proportionality:*** damage to be inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms.¹⁴

General Ridgway clearly states that the forces in Korea have been sent to fight because *properly constituted authorities of our respective governments* have decided so – they are the competent authority, and the members of his command should defer to their leaders without question.

General Ridgway’s answer to the second question (what are we fighting for?) is related to the concept of *Jus in Bello*, or the conduct in war. This concept relates to the overall “strategy, tactics, and individual actions” during warfare.¹⁵

The U.S. Army has outlined the overall legal principles for how units use legal force (*Jus in Bello*) in Army Doctrine Reference Publication (ADRP) 1, *The Army Profession*:

- *The principle of **Military Necessity** requires combat forces to engage in only those acts essential to secure a legitimate military objective. This principle justifies those measures, not forbidden by international law, necessary to accomplish the mission.*
- *The principle of **Distinction** requires discrimination between lawful combatants and noncombatants. The latter includes civilians, civilian property, prisoners of war, and wounded personnel who are unable to resist.*
- *The principle of **Proportionality** states that the anticipated loss of life and damage to property incidental to military action must not be excessive in relation to the expected military advantage.*
- *The principle of **Unnecessary Suffering** requires military forces to avoid inflicting harm to people or damage to property beyond that which is necessary to accomplish the mission. Tactically, this principle imposes restraints on Soldiers involved in close combat.*
- *These principles establish legal and moral boundaries for the use of landpower. They are the basis for the rules of engagement and “The Soldier’s Rules.” These principles guide Army leaders as they plan and conduct the mission and protect noncombatants and their property to the maximum extent possible.¹⁶*

There is a clear distinction, at least in the literature, between the concepts of *Jus ad Bellum* (the justice of war) and *Jus in Bello* (the justice in war). As Michael Walzer states,

Jus ad bellum requires us to make judgments about aggression and self-defense; Jus in Bello about the observance or violation of the customary and positive rules of engagement. The two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.¹⁷

The conduct of war (*Jus ad Bellum*), therefore, is considered an issue that relates to the relationships between states, whereas the conduct in war (*Jus in Bello*) concerns the actions of individuals.¹⁸ This distinction is important – soldiers fight because of a legal obligation

or patriotic duty, but they are never guilty of a crime of aggression because they believe that their cause is just; they are responsible for how they fight wars, but not for fighting in wars that their *properly constituted authorities* have waged.¹⁹

<p style="text-align: center;"><u>Jus ad Bellum</u> <i>Nation-State</i></p> <ul style="list-style-type: none"> • <i>Just Cause</i> • <i>Competent Authority</i> • <i>Comparative Justice</i> • <i>Right Intention</i> • <i>Last Resort</i> • <i>Probability of Success</i> • <i>Proportionality (of war)</i> 	<p style="text-align: center;"><u>Jus In Bello</u> <i>Individual</i></p> <ul style="list-style-type: none"> • <i>Military Necessity</i> • <i>Distinction</i> • <i>Proportionality (of military actions)</i> • <i>Unnecessary Suffering</i>
---	---

Table 1. Jus ad Bellum and Jus in Bello Principles

THE RESPONSIBILITY TO PROTECT AND JUST WAR THEORY

The concept underlying the Responsibility to Protect was initially thought of as the domain of nation-states. As an extension of the concept of sovereignty, nations were responsible for taking care of their own citizens and ensuring that atrocities and inhumane acts do not take place within their borders. When nations did not fulfill their obligations to secure their own population, the international community developed the Responsibility to Protect doctrine to justify intervention – and only based on the actions of the UN Security Council.

The Responsibility to Protect concept is analogous to the concept of *Jus ad Bellum*, or justification for intervention only if certain criteria have been adopted by the international community. In the case of intervention, the Competent Authority is the UN Security Council. The other components of *Jus ad Bellum* are also generally met: a Just Cause to confront a real and certain danger to the population; Comparative Justice where the values at stake are critical enough to override the presumption against intervention; Right Intention to only protect the population; Last Resort where all alternatives have been exhausted; the Probability of Success to attain objectives; and a consideration of Proportionality to ensure the potential damage and costs incurred by intervention are proportionate to the good.

For nation-states, the concepts of the Responsibility to Protect and *Jus ad Bellum* appear to be consistent and reconcilable. There are issues of sovereignty that are no doubt a concern for many nations, but there is a forum (the United Nations Security Council) that has been established to consider these matters. From a nation-state perspective, a country that is involved in military action which meets the principles of *Jus ad Bellum* could also transition to approach (from a nation-state perspective) addressing atrocities and inhuman treatment – in fact, these may too easily go hand-in-hand during conflicts.

For individuals, the concepts of the Responsibility to Protect as an individual obligation and *Jus in Bello* are not as clear nor as reconcilable. All three of the principles outlined in the U.S. Army doctrine for **Jus in Bello** have potential conflicts with the Responsibility to Protect as an individual obligation.

- ***Military Necessity** requires combat forces to engage in only those acts essential to secure a legitimate military objective. This principle justifies those measures, not forbidden by international law, necessary to accomplish the mission.*

The principle of **Military Necessity** addresses doing those actions that are essential to securing military objectives. From an individual perspective, accomplishing stated military objectives and “*doing all in your power to stop*” an atrocity or an inhuman act may not be complementary, especially when the observed act is not obviously heinous. Should an individual soldier risk the mission to stop someone from a fight which may look like abuse? Is stopping that action militarily necessary? This is a matter of judgment, but one that could cause enormous difficulties.

- ***Distinction** requires discrimination between lawful combatants and noncombatants. The latter includes civilians, civilian property, prisoners of war, and wounded personnel who are unable to resist.*

The principle of **Distinction** addresses discerning between lawful combatants and noncombatants. Since it is assumed that most (but not all) cases of atrocities or inhumane acts would take place within the civilian population, military members may ultimately serve in the same role as police in sovereign countries as they see situations that require intervention – rather than allowing sovereign forces to address issues. From a judgment perspective, soldiers may even feel that the actions of local police are inadequate and feel an obligation to intervene.

- *The principle of **Proportionality** states that the anticipated loss of life and damage to property incidental to military action must not be excessive in relation to the expected military advantage.*

The principle of **Proportionality**, as it relates to *Jus in Bello*, has similar concerns as addressed in the principle of Military Necessity. All actions must be related to the “expected military advantage” whereas responding to an atrocity or inhumane may not offer an apparent military advantage.

- *The principle of **Unnecessary Suffering** requires military forces to avoid inflicting harm to people or damage to property beyond that which is necessary to accomplish the mission. Tactically, this principle imposes restraints on Soldiers involved in close combat.*

The principle of **Unnecessary Suffering** also relates directly to limiting actions that only those necessary for the accomplishment of the military mission. Again, “*doing all in your power to stop*” an atrocity or inhuman act must be measured against the military mission, which could conceivably be difficult to determine.

CONCLUSION

The U.S. Army’s Leadership Manual, ADRP 6-22, states the following in the introduction to the first chapter of the manual:

Army leaders exercise a profound responsibility because the consequences of their decisions and actions affect the lives of Soldiers, their families, the enemy and non-combatants. Leaders draw from deep-rooted values and professional competence to demonstrate resolve to do what is right at the right time for the right reason.

General Pace was right – military members cannot just sit by and watch atrocities or inhumane treatment and let them pass by; they cannot be satisfied with merely “reporting” such actions. The consequences of the actions – and inaction – of the military during the conduct of war affects all.

That being said, there is no “easy button” when there is a conflict between meeting military objectives and addressing immediate requirements and obligations. The use of “human shields” is effective because adversaries know we will protect those in harm’s way... and, because of this, the use of human shields has become a common tactic to cause us to pause. As a result, an absolute obligation adhere to an individual-based Responsibility to Protect may encourage more atrocities and inhumane treatment as a tactic to be used against us and the vulnerable populations we intend to protect.

Demonstrating “resolve to do what is right at the right time for the right reason” is the hard part.

Notes

1. News Briefing with Secretary of Defense Donald Rumsfeld and Gen. Peter Pace, November 29, 2005, Federal News Service transcript, <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1492>, accessed 15 April 2017.
2. Ibid.
3. Ibid.
4. Ibid.
5. Albert M. Erisman, "General Peter Pace: The Truth as I Know It," *Ethix* (Seattle, WA: The Institute for Business, Technology, and Ethics, 2008), <http://ethix.org/2008/10/01/the-truth-as-i-know-it>, accessed 15 April 2017.
6. News Briefing with Secretary of Defense Donald Rumsfeld and Gen. Peter Pace, November 29, 2005, Federal News Service transcript, <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1492>, accessed 15 April 2017.
7. United Nations General Assembly, *Resolution adopted by the General Assembly on 16 September 2005 A/RES/60/1. 2005 World Summit Outcome*, pg. 30, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/pdf/N0548760.pdf?OpenElement>, accessed 15 April 2017.
8. United Nations General Assembly, *Report of the Secretary-General, Implementing the responsibility to protect, 12 January 2009 A/63/677*, pg. 8, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/206/10/pdf/N0920610.pdf?OpenElement>, accessed 15 April 2017.
9. Ibid, pg. 14.
10. United Nations General Assembly / Security Council, *Report of the Secretary -General, The role of regional and subregional arrangements in implementing the responsibility to protect, 28 June 2011, A/65/877 – S/2011/393*, pg. 4, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/391/43/pdf/N1139143.pdf?OpenElement>, accessed 15 April 2017.
11. Erisman.
12. Matthew B. Ridway, *Why We Are Here*, Memorandum from Eighth United States Army, 21 January 1951, <http://cgsc.contentdm.oclc.org/cdm/ref/collection/p4013coll11/id/1554/>, accessed 15 April 2017.
13. Ridgway.
14. U.S. Catholic Bishops, "The Just War and Non-Violence Positions," in *War, Morality, and the Military Profession*, Malham M. Wakin, ed., (Boulder, CO: Westview Press, 1986), pp. 246-248.
15. Ibid., pg. 248.
16. Department of the Army, Army Doctrine Reference Publication (ADRP) 1, *The Army Profession* (Washington, DC: GPO, 2015) paragraphs 3-18 – 3-19.
17. Michael Walzer, *Just and Unjust Wars*, 2d Edition (New York: Basic Books, 1977), pg. 21.
18. Paul Christopher, *The Ethics of War and Peace* (Upper Saddle River, NJ: Pearson Prentice Hall, 2004), pg. 88.
19. Walzer, pg. 28ff.