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The Responsibility to Protect as an Element of Peace

Recommendations for its
Operationalisation

Policy Paper 28

I. Introduction

The "responsibility to protect" (R2P), universally recognised for the first time by the world's heads of state and government at the United Nations' World Summit in New York in September 2005, is a duty of solidarity which takes effect in cases of genocide, crimes against humanity and war crimes, for example: in short, in response to the most unconscionable humanitarian disasters which are not natural in origin and which, as "crimes against humanity", are typically initiated by states or are tolerated by them. Only if the international community is successful in preventing these types of crimes against humanity or, at the least, ending them at an early stage will it fulfil its responsibility for the preservation of peace in the 21st century.

For this to occur, now that the initial step, namely the conceptualisation and fundamental recognition of the responsibility to protect, has been taken, it is essential to move towards a clearer definition and operationalisation of the R2P concept while maintaining institutional coherence within the UN system. Whereas ideally, the *responsibility to prevent*, including early warning, resides with the UN Human Rights Council and, in parallel, the General Assembly, the *responsibility to react* is primarily a task for the UN Security Council. In addition, the International Criminal Court (ICC) has the complementary task of trying and sentencing persons accused of these serious crimes, while the newly established United Nations Peacebuilding Commission

bears the *responsibility to rebuild*. Significantly, the UN Secretary-General should be able to provide the necessary leadership for implementation of R2P without becoming embroiled in controversial debates.

Recent reforms of relevance to R2P include the appointment in 2007 of Francis Deng as the Special Adviser for the Prevention of Genocide and Mass Atrocities at the Under-Secretary-General level (with the post, formerly that of the Special Adviser on the Prevention of Genocide, being upgraded) and the creation of the position of Special Adviser on matters relating to prevention and resolution of conflict (Jan Egeland). And although there may be some doubt as to whether the creation of a third similar post – with Edward Luck being appointed as Special Adviser for the Responsibility to Protect at the Assistant Secretary-General level – will enhance coherence within the UN system, it is certainly a step forward in substantive terms.

At present, one option which may be worth considering in relation to the operationalisation of R2P is to pool its "prevention" and "reaction/intervention" components and, in parallel, to concentrate on rebuilding in post-conflict situations, which can make a strategic contribution to the prevention of future conflicts. With the creation of the UN Peacebuilding Commission, reconstruction now has an admittedly imperfect but nonetheless already surprisingly stable institutional framework, and will therefore not be discussed in more detail here.

II. A long road: from unilateral "humanitarian interventions" to collective action (R2P)

1. Background: experiences of injustice and suffering

The belief shared by many people in Germany that crimes against humanity must "never again" be countenanced is based on the experience of the mass injustice of the Holocaust under National Socialism. We Germans feel a particular moral responsibility when mass expulsions, deportations and summary executions of defenceless civilians – women, children and the elderly – occur. But it is not only the recollection of the past which awakens this response. In the wider international arena too, the experiences of more recent genocides – Bosnia-Herzegovina (1992-95), Rwanda (1994) and Darfur/Sudan (since 2003) – have also left deep scars. There is a concern that such humanitarian tragedies could be repeated – with millions of avoidable deaths, mass rape, disease, refugee flows and the consequent impacts on neighbouring countries and the stability of entire regions.

The Kosovo crisis in particular highlighted the discrepancy between the legal imperative and the action that is morally desirable to assist the victims of massive human rights violations. The UN Secretary-General has, since then, repeatedly urged the international commu-

Recommendation

In order to create an awareness and understanding of the responsibility to protect, the issue of R2P should feature in the media and in the public relations work undertaken by foundations and think tanks, not only in a non-European context (especially Africa), but also with a focus on its national and European relevance. In view of the urgency of this issue, it would be desirable if national human rights institutions such as the German Institute for Human Rights and other civil society organisations were to focus systematically on the theme of R2P in its various dimensions. The debate about the responsibility to protect must make it clear that human rights and security are indivisible and that the responsibility to protect is therefore a matter of direct concern for everyone, also in Germany.

nity to consider how the United Nations can and should respond to such crises. He has made it clear that the real danger lies not in the improper use of intervention for political purposes, but in "inaction" or irresolute action by the international community. All too often, as practice has shown, valuable time for effective crisis management is lost in advance of an emerging crisis.

Often, too, underdevelopment and poverty, corrupt governments and a climate of impunity contribute to the escalation of crises which would trigger the responsibility to protect, while the denial of people's fundamental economic, social and cultural rights exacerbates conflict in many cases.

Darfur in particular, but also Srebrenica, Rwanda and other crises should therefore serve as a warning to future generations, recalling how the international community failed by far to make use of the opportunities afforded by the comprehensive exercise of the responsibility to protect in its various dimensions, especially at an early stage. At the same time, the act of commemorating the victims should spur us on towards more effective international action in future.

2. Overcoming the doctrine of (unilateral) "humanitarian intervention"

The history of "humanitarian intervention" is bloody and often arbitrary in nature: repeatedly, unilateral military operations genuinely or supposedly aimed at saving people's lives in third countries were opportunistic in nature and stemmed from the intervening countries' overwhelming power. It was only with the founding of the United Nations that the situation changed: the introduction of the prohibition of the threat or use of force (embodied in Article 2 (4) of the UN Charter) meant that military interventions beyond the inherent right of individual or collective self-defence (Article 51 of the UN Charter) had to be authorised by the UN Security Council. However, in the case of the genocide perpetrated by the Khmer Rouge in Cambodia, which claimed up to three million lives, this did not result in the international community resolving to take collective action: on the contrary, when Vietnam invaded in January 1979 and ended the Khmer Rouge's reign of terror, the UN Security Council condemned the action and immediately demanded the withdrawal of all Vietnamese troops from Cambodia.

The response to Vietnam thus highlights a moral and legal paradox which, even now, is hard to resolve: on the one hand, unilateral military interventions in response to the most severe human rights violations are viewed as violations of international law because they breach the prohibition of the use of force, may be improper, and undermine the UN Security Council's authority to mandate action within the framework of collective security (Chapter VII of the UN Charter); on the other hand, there is no *duty* for the international community to take action under Chapter VII to prevent genocide and similar atrocities.

But this situation is changing: whereas the supposed "right of humanitarian intervention" was applied at the discretion of the intervening states, which could also refrain from exercising this right, R2P – with its emphasis on responsibilities and duties – has shifted the focus: states and the international community as a whole – and with it, the Security Council – are increasingly regarded as duty bearers. It is no longer about the "right of the intervening parties"; it is about the responsibility of states and the international

community to provide protection against crimes against humanity.

3. The responsibility to protect: more than a moral duty

Besides numerous human rights treaties, there is a solid body of international law prohibiting genocide, crimes against humanity and war crimes, notably the four Geneva Conventions (1949) and their two additional protocols (1977). Today, it is beyond doubt that the prosecution of massive violations of human rights and international humanitarian law, genocide and crimes against humanity does not fall within the sole jurisdiction of states. The UN Security Council has also recognised this state of affairs and, in the early 1990s, set up the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, whose case law has contributed to the further development of the legal instruments mentioned above.

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) is of particular importance, also in relation to customary international law. It contains the "hard core" of the responsibility to protect: the duty to prevent and to punish genocide (Article 1), which must be understood in the legal sense, not simply as a moral or political obligation. Since the judgment of the International Court of Justice (ICJ) in the case of *Bosnia and Herzegovina vs. Serbia and Montenegro* (2007) at the latest, the message must be clear to everyone: anyone who does not fulfil his obligation to prevent genocide, also in a country other than his own, breaches current international law and can be held not only morally but also legally accountable. In this context, the obligation to prevent genocide entails a specific duty of conduct: state authorities must show due diligence and take all reasonable measures within their power to prevent genocide.

Closely linked to this, incidentally, are the Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission (ILC): "A gross or systematic failure" by a responsible state triggers the positive obligation of other states to cooperate to bring to an end, through lawful means, this serious breach. This legal duty of cooperation in order to end a serious breach of the law is very close to the concept of the collective responsibility to protect.

4. The development of R2P as an international norm

One of the main achievements of the International Commission on Intervention and State Sovereignty (ICISS), which was established in 2000 on the initiative of the Canadian Government, is that in its report *The Responsibility to Protect* (2001), it broke once and for all with the state-centric concept of "humanitarian intervention", which relies solely on military action, and replaced it with a three-pillar concept of the "responsibility to protect", which embraces the security of the individual and consists of the following dimensions: prevention (*responsibility to prevent*), reaction (*responsibility to react*) and reconstruction (*responsibility to*

rebuild). At the same time, the Commission made it clear that prevention is the most important dimension of R2P: the collective use of force, it said, should only ever be a last resort and should only be used if an individual state is unwilling and/or unable to fulfil its primary responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The ICISS's approach, which makes the use of coercion conditional on a UN Security Council mandate, is in line with existing legislation and offers nothing new in terms of international law. The same applies to the individual state's postulated responsibility to protect: this already arises from the obligations to respect human rights and international humanitarian law enshrined in the international conventions and in international customary law, outlined above, and reflects the current legal position. By contrast, the ICISS report enters new territory where it considers the option of curtailing the use of the veto by the five permanent members of the Security Council (Permanent Five, or P-5) and also proposes making the decision-making and opinion-forming process within the Council partly conditional, when it comes to military action, on specific principles borrowed from the doctrine of the "just war". The report thus identifies various criteria to test the validity of any case made for military intervention, including just cause (*causa justa*), right intention (*recta intentio*), the primary motivation being to halt or avert human suffering, and the principle that military intervention must only ever be the last resort (*ultima ratio*), after the failure of other measures to achieve satisfactory results.

In the 2004 report of the High-level Panel on Threats, Challenges and Change, the responsibility to protect was already being described as an "emerging norm". The report *In Larger Freedom*, published by UN Secretary-General Kofi Annan in 2005 in preparation for the World Summit, also proposed that the Security Council develop a set of principles and be guided by them when deciding whether to authorise or mandate the use of force. And finally, the Millennium+5 Summit in September 2005 further elaborated the responsibility to protect and referred the issue back to the UN General Assembly for its continued consideration.

Recommendations

Building on the model character of the Action Plan "Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peace Building", the German Government should join forces with those governments which are prepared to give high priority to R2P and, in this context, also seek allies among non-EU states. Within the Council of the European Union and the European Parliament, a fundamental decision of principle on the responsibility to protect should be adopted which recognises its legal relevance, with a view to its operationalisation within the framework of the European Security and Defence Policy (ESDP). The European Security Strategy published in 2003, which is primarily a response to the events of 9/11 and the discord among the EU partners over the issue of unilateral action against Iraq in 2003, should be developed further to take account of the R2P principle.

The UN Secretary-General's newly appointed Special Adviser for the Responsibility to Protect, Edward Luck, has a key role to play in defining R2P and compiling positive examples from the past, in advising the UN Secretary-General on his role and strategy, and in promoting an understanding of the importance of R2P in debates and conferences outside Europe and North America. Due to the administrative and budgetary problems associated with the creation of this post, the German Government should consider providing short-term assistance here, based on its contribution to the establishment of the UN Global Compact Office in New York, and actively participate in setting up the office of the Special Adviser.

5. The impacts of 11 September 2001

The events of 11 September 2001 and the ensuing declaration of "war on terror" by the US and its allies meant that reactions to the ICISS report, also from non-governmental organisations (NGOs), were initially more muted than expected. Faced with terrorist threats, which would tie up resources for the time being, the issue of a collective responsibility to protect populations from crimes against humanity in third countries faded into the background at first. This is a deeply unsatisfactory state of affairs, given the clear evidence that since the Second World War, millions more people have died as a result of "non-intervention" and delayed action than have lost their lives as a result of terrorist violence. The resources allocated are also hugely disproportionate: government expenditure on the "war on terror" is infinitely higher than was spent previously on combating crimes against humanity. Counter-terrorism and the responsibility to protect should therefore not be played off against each other, even indirectly or unintentionally. But nor should the concept of R2P be invoked to justify military action retrospectively, as was attempted in the case of the Iraq war in 2003.

Recommendation

The German Bundestag, in its future decisions (especially on troop deployment), should also be guided by the principle of Germany's global responsibility to prevent crimes against humanity. Efforts to curb terrorism in particular should not be used as a pretext to tolerate massive violations of fundamental human rights in third countries and the non-exercise of the "responsibility to react". NGOs and other civil society actors could, in this context, give a voice to victims of massive human rights violations and convey to decision-makers the urgent need to act on the responsibility to protect.

III. Key elements of the responsibility to protect

Implementation of the R2P concept can only succeed if a shared understanding of the concept can be developed and defined conclusively. Possible key elements include the following:

1. The territorial state's responsibility to protect

The immediate responsibility to protect – i.e. the responsibility to prevent and, if necessary, end violence – lies with the state in which such violence is taking place. This aspect is non-contentious and arises, as outlined above, from the state's obligations under treaty and customary international law to protect human rights and international humanitarian law. When there are indications that violations are occurring, criminal investigations and, if appropriate, criminal proceedings must be initiated.

In cases of fragile statehood, the multilateral institutions already present in the country (the UN, EU, African Union and others), which often have more resources at their disposal than the host country itself, also bear responsibility. An "empowerment approach" supported by NGOs, which gives the local population the right to lodge individual or collective complaints to national authorities and the offices of multilateral institutions, could help to strengthen the rights of individuals within the framework of the state's responsibility to protect, provided that the state in question is willing and able to engage in a minimum of cooperation.

2. Primacy of prevention and early warning

Prevention must take place as a priority, with the early participation of stakeholders (*culture of prevention*). In principle, the full range of instruments can be used here, including mediation, political condemnation, travel bans, seizure of bank accounts, demarchés on the expansion of the "humanitarian space", observer missions, and political pressure on the conflict parties to safeguard the implementation of recommendations and norms. The resources provided by technical cooperation in the fields of legislation, administration and development, and which promote capacity-building, are of key importance as well. The UN Security Council should also make greater use of its right to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, under Article 34 of the UN Charter and of its powers under Article 33 (2) of the UN Charter to recommend that the parties to any dispute seek a solution by specific peaceful means named in this Article. Similarly, the UN General Assembly should make full use of its powers relating to prevention (Articles 10, 11 and 14 of the UN Charter) and make recommendations on greater resort to the Commission of Good Offices, Mediation or Conciliation within the United Nations (GA Decision 44/415 of 4 December 1989, annex) and the Panel for Inquiry and Conciliation (GA Res. 268 D (III) of 28 April 1949).

At local level, unrestricted access for the International Committee of the Red Cross (ICRC) to crisis areas can have a supportive effect by raising rebel groups' awareness of their obligations to comply with international humanitarian law (no recruitment and use of children in armed conflict, unrestricted access for humanitarian workers to visit refugee camps, etc.). Round tables in the countries concerned, involving the churches, civil society and private actors (companies), and regional and national conferences are other options in order to intensify dialogue and promote the peaceful resolution of disputes. The primary goal should be to create local structures which prevent violence, also to ensure that the responsibility to protect is not viewed as a "top-down" approach imposed by the countries of the northern hemisphere. Programmes which focus on the root causes of the crisis – which are often economic in nature – therefore play an especially important role, entirely in line with Professor Dieter Senghaas' maxim "si vis pacem, para pacem" ("If you want peace, prepare for peace").

Recommendation

In view of the fundamental importance of prevention for peaceful conflict resolution and averting grave human rights violations, but also due to the fact that parts of Charter VI of the UN Charter remain unutilised in practice, the conclusion of a "Convention on Prevention" would seem to be a sensible option. It should deal systematically with the various levels of prevention, relevant actors, and the obligations and options for action, amounting to a long overdue revitalisation of Chapter VI of the UN Charter. As a first step, the German Government and its European partners, in conjunction with the champions of the "human security" concept (Canada, Japan and others), could work to secure a relevant declaration from the UN General Assembly.

To ensure that words are swiftly followed by actions, the preventive dimension of the responsibility to protect must, as a priority, be equipped with further institutional safeguards at UN level. The key elements are:

- *Expansion of fact-finding activities*: Experts have proposed that the ad hoc International Commission of Inquiry on Darfur be viewed as a model for future crisis responses. However, this must not lead to a fruitless debate about whether there is evidence of genocide, which costs valuable time, especially given the a priori existence of a duty of prevention.
- *Establishment of a treaty body for the Genocide Convention*: Although a report commissioned by the UN Human Rights Commission in 2004 found that the UN member states had no interest in establishing a treaty body to monitor compliance with the obligations arising under the Genocide Convention, this proposal should be taken up again by NGOs and national human rights institutions. In this way, the obvious shortcomings in national implementation of the duty to prevent genocide (Article 1 of the Genocide

Convention) could be addressed, and the Genocide Convention's "second-class" status compared to other human rights conventions as regards a review of the treaty obligations could be redressed.

- *A new focus for peace missions:* It is also important to shape the human rights components of UN peace missions in a way which enables them to exert an effective preventive effect, also in light of the responsibility to protect.
- *More frequent mandating of preventive deployment:* Various reports suggest that the deployment of between 5000 and 6000 troops to Rwanda in April 1994 would have been enough to stop the genocide. Yet despite what are clearly positive experiences in practice (e.g. the United Nations Preventive Deployment Force in Macedonia or the United Nations Mission in the Central African Republic), this valuable and – compared with other measures – extremely cost-effective instrument, proposed as early as 1992 in *An Agenda for Peace*, still remains largely unutilised. The Security Council can choose from a wide range of options here, from the deployment of individual UN observers to the mandating of heavily armed multinational forces.

Recommendation

Tried and tested as well as potential prevention and early warning measures should be identified and reviewed in terms of "best practice". On this basis, the UN Secretary-General could propose the "mainstreaming" of R2P in its preventive dimension. The aim should be to interlink the full range of measures – early warning, fact-finding, reporting and preventive deployment – more strongly at UN level and provide institutional safeguards. The creation of new instruments, such as the establishment of a treaty body to monitor compliance with the obligations arising under the Genocide Convention, should also be considered.

In terms of the international community's credibility, however, it is essential that prevention genuinely takes place: based on substantiated "early warning", "early action" should be taken more frequently than in the past.

3. The correlation between criminal prosecution and deterrence

In all areas of R2P (prevention, reaction and reconstruction), actors' accountability must be strengthened. A further aim, in parallel to these efforts, must be to ensure that reparations are made to the victims. The centrepiece of the criminal law dimension is the Genocide Convention, which leaves no doubt that besides the obligation to prevent, there is also an obligation to punish. This falls primarily within the jurisdiction of the states themselves, but if a state is unable to undertake this process in a serious manner itself, prosecution becomes the responsibility of the international community, primarily through the ICC.

In future, law-breakers must clearly understand that the international community is prepared to act. This too is a contribution to prevention.

Recommendation

In future, the UN Security Council, as in the case of Darfur, should make use of the opportunity to refer matters to the International Criminal Court. Arrest warrants issued by the ICC must be acted upon swiftly. Furthermore, the Prosecutor of the ICC should use his own scope to achieve a breakthrough for R2P in cases of genocide, crimes against humanity and war crimes. Courts in UN member states should show greater willingness to prosecute and convict those accused of crimes against humanity on the basis of universal jurisdiction. Similarly, UN member states should on principle be prepared to provide penal facilities to hold prisoners convicted by the ICC.

4. The international community's original responsibility

In the 2005 World Summit outcome document, the heads of state and government recognised that beyond the option of collective action under Chapter VII of the UN Charter, the international community, through the United Nations, should, "as appropriate", encourage and help states to exercise their responsibility to protect. In this context, and linking in with the report by the High-level Panel on Threats, Challenges and Change, they designated the "international community" an individual bearer of the responsibility to protect: "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" (UN Doc. A/60/L.1, para. 139). This wording makes it clear that the responsibility to protect lies with the United Nations in advance of coercive measures taken under Chapter VII of the UN Charter and arises simultaneously and in parallel to that of the UN member states. Nonetheless, a fundamental problem occurs here, which is partly practical and partly political in nature: for if the UN is to take action on the territory of a sovereign member state under Chapter VI, the consent of the host country is required. And that may prove to be a major obstacle.

5. The UN Security Council's scope for action

The UN Security Council always takes decisions at its discretion under Article 39 of the UN Charter (threat to international peace and security); in this context, the president of the Security Council – reflecting the thinking of the then UN Secretary-General Boutros Boutros-Ghali – observed as early as 1992 that "non-military sources of instability in the (...) social (...) [and] humanitarian (...) fields have become threats to peace and security" (UN Doc. S/23500, p. 3). This means that the UN Security Council *could* act without further ado in the event of massive human rights violations. The World Summit outcome document specifically does not refer to "responsibility" in relation to the Security Council. Nonetheless, the Security Council does not have complete discretion when confronted with initial

evidence of crimes against humanity: the Security Council itself must act in conformity with the law and must, at the least, respect *ius cogens* and minimum humanitarian standards. Moreover, as the heads of state and government made clear in 2005, the Security Council must respect the will of the international community and then take effective action if prevention fails. It could be argued that the Security Council has become the international community's mandating authority in the R2P context – for it is the international community which has decided that the timely deployment of collective (UN) instruments, not a "go-it-alone" approach by individual countries or "coalitions of the willing", for example, is the appropriate response to a crisis. This conforms with Article 24 (1) of the UN Charter, which states that the members of the United Nations confer on the Security Council "primary responsibility" for the maintenance of international peace and security "in order to ensure prompt and effective action". Not least, the Security Council's response will gain in authority and credibility to the extent that the members of the United Nations fulfil their obligations under Article 25 of the UN Charter,

namely to accept and carry out the decisions of the Security Council in accordance with the Charter.

In the past, however, critical voices have repeatedly pointed out that the five permanent members of the Security Council (the P-5) in particular have so far shown no willingness to accept any curtailment of their powers under Article 24 and Chapter VII of the UN Charter. Against this background, it is undoubtedly a positive development that Resolution 688 of spring 1991 on humanitarian relief for the Kurds in Northern Iraq made the principle of R2P a political guideline for the work of the Security Council, albeit without making explicit reference to the R2P concept. There are cases in which the concept of R2P has, implicitly, been applied successfully (e.g. Macedonia, Burundi). A number of missions authorised by the Security Council were also mandated "to protect civilians under imminent threat of physical violence". The first explicit reference to the concept of R2P is found in Resolution 1674 (2006) on the protection of civilians in armed conflict, adopted by the Security Council on 28 April 2006 (UN Doc. S/RES/1674 (2006), para. 4).

IV. Strategies for, and obstacles to, implementation of R2P

1. Identifying the bearers of R2P

If states are to exercise "their" responsibility to protect in a proper manner, careful monitoring by the relevant UN treaty bodies of compliance with existing human rights obligations is essential. These bodies bear much of the responsibility for ensuring that governments comply fully with their treaty obligations in their treatment of their populations, and are also responsible for passing on information as part of the early warning process, as occurred in the crises in Rwanda and Sudan. A key task for the future is to develop a specific system of early warning and prevention within the R2P framework, comprising elements of human rights protection and conflict warning.

So which other institutions have a role to play? Only the principal UN organs (Security Council, General Assembly, International Court of Justice, etc.) and their subsidiary bodies, or the specialised agencies as well? Only the relevant bodies in Geneva and New York (Department of Peacekeeping Operations, High Commissioner for Human Rights, etc.) or UN field staff as well? Reports from Angola, for example, show that staff from the Human Rights Division of the peace mission and the Office of the UN High Commissioner for Refugees (UNHCR) were expected to carry out specific duties of protection – derived from R2P – at local level, which due to a lack of support from New York sometimes caused major uncertainty and frustration. Furthermore, non-state actors (NGOs, transnational corporations, and in some cases even "private" security companies) are also often involved, both positively and negatively, in situations in which grave human rights violations are occurring. Here, it would under certain circumstances be helpful if the UN General Assembly, for example, were to produce a

negative list of foreign companies which are demonstrably cooperating with governments that are failing to fulfil their responsibility to protect.

As to the specific question of when an obligation to prevent genocide is engaged, the ICJ, in the case of *Bosnia and Herzegovina vs. Serbia and Montenegro* (2007), has provided some initial clarification: in essence, the Court said that there are three tests that determine when responsibility is engaged: firstly, proximity, which may be determined geographically, by political links or by other relevant factors; secondly, actual or constructive knowledge of the impending disaster, and thirdly, influence, i.e. the likelihood that the party concerned could have influenced the course of events.

In the context of a potential deadlock blocking a decision by the UN Security Council, too, the P-5 should in future be mindful of the responsibility stipulated by the ICJ. "Before exercising a veto in the Security Council that could block international action that might have the result of preventing genocide, the veto holders should think very hard about their potential liability under the Genocide Convention under the tests articulated by the Court", warned UN High Commissioner for Human Rights Louise Arbour in an on-the-record conversation at the Council on Foreign Relations on 8 June 2007.

2. Self-restraint in the use of the veto

The fundamental recognition of the responsibility to protect should not obscure the fact that the problems with decision-making in the Security Council are still ongoing. A reform which would safeguard the Security Council's capacity to act must therefore have absolute priority. A key issue is whether the Security Council, as proposed in the ICISS report, will be willing to exercise

some measure of self-restraint in its use of the veto to the effect that action in third countries would not be vetoed in cases involving crimes against humanity. Relevant proposals made in the past have ranged from the modification and curtailment of the veto to a general obligation to justify its use and even its surrender altogether. Some proposals have included foregoing the right of veto for new permanent members, notably the Group of Four (G-4) initiative supported by Germany, which was intensively debated in advance of the World Summit. Although this proposal ultimately failed to gain broad support, the approach which it advocates – namely a curtailment of the veto – was right in principle and should also be pursued within any "interim solutions" adopted (e.g. redistribution of seats on a time-limited basis pending review).

Recommendation

The issue of the non-exercise of the veto in the event of actual or imminent crimes against humanity should be actively pursued in German foreign policy within the ongoing debate about UN Security Council reform and especially about working procedures. This would give the German side the opportunity to further enhance its profile in the human rights arena too, above and beyond any direct interest in an (interim) seat on the Security Council, and provide major impetus for the further development of international law outside the narrower institutional framework of Security Council reform. However, this approach presupposes that the concern – especially among the non-aligned countries – about other countries' "interventionist" tendencies in the context of R2P can be assuaged (see IV.8).

3. Alternative solutions in the event of deadlock in the Security Council

Under no circumstances should there be a sole – and certainly not overhasty – reliance on conflict solutions which depend on the use of force. Nonetheless, it is important to consider what should happen if the threat or use of a veto leads to deadlock in the UN Security Council. Various models exist here, besides the curtailment of the veto discussed above.

While there are some who advocate a reversion of R2P to those sub-state actors who exert some measure of territorial control, the ICISS explored the option of enhanced powers for the UN General Assembly based on the model presented in the *Uniting for Peace* resolution of 1950, which states that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session to consider the matter. This proposal rightly assumes that as a two-thirds majority would be

required to endorse the General Assembly resolution, this would accurately reflect the will of the international community and could thus make a major contribution to maintaining or restoring international peace and security; it would, arguably, also do much to strengthen the General Assembly's authority in the UN system. Furthermore, the ICISS did not rule out the possibility that in some cases, the Security Council's *ex post facto* authorisation of military action taken by a regional or sub-regional grouping (under Article 53 of the UN Charter) could suffice. The NATO interventions in Kosovo and the interventions by the Economic Community of West African States (ECOWAS) in Sierra Leone and Liberia could serve as examples of this type of *ex post facto* authorisation. This proposal takes account of the fact that in practice, it is sensible to establish functional burden-sharing between the United Nations and regional organisations and to involve the latter in the implementation of the "responsibility to react".

Others argue in favour of a combined UN model which, in order to increase the legitimacy of the action, also involves securing an advisory opinion from the ICJ; such an opinion can be requested by the UN General Assembly pursuant to Article 96 (1) of the UN Charter. The International Court of Justice is also empowered to deal with disputes relating to the interpretation, application or fulfilment of the Genocide Convention. If the ICJ endorsed the criteria for intervention in principle, the General Assembly could, in line with Article 11 (2) of the UN Charter, refer the matter back to the UN Security Council, thereby increasing political pressure on the Security Council; in the event of continued inaction by the UN Security Council, the General Assembly could empower a regional organisation to take military action. If the General Assembly took no action, military intervention would be ruled out. This model would prevent any improper use from occurring, as the criteria for intervention would be determined by the ICJ; however, one argument against the involvement of the ICJ is that it has a very heavy workload which could result in unacceptable delays.

It is important to ensure that based on the current legal position, only the UN Charter and its principal bodies (the Security Council, General Assembly and the ICJ) decide on issues concerning international peace and security. Authorisation or self-mandating of the use of force by coalitions of the willing or regional groupings is not permitted. This is the core principle underlying the responsibility to protect as developed by the ICISS.

Recommendation

To minimise the risk of self-mandated unilateral interventions by individual actors in the event of a deadlock in the UN Security Council, the development of an "alternative UN model" for the authorisation of military action which relies on the UN's principal bodies (General Assembly, Security Council, ICJ) deserves consideration. Proposals for the development of this type of alternative model which underscores the sole responsibility of the UN could be drafted by the Office of Legal Affairs (OLA) in the UN Secretariat or by the UN High Commissioner for Human Rights.

By contrast, calls for a "Council of Democratic States" or a "Court of Human Security", to be responsible for (humanitarian) interventions as an alternative to the Security Council in future, appear to be far more difficult to implement and are unlikely to be effective in practice.

4. Criteria for the responsibility to protect

If a catalogue of criteria for military interventions were adopted, e.g. in the form of a declaration, a General Assembly resolution and/or Security Council "guidelines", this would make it more difficult to justify inaction in future in cases where the criteria are fulfilled. The relevant decision-making criteria discussed to date include: the gravity of the threat, the right intention, last resort, proportional means and reasonable prospects.

Consensus on the criteria to test the validity of any case made for unavoidable military intervention in situations involving crimes against humanity could also increase the transparency of decisions taken by the UN Security Council in future. The Council's decisions – even if negative – would be easier to understand/justify, which would enhance their legitimacy. Well-defined criteria for R2P would enable a clear distinction to be made between impermissible military actions undertaken in the national interest or in pursuit of regime change, on the one hand, and military action as the last resort (*ultima ratio*) in the interest of humanity, on the other. This could make it easier for states to join in this type of UN operation. It would also stop the international community from focussing its efforts prematurely on the military option. The criteria should prohibit unilateral action and ad hoc "coalitions of the willing". The threshold for military intervention would thus be raised, which would also assuage the developing countries' concerns about non-collective and non-UN-mandated interventions.

Recommendation

In order to strengthen the rule of law, academics and practitioners – following the line taken by the ICISS and subsequent reports – should aim to agree "policy guidelines" or criteria determining when and under which circumstances the Security Council should authorise military action in response to crimes against humanity. One option is to appoint a UN committee of experts to clarify and prepare decisions, and especially to make recommendations for action. A revitalisation of the ICISS, e.g. on the basis of a Canadian initiative and with support from Germany, France, Switzerland and others, is also conceivable. The development of an appropriate catalogue of criteria could also be a matter for the new Global Centre for the Responsibility to Protect established in 2007/8 at the Ralph Bunche Institute for International Studies in New York, and could also be a subject for an interdisciplinary research project by the United Nations University (UNU) and/or the University for Peace in Costa Rica.

However, the debate should not be reduced to the availability of criteria for military action. A key issue for the operationalisation of R2P is effective support from responsible states under Chapter VI and VIII of the UN Charter, i.e. in advance of military action. It is also crucial to enforce existing international law more

effectively. The main purpose of R2P is to mobilise the political will to strengthen the rule of law, not to devise new reasons and opportunities for intervention.

5. The "threshold" for intervention – a contentious issue

Every military intervention must be embedded in an overall political strategy which is based on the broadest possible consensus among all stakeholders and opens up political perspectives. The "threshold", as outlined by the ICISS, poses particular problems in relation to the legitimacy criteria: which level of intensity of human rights violations should trigger the "responsibility to react", and which evidence should be deemed sufficient to warrant such a response? The ICISS and subsequent reports all differentiate between the primary responsibility of the state concerned, and – as a "fall-back position" – the subsidiary responsibility of the international community, which is only engaged once the state concerned has shown itself to be "unable or unwilling" to grant protection.

This approach may lead to problems in practice. It could create an additional obstacle to collective action by the UN Security Council. The state's "primary" responsibility to protect may, in practice, provide a pretext for the Security Council's inaction, as the tragedy in Darfur has shown.

Proposals, contained in the literature, for the expansion of R2P to include regime change, democratisation and the prevention of nuclear security risks should also be resisted. The introduction of these and other circumstances as criteria for intervention reduces the prospects of reaching agreement on joint threshold criteria, and may make it more difficult to achieve consensus on the prevention of crimes against humanity per se.

Recommendation

In future, the criterion proposed in the ICISS and subsequent reports that a state is manifestly "unwilling or unable" to act must not pre-empt the Security Council's judgment on when the responsibility passes over to the international community. Nor should R2P be expanded to include circumstances other than atrocity crimes.

A viable procedure for the hearing of evidence must also be agreed. How much significance should be attached to *prima facie* evidence? Which bodies and institutions should be consulted? And which level of intensity of abuses should trigger collective action? These questions can only be resolved on a case-by-case basis, drawing on the expertise of various UN bodies. The UN Secretary-General will continue to take the lead in relations with the UN Security Council: after Rwanda, the Security Council explicitly encouraged the Secretary-General to convey to the Security Council his assessment of potential threats to international peace and security in accordance with Article 99 of the Charter of the United Nations (SR Res. 1366 (2001), para. 5).

Recommendation

It is primarily a matter for the UN General Assembly, to which the task of further elaborating the responsibility to protect was referred back by the World Summit in autumn 2005, to clarify, in general and abstract terms, the further modalities to determine when a situation could trigger the responsibility to protect. The Office of the United Nations High Commissioner for Human Rights could draft proposals on the appropriate procedure for the hearing of the relevant evidence, the timescales that would apply, and how the process could be expedited in the event of acute crises.

Even with further clarification of the procedures and, if appropriate, timescales for the Security Council's decision – which will ultimately be taken on a case-by-case basis – as to whether a given situation triggers the responsibility to protect, it is to be feared that situations could still arise in future in which no action is taken despite an imminent threat to hundreds of thousands of people's lives. The problem in many cases is not the appropriate procedure but the lack of political will, especially as regards the exercise of the duty of prevention below the genocide threshold for war crimes and crimes against humanity. For this reason, the responsibility to protect should become a priority issue for civil society, including NGOs and the churches, at long last.

6. Resources

The precondition for any implementation of the responsibility to protect is that adequate resources are available. This requires not only the political will on the part of donors to commit substantially increased funding; it also presupposes a minimum level of security in order for these resources to be deployed effectively, e.g. as humanitarian relief. In practice, this poses major problems, as the events in Somalia, Darfur and elsewhere show.

Adequate resources should be provided in a staged approach, starting below the threshold for military intervention. One option, for example, is to deploy human rights observers under a UN Security Council mandate (under Chapter VI of the UN Charter) in the country concerned, equipped with an appropriate remit to report to the Security Council, which could then adopt further de-escalation measures up to and including the deployment/mandating of UN troops as the last resort (*ultima ratio*). In this latter case too, this does not necessarily entail the immediate deployment of heavily armed units. A step-by-step approach is possible, starting, for example, with the deployment of unarmed or lightly armed units charged with de-escalating or even ending the conflict. The aim should be to make available a comprehensive and differentiated range of instruments which can be "customised" on a case-by-case basis.

When the use of military resources is required, the fact that the United Nations is reliant on capacities provided on an ad hoc basis has proved to be an impediment, leading to great dependency on the troop-providing countries (and their various priorities). *An Agenda for Peace*, published back in 1992, drew attention to one solution here, namely stand-by forces or stand-by police

for the UN. A key role for the military capabilities of the UN is also played by the EU Battlegroups and the structured cooperation with the European partners. Regrettably, however, stronger involvement in UN-mandated foreign operations in compliance with current international law is viewed with scepticism on the part of the EU. The Working Group for a United Nations Emergency Peace Service (UNEPS) is therefore proposing the establishment of a permanent body of volunteers recruited individually from countries all over the world. This type of arrangement, which was endorsed by the US Congress back in 2005, or perhaps a body similar to the Multinational Standby High Readiness Brigade for United Nations Operations, in which the Scandinavian countries play a key role, could reduce the current problems with standardisation of training and rapid force deployment.

Recommendation

While European support for the development of an operational multilateral crisis response capability for the African Union (AU) and other regional institutions under a UN mandate should be intensively pursued, the establishment of a permanently available UN contingent of crisis reaction forces deployable worldwide, with a core force of 5000 soldiers plus at least 5000-10,000 more troops for support, logistics, and if necessary reinforcement of the core force, is essential in the medium term. The primary task of this UN Protection Force (UNPFOR) – which could be deployed immediately in the early stage of a conflict or at the request of the government concerned or all parties, but always with a UN mandate – would be to provide physical protection for persons under imminent threat of violence and grave human rights violations (e.g. by establishing buffer and/or demilitarised zones and safeguarding access routes for humanitarian relief).

This type of crisis response force could be deployed temporarily until other forms of prevention/conflict resolution take effect or the United Nations has reached relevant deployment agreements with troop-providing countries.

7. German participation

Deployment decisions must be based on a clear security policy concept and must not lead to any overstretch of force capacities. In terms of the Bundeswehr (German Federal Armed Forces), it has repeatedly been pointed out that individual decisions cannot be reached via a binding catalogue of criteria but must accord with political principles. Nonetheless, it seems sensible as a matter of principle to seek a UN mandate, which is binding in international law, in every case, taking account of the success prospects and risks of any deployment, the dynamics of a crisis, and the desired humanitarian objectives.

Recommendation

As the White Paper on German Security Policy and the Future of the Bundeswehr, published in October 2006, does not answer the question as to what extent deployments to implement any Security Council-mandated action in fulfilment of R2P are in the German interest, this question should be discussed more intensively within the debate about

guidelines for the deployment of the Bundeswehr overseas. Military leadership and training centres should also make provision for implementation of R2P. The question of which methods and principles should in future be applied in order to provide effective protection of civilians at risk from massive human rights violations must become an integral element of the military doctrine of the armed forces.

8. Convincing the countries of the South: concerns about sovereignty

There are vehement critics of the R2P concept, notably Egypt, Iran, Cuba and Pakistan. Indonesia, Venezuela and Zimbabwe have also openly rejected the concept, and this list is by no means exhaustive. By contrast, China has developed its own variant of R2P which protects sovereignty; it advocates that the need to respect the opinion of the country and, if relevant, the regional organisation concerned should be considered along with other criteria.

The critics' primary concern is that state sovereignty will be eroded by the "responsibility to react"; in some instances, it is argued that a paradigm shift towards *sovereignty as responsibility* has taken place. However, the actual change is far less radical than assumed: given that sovereign states are always directly subject to international law, sovereignty is a relative concept from the outset. It is therefore more appropriate to refer to state sovereignty being "enriched" by these recent developments: in line with this thinking, governance of a territorial state also entails a responsibility for its populations. It is therefore incumbent on states to exert effective control over their territory and respect human rights; in other words, state sovereignty is coupled to respect for human rights and the protection of the individual. In this context, the African countries too have finally moved away from the principle of non-intervention by adopting Article 4 (h) of the Constitutive Act of the African Union, which affirms "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".

There is also a concern that moral and legal motives will be overlaid by political and strategic interests, as occurred in the Iraq war (2003), for example. In order to adequately address the concerns, primarily among the countries of the South, about the improper use of the responsibility to protect, it is important to send out a clearer message that no cases have yet arisen in which

military intervention to prevent or end grave human rights abuses has been improperly mandated by the United Nations: the UN's record is unblemished in this respect. The action taken in Kosovo in 1999 and in Iraq in 2003 was not authorised by the United Nations, whereas in both Somalia and East Timor, the provisions of international law were upheld. Attempts by the USA to justify the 2003 Iraq war on allegedly humanitarian grounds found no acceptance at UN level. The concern that the UN could pursue an "imperialist policy" therefore appears to be unfounded. Nor is there any reason to fear any such abuse, as the heads of state and government attending the 2005 World Summit affirmed that the relevant provisions of the UN Charter must apply. However, it is important for the Security Council to formulate its mandates clearly and not, for example, to open up a latent field of application for the R2P by providing a "mix" of criteria and justifications.

9. Monitoring implementation

As stated above, various – in some cases wide-ranging – legal obligations have already been established in the R2P context, but in practice, it is not clear "who" is specifically responsible for "what". There is thus a risk that ultimately, no one will appear to be responsible at all. Clarification of competences is therefore essential. It would also seem sensible, in parallel, to set up an administrative and, if appropriate, legal mechanism to review the application of any measures taken to implement R2P, and, indeed, whether such measures were applied at all.

As the conduct of the Government of Sudan in recent months has shown, the fact that some states obstinately ignore the international community's recommendations and even its binding decisions poses serious problems. In order to encourage implementation of the responsibility to protect and avoid any erosion of authority, especially of the Security Council, it is important to review how such states can be exhorted to abide by this authority in future. New approaches should also be adopted here in order to safeguard compliance (*carrots and sticks*). Judge Richard Goldstone, former chief prosecutor at the International Criminal Tribunals for the former Yugoslavia and for Rwanda, for example, has proposed the establishment and operation of an oil trust fund, with the revenue from oil being administered by the international community and unavailable for the Government of Sudan pending a resolution of the conflict. This would safeguard the import interests of third countries (China) and ensure that sanctions would at last have an effect.

IV. Conclusion

Even through the details are still a matter of dispute, the responsibility to protect has the potential to become a milestone in international law, comparable – in terms of their implications for international criminal law – with the Nuremberg Tribunal and the establishment of the International Criminal Court. If the responsibility to protect is further elaborated on a systematic basis within the United Nations and increasingly applied in practice, this

can, in the medium term, clear the way for more political options and, in the long term, create a comprehensive *obligation* to act and protect. Although law is no substitute for ethics, the establishment of new institutions such as the Global Centre for the Responsibility to Protect or the Asia-Pacific Centre for Responsibility to Protect demonstrates that the R2P concept needs further intensive elaboration in both a political and a legal sense.

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