

EMERGING NORMS OF THE RESPONSIBILITY TO PROTECT

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According to the Report of the International Commission of Inquiry on Darfur to the Secretary - General², it is evident that the Government of the Sudan and the Janjaweed were responsible for serious violations of international human rights and the humanitarian law. The Commission pointed out that the Government forces and militias conducted indiscriminate attacks, including killing, torture and enforced disappearances of civilians throughout Darfur and that these acts might amount to crimes against humanity.

However, at the same time, the Commission concluded that the Government of the Sudan had not pursued a policy of genocide because the crucial element of genocidal intent appeared to be missing. The Commission pointed out that in some instances, individuals, including government officials, might commit acts with genocidal intent, but whether this was the case in Darfur could be determined only by a competent court by case basis.

Alex de Waal observed the following:

Is it genocide? Here we encounter problems of definitional bluntness, similar to those encountered when asking what counts as famine.

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2. S/2005/60

In contrast to the rich conceptual history of ‘famine,’ the term ‘genocide’ is a neologism barely sixty years old, whose coinage was coincident with its legal definition in the 1948 Genocide Convention. Because it is a crime, the diagnosis of ‘genocide’ hinges on the perpetrators’ intent.³

The Commission concluded that no genocidal policy had been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control. However, international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious than genocide. Is there any possibility of the United Nations intervening in the crisis in Darfur ?

In the post-Cold War period, there were many occasions on which the United Nations intervened in matters that were previously regarded as those under domestic jurisdiction. In such situations, the United Nations requires the authority of Security Council resolutions. It is usually necessary to identify the existence of a threat to peace in the context of Article 39 of the United Nations Charter. On analyzing the various cases and resolutions, we observe that the concept of a threat to peace has evolved. Here we face the basic problem of legal justification for the new practices of the United Nations.

The Secretary-General of the United Nations observed the following:

134. Nowhere is the gap between rhetoric and reality – between declarations and deeds – so stark and so deadly as in the field of international humanitarian law. It cannot be right, when the international community is faced with genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end, with disastrous consequences for many thousands of innocent people. I have

3. Alex de Waal, *Famine that Kills, Darfur, Sudan, revised edition*, Oxford University Press, 2005, p. XVIII.

drawn Member States' attention to this issue over many years. On the occasion of the tenth anniversary of the Rwandan genocide, I presented a five-point action plan to prevent genocide. The plan underscored the need for action to prevent armed conflict, effective measures to protect civilians, judicial steps to fight impunity, early warning through a Special Advisor on the Prevention of Genocide, and swift and decisive action when genocide is happening or about to happen. Much more, however, needs to be done to prevent atrocities and to ensure that the international community acts promptly when faced with massive violations.

135. The International Commission on Intervention and State Sovereignty and more recently the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an “emerging norm that there is a collective responsibility to protect” (see A/59/565, para. 203). While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.⁴

4. A/59/2005

In this article, I want to discuss the issues of the legal justification of the UN actions regarding its “Responsibility to Protect policy.”

THE CONCEPT OF THE RESPONSIBILITY TO PROTECT AND ITS LEGAL BASIS

Recently, the term “Responsibility to Protect” has been used to explain the current actions of the UN. The Report of the International Commission on Intervention and State Sovereignty states the following;

2.28 The traditional language of the sovereignty–intervention debate—in terms of “the right of humanitarian intervention” or the “right to intervene” - is unhelpful in at least three key respects. First, it necessarily focuses attention on the claims, rights and prerogatives of the potentially intervening states much more so than on the urgent needs of the potential beneficiaries of the action. Secondly, by focusing narrowly on the act of intervention, the traditional language does not adequately take into account the need for either prior preventive effort or subsequent follow-up assistance, both of which have been too often neglected in practice. And thirdly, although this point should not be overstated, the familiar language does effectively operate to trump sovereignty with intervention at the outset of the debate : it loads the dice in favor of intervention before the argument has even begun, by tending to label and delegitimize dissent as anti-humanitarian.

2.29 The Commission is of the view that the debate about intervention for human protection purposes should focus not on “the right to intervene” but on “the responsibility to protect.”⁵

5. *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, 2001.

The original concept of humanitarian intervention was often regarded as illegal in the 19th century and consequently, the current practices of the UN regarding the responsibility to protect cannot be justified on the basis of the Security Council resolutions alone. With regard to the case of Kosovo, Thomas M. Franck observed the following:

Was the NATO action unlawful? Yes, in the sense that the prohibition in Article 2(4) cannot be said to have been repealed in practice by the system's condoning of NATO's resort to force without the requisite armed attack on it or prior Security Council authorization. Such a repeal is not supported by the members of the global system at this time. No, in the sense that no undesirable consequences followed on the NATO's technically illegal initiative because, in the circumstances as they were understood by the larger majority of UN members, the illegal act produced a result more in keeping with the intent of the law (i.e. "more legitimate") - and more moral - than would have ensued had no action been taken to prevent another Balkan genocide.⁶

On the other hand, the system of international protection of human rights which has been developed by the UN, does not regard human rights issues as genuine matters of domestic jurisdiction. This implies that international law can provide the legal justification for the intervention of the international community into these matters.

At this point, it might be useful to reexamine the policy-oriented proposal regarding the criteria for humanitarian intervention. For example,

6. Thomas M. Franck, Interpretation and change in the law of humanitarian intervention in J. L. Holzgrefe and Robert O. Keohane eds., *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge University Press, 2003, p. 226.

the proposal of Professor R.B. Lillich⁷ included six criteria for UN humanitarian intervention, and the current situation in Darfur fulfils the first criterion, i.e.,

UN humanitarian intervention must be based on the actual existence or impending likelihood of gross and persistent human rights violations that shock the world's conscience.

The legal justification for the UN actions regarding the responsibility to protect is based on authorization by Security Council resolutions in the context of Articles 39 and 42 of the UN Charter. During the drafting process of the UN charter we are of the opinion that no states believed that the treatment of its own nationals would comprise a threat to international peace and security. However, it is observed that the recent practices of the UN have been permitted by the international community in the wake of domestic human rights violations that allegedly posed a threat to peace. In the Cold War era, it was difficult for the Security Council to adopt resolutions with a view to taking enforcement measures because of the veto power. With the end of the Cold War, the Security Council has been revitalized, ushering in more possibilities for actions by the UN. Prof. Lillich regarded it as a de facto revision of the UN Charter by the practice of the Security Council. Charlotte Ku and Harold K. Jacobson note the following⁸;

7. R. B. Lillich Humanitarian Intervention Through the United Nations : Towards the Development of Criteria, 53 *ZaöRV*, 1993.

8. Charlotte Ku and Harold K. Jacobson, Toward a mixed system of democratic accountability, in Charlotte Ku and Harold K. Jacobson eds., *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, 2003, p. 355.

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The Security Council authorized the use of military forces twenty-nine times based on Chapter VII, but only six of those cases involved a clear inter-state conflict. Although Article 2(7) of the Charter states that the principle of non-intervention in “matters essentially within the domestic jurisdiction” of a state “shall not prejudice the application of enforcement measures under Chapter VII,” humanitarian interventions challenge a key assumption of international law – that states are sovereign within their own territory.

The matters of human rights have usually been regarded as matters for ECOSOC, specialized agencies, and subsidiary organs such as the Human Rights Commission. However, the current practice regarding the responsibility to protect suggests that the Security Council has begun to play an important role in the issues regarding the international protection of human rights.

In cases where the international community decides that grave violations of human rights constitute a threat to international peace and security, the only organ that can take enforcement measures is the Security Council. It is in this context that we observe the importance of the Security Council.

There exists a theory that explains the legality of the UN actions regarding the responsibility to protect from the view point of functional change in the Security Council. If we restrict the extent to which the Security Council can act on the existence of an international threat to peace, we cannot argue that it includes action against domestic human rights violations. However, it is evident that in the post-Cold War period, the Security Council regarded the response to human rights violations as the main aim of its activities. In order to deal with these incidents, the Security Council adopted resolutions that enabled it to support humanitar-

ian activities in the targeted states, and the UN dispatched personnel to conduct such humanitarian activities. However, if we seek the legal basis for such actions, it is unclear whether we can explain the legality of enforcement measures in terms of the functional change in the Security Council.

This functional change in the Security Council implies broadening the interpretation of the concept of a threat to peace. However, there are a number of states that are concerned about this broadening of interpretation through the UN's practices. Additionally, we have to consider the fact that there is no consistent practice that can lead to evidence of *opinio juris*. In reality, states always consider their national interests in deciding whether to take action.

The concept of human rights is usually viewed as positive but the concept of intervention is always considered dubious. Further, the UN is now focusing not on "the right to intervene" but on "the responsibility to protect". We can argue that when there are grave human rights violations in a certain state and other states consider them to be intolerable, the international community should act with regard to its responsibility to protect. However, in order to analyze the legality of such actions, we have to consider various aspects of the responsibility to protect.

CURRENT DISCUSSIONS ON THE RESPONSIBILITY TO PROTECT

— If human rights violations occur in failed states and the government
— cannot take responsibility for the protection of human rights, the UN can
— act as the democratic administrative organ. This action can be described
as one with regard to the responsibility to protect.

The legal problem that the international community is currently facing

regards the manner in which universal humanitarian standards can be defined. The task involves clarifying the criteria for appropriate action. However, at this point, it is extremely difficult to prove the existence of certain criteria as customary international law and to codify new conventions for this purpose. Clarifying the criteria for UN actions is of utmost importance because there is an evolving expectation that the UN would be obliged to act toward preventing humanitarian crisis as in the post-Cold war era.

We can identify seven different arguments regarding the legal basis of such actions.

First, there exists the argument that such actions are always illegal from the view point of international law. We can refer to the principle of non-intervention and the prohibition of the use of force to explain this position. We can certainly argue that due to such principles, unilateral intervention had been regarded as illegal in the international community for a long time. However, this position cannot explain the practices of the UN. In the case of Somalia, there was a consensus among states that regarded intervention to be legally permissible.

The second argument regards the functional change of the Security Council and the third is that since humanitarian activities do not conflict with the exclusive jurisdiction of states, they are legally permissible and there is no conflict with article 2(7) of the UN charter. However, it is impossible to explain the enforcement measures.

The fourth argument is that the actions regarding humanitarian purposes are not restricted by Article 2(4) of the UN Charter because it does not prohibit the use of force in a manner that is consistent with the objectives of the UN. Moreover, the protection of human rights is one of the important objectives of the UN. However, opponents maintain that article 2(4) cannot be interpreted as being permissive of such actions, either

because this norm bans virtually all uses of force or because allowing the exception would open the door to unacceptable abuse⁹.

The fifth argument pertains to the new customary international law as being permissive of the actions against large-scale and persistent violations of human rights. We can apply this argument to certain situations like genocide which involve a violation of jus cogens. However, it is uncertain whether there exists an opinio juris of a majority of states.

The sixth argument is whether international law provides states with legal rights to act in support of democracy. However, we cannot find enough evidence to corroborate this argument. We have to consider the risk of abuse of such interpretations of these arguments.

The seventh argument regards the international law permitting the international community to act in order to carry out the responsibility to protect in case of a fundamental dissociation of states. For example, in situations such as in Somalia, where there was no government capable of maintaining law and order, the international community could act as a temporary government. In this process, we have to first recognize that there is a threat to international peace and security and subsequently decide on the measures to be taken by organizations such as the Security Council. Such measures have to be authorized by the UN Charter, particularly by Chapter 7. The duration and aim of the intervention have to be specified. In this argument, the focus is on the situations of states, which implies that in failed states, the bar of sovereignty can be considered to become lower. Accordingly it is possible for the international community to act in order to legally carry out the responsibility to protect.

9. Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality, Second Edition*, Transnational Publishers, 1997, p. 147.

THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL PROTECTION OF HUMAN RIGHTS

We have to consider that in the Cold War period, interstate conflicts were usually regarded to be the source of threats to peace. However, now the fact that domestic ethnic conflicts lead to a threat to peace more often should be taken into consideration. The UN Charter does not have appropriate provisions for tackling this problem. Civil strife has resulted in grave human rights violations, and it is necessary for the UN to take certain measures in order to ensure the protection of human rights.

This leads to the question regarding the kind of enforcement measures that are legally permissible. If the measures adopted include enforcement, we have two methods of legalizing them. One is to recognize the threat to peace in the context of Article 39 of the UN Charter and to take measures in accordance with Chapter 7. Another situation involves the protection of a state's own nationals. In this situation, we can apply the concept of self-defense to justify such measures. The important point is whether or not we regard the concept of the responsibility to protect as a new phenomenon beyond the general interpretation of the concept of a threat to peace. It is more important to focus on the situations of the targeted states, because they present the issue of the dissociation of states, which involves a change in the sovereignty of nation states.

Those who are in favor of a broader role of the Security Council inclusive of the protection of human rights attempt to relate the issues regarding the responsibility to protect with the international protection of human rights. They argue that in the post-Cold War situation, the Security Council does not consider state sovereignty to be absolute and emphasizes the protection of human rights. Systems that stress the importance of the protection of human rights over the principle of non-intervention have

been developed, particularly upon ratification of the Genocide Convention.

In this context the Security Council began to use its power of recognizing threats to peace in humanitarian crises. We can observe many incidents in the post-Cold War period wherein the Security Council regarded human rights violations as a threat to peace and took measures in accordance with Chapter 7. However, we have to reemphasize that it is difficult to argue that these incidents are evidence of state practices that become customary international law and lead to identifying all domestic human rights crises as threats to international peace and security. The number of incidents is still limited and states often decide whether to intervene based on their national interests or political considerations. Therefore, such incidents do not easily create universal state practices. If we require the enforcement powers of the Security Council to ensure the effectiveness of the system of international protection of human rights, we face serious problems in the development of universal systems since there are limited cases into which the Security Council can intervene.

We can point out that there are some important Security Council resolutions such as resolution 688 and 794. If we regard such resolutions as new steps toward justifying UN actions regarding the responsibility to protect, we have to define the scope of such actions. On the other hand, it is still inevitable for us to face the legal problems pertaining to the principle of non-intervention.

CONCLUSION

In conclusion, we have to say that at this moment it seems difficult for us to prove the existence of a new international custom that is legal with reference to the UN led actions regarding the responsibility to protect

without examining different elements of each case. It is appropriate to consider that the Security Council still needs certain transboundary elements in order to determine the existence of a threat to peace and security in the context of article 39. At the same time, we can say that in the international community in the post-Cold war era, the large-scale violations of human rights within territorial states may constitute a threat to peace and security if such violations have a slight trans-boundary element.

We can promote the UN led action against human rights violations by utilizing the Security Council as an organ capable of taking enforcement measures to deal with threats to international peace and security.

Graham Day and Christopher Freeman pointed out four practical proposals¹⁰ in order to operationalize the responsibility to protect. They also pointed out that in humanitarian crises such as Darfur, the policekeeping approach could command local consent more effectively by protecting societies from persecution and lawlessness, and by insisting that the government accepts a policekeeping rather than peacekeeping force via the African Union.

I believe that this comprehensive approach should be applied in dealing with domestic human rights violations and implementing the responsibility to protect.

10. Graham Day and Christopher Freeman, Operationalizing the Responsibility to Protect—the Policekeeping Approach, *Global Governance* 11 (2005), pp. 142–145.