The law on the use of force and the responsibility to protect straitjacket or life jacket?

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This comment presents an analysis of the responsibility to protect guided by the question of whether the law on the use of force is a straitjacket or a life jacket. The author believes that the Secretary-General has followed the best possible approach by preferring to stick to the rigour of the Charter system of collective security. Indeed, it is true that this approach implies that the rules on the use of force may be considered a straitjacket, if the Security Council does not take decisions when necessary to give effect to its responsibility to protect. But it should not be forgotten that this Charter system of collective security may also be a life jacket that should prevent the international community from sinking into the chaos of unilateral use of force.

This paper focuses on the law on the use of force and the responsibility to protect. The key question I will discuss is whether the law on the use of force is a straitjacket or a life jacket. Is the law on the use of force a cumbersome impediment when military intervention is necessary to stop genocide or similar humanitarian crises? Or is it necessary for the maintenance of international peace and security, as a guarantee against the anarchy of unilateralism? In case of large-scale humanitarian crises such as genocide in Cambodia in the 1970s and in Rwanda in 1994, may the UN Security Council authorize the use of force to bring the crisis to an end? Or, if no such authorization is given, could it be lawful for foreign states to intervene by force?

I will first indicate how the Report by the High-level Panel and the March 2005 Report by the Secretary-General deal with these issues. Next I will present a few observations on the approach and recommendations in these reports.

The High-level Panel Report and the responsibility to protect

The High-level Panel discusses the responsibility to protect in Part three of its report that is devoted to collective security and the use of force. It refers to "a long-standing argument in the international community between those who insist on a 'right to intervene' in man-made catastrophes and those who argue that the Security Council […] is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders".

Next, the High-level Panel mentions the Genocide Convention and states that it is now understood that "genocide anywhere is a threat to the security of all and should never be tolerated". The principle of non-intervention in the internal affairs can no longer be used to protect genocide "or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council".

The High-level Panel refers to cases of humanitarian disasters such as in Rwanda. It observes that there is now "a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of *every* State when it comes to people suffering from avoidable catastrophe […]. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that

responsibility should be taken up by the wider international community […]. Force, if it needs to be used, should be deployed as a last resort".

The High-level Panel criticizes the Security Council for the role it has played in this area. The Council so far "has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs […]".

Against the background of these considerations, the High-level Panel presents its recommendation no. 55, in which it endorses "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent".

The Report of the Secretary-General and the responsibility to protect

The Secretary-General almost completely follows the observations and recommendation of the High-level Panel regarding the responsibility to protect, even though his approach is slightly different. His observations are put in a different context than those of the High-level Panel. They do not form part of Chapter III (freedom from fear) of his report which discusses collective security and the use of force. Instead, they are included in Chapter IV (freedom to live in dignity), more precisely in the Section devoted to the Rule of Law. As a result, the perspective is a bit more the need to protect, and a bit less remedial action (in particular: the use of force that should be permitted as a last resort).

The key observations of the Secretary-General can be found in paragraph 135 of his report. I quote: "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".

Some observations

Let me now make a few observations on these important parts of the two reports. First of all, it is clear that the considerations and recommendations regarding the responsibility to protect in the two reports do not come out of the blue. They are almost fully taken from the December 2001 report by the International Commission on Intervention and State Sovereignty, created at the initiative of the Canadian Government.

It is significant that both the High-level Panel and the Secretary-General strongly promote the responsibility to protect. Significant, because this concept is not yet generally established and accepted. This was demonstrated last April when the General Assembly discussed the Secretary-General's report. In particular a number of developing countries indicated that they did not accept this concept. China and Russia expressed reservations. Nevertheless, I think that there is a fair chance that the September Summit will arrive at some consensus on this, in particular for the following reason.

The responsibility to protect is a new concept, used for the extreme cases for which in the past the notion of "humanitarian intervention" was used. But this notion of humanitarian intervention was often defined as the use of force for humanitarian reasons without a Security Council authorization. The advantage of the new concept of the responsibility to protect is that it clearly emphasizes the need of such an authorization. It does not cover unilateral interventions. The new label uses a different starting point. There is a responsibility to protect, which is primarily a responsibility for each State itself. Only in case a State is no longer able or willing to fulfil this task, there is a subsidiary role for the international community, and this role should be exercised by the Security Council.

This way of defining the division of responsibilities between the State and the international community is similar to the way this is done in the Statute of the International Criminal Court. Under this Statute, the ICC is complementary to national criminal jurisdictions. Primary criminal jurisdiction is for national jurisdictions. Cases brought before the ICC are inadmissible when they are or have been dealt with at the national level, unless States are unable or unwilling to investigate or prosecute. According to this so-called principle of complementarity, measures taken at the national level come first. Only if the national authorities are not able or willing to perform their criminal jurisdiction functions, the ICC can be triggered to step in. The ICC provides for a safety net in the fight against impunity for those who have committed "the most serious crimes of concern to the international community as a whole". Likewise, according to the two reports, the Security Council should function as a safety net if a State is not able or willing to take seriously its responsibility to protect.

On another crucial issue the two reports also follow the same approach: they do not even mention the possibility that one or more individual States may use unilateral, unauthorized armed force in response to humanitarian catastrophes abroad. The sole route by which the international community may take action is a decision by the Security Council. This multilateral approach is fully in line with the Charter system of collective security, one of the cornerstones of which is the understanding laid down in the Preamble that "armed force shall not be used, save in the common interest". I fully agree with this approach by the High-level Panel and the Secretary-General. But the most important missing element is the fact that their analysis and recommendations stop at the point where they emphasize the Council's role regarding the responsibility to protect. The assumption is that the Security Council is or should be able to take its responsibility. But what if this is not the case? What if not only a State, but also the Security Council is unwilling or unable? No answers to this question are provided, even though the High-level Panel explicitly states that the Council "has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all". But what must happen if the Security Council shirks its responsibility to protect? Could States then, in extreme situations, lawfully use force to end a large-scale humanitarian catastrophe? Neither the High-level Panel nor the Secretary-General answer this question.

Only the High-level Panel report very briefly mentions one small way out. It is somewhat hidden in paragraph 272(a) of the Panel report, dealing with the role of regional organizations. The High-level Panel recommends that "Authorization from the Security Council should in all cases be sought for regional peace operations, recognizing that in some urgent situations that authorization may be sought after such operations have commenced". This means that in urgent cases a regional organization may establish peace operations, which probably may need to use force, without a prior authorization from the Security Council. This 'urgent case scenario' is questionable from a legal point of view. Perhaps this is one of the reasons why the Panel has left this out in its formal recommendation 86 at the end of the Report. This recommendation does not any more refer to this possibility of 'authorizations afterwards'. It only states that 'authorization

from the Security Council should in all cases be sought for regional peace operations'. The use of the word "sought" leaves open a critical question: Must authorizations only be sought? Or is it required that they are *given*?

Security Council practice offers some isolated support for 'authorizations afterwards'. In the 1990s a few resolutions have been adopted by the Council, dealing with the situation in Liberia and that in Sierra Leone. Military forces from ECOWAS intervened, and the Security Council subsequently adopted resolutions in which it "commended" ECOWAS for having carried out the operation.

However, there is certainly not a well established practice of the Security Council on this issue. In a number of other cases the Council has done everything to avoid an authorization afterwards. Examples are the resolutions adopted after the Kosovo crisis (Resolution 1244) and Resolution 1483 adopted after the military operation against Iraq in 2003 (although the last case is not an example of responsibility to protect).
'Authorizing afterwards' is not a sound element in a viable collective security system. What if no authorization is given? And of course: if this would be accepted, States and regional organizations may use force unilaterally, and declare that they are confident that it will be approved later. I therefore think it is wise that the Secretary-General does not refer to this possibility of authorizing afterwards.

But, apart from this issue, the reports do not touch upon the question of what to do if the Security Council does not take decisions when necessary. It may be that this question is not discussed because the High-level Panel and the Secretary-General both favour a strengthening of the UN's collective security system, in particular a reinforcement of the role of the Security Council, and because they do not want to leave the door open for unilateral, unauthorized use of force. The Secretary-General almost word by word repeats what is stressed by the High-level Panel, which in turn almost word by word repeats what is stated in the 2001 Canadian report: "[t]he task is not to find alternatives to the Security Council as a source of authority but to make it work better". And the Secretary-General also follows the High-level Panel in its recommendation to adopt the following five principles or "basic criteria of legitimacy":

1. the seriousness of the threat
2. the proper purpose of the proposed military action
3. last resort (could the threat not be stopped by using means short of the use of force?)
4. is the military option proportional to the threat at hand?
5. is there a reasonable chance of success?

There are important advantages to this recommendation. As the Secretary-General mentions, using these principles may add transparency to the decisions of the Council, and may make its decisions more likely to be respected, by both governments and world public opinion. As the High-level Panel indicates, these guidelines also should serve:

- "to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force;
- to maximize international support for whatever the Security Council decides; and
- to minimize the possibility of individual Member States bypassing the Security Council".

But it is also obvious what these criteria cannot do. They can never *guarantee* that decisions are taken when there is a responsibility to protect for the Council. Therefore the big question will not go away: what if no decisions are taken when necessary? If states will then decide to use force unilaterally, they will probably use these five criteria of legitimacy to justify their decision in political terms. But these criteria are not proposed

to weigh the lawfulness of unilateral use of force. Their purpose is exclusively to play a role in decision-making by the Security Council.

These criteria will not change the legal situation. It will continue to be controversial whether or not in a specific case unilateral military intervention for humanitarian reasons will be lawful. A lot will depend on the facts of the case. Views of States at present vary widely and it is likely that they will continue to vary widely in the foreseeable future. Many developing States would say that there is no such unilateral right. This is not surprising, if these States already find it difficult to support the concept of the responsibility to protect. On the other hand, a number of developed States would say that there is such a right. For example, in a secret legal opinion of 7 March 2003 that was made public by the UK government a few weeks ago, the Attorney General explicitly mentioned as one of the three possible bases for the use of force: “exceptionally, to avert overwhelming humanitarian catastrophe”.

Against this background, the High-level Panel and even more the Secretary-General have followed the best possible approach as they preferred to stick to the rigour of the Charter system of collective security. It is true that this approach implies that the rules on the use of force may be considered a straitjacket, if the Security Council does not take decisions when necessary to give effect to its responsibility to protect. But it should not be forgotten that this Charter system of collective security may also be a life jacket that should prevent the international community from sinking into the chaos of unilateral use of force.

This does not mean that in practice, in extreme and clear-cut cases, nothing will happen if the Security Council fails to act. States may then well decide that the use of force is necessary, and the well-known arguments in favour and against will be used again. In this debate, it will not be easy to argue convincingly that a right to intervene unilaterally is part of international law as it stands today. But by muddling through in such a way, international law may further develop in the future. How it will develop is uncertain. This will partly depend on how seriously the Security Council will take its responsibility to protect.