Discussion Paper Based on Panel 5 of the series
"The Role of the Security Council in Strengthening a Rules-Based International System"

THE SECURITY COUNCIL AND THE INDIVIDUAL

Rights and Responsibilities

Simon Chesterman & David A. Jordan
Institute for International Law and Justice
New York University School of Law

H.E. Mr. Gerhard Pfanzelter (Permanent Representative of Austria to the United Nations) welcomed the participants. The panel was chaired by Thomas Franck (Professor of International Law at New York University School of Law), and comprised the following speakers: Ms. Radhika Coomaraswamy (Special Representative of the Secretary-General for Children and Armed Conflict); Ms. Louise Fréchette (former Deputy Secretary-General of the United Nations); Mr. Nicolas Michel (United Nations Under-Secretary-General for Legal Affairs); and Professor Hélène Ruiz Fabri (Professor of International Law at University of Paris I-Panthéon Sorbonne and President of the European Society of International Law).

This document records some of the issues and concerns that were raised during the discussion at the panel presentation on 27 March 2007, but is not intended to be comprehensive nor to represent an agreed position of the participants or the organizers.

Introduction

Established in the UN Charter as a group of states given extraordinary power to intervene in conflicts between other states, the Security Council has increasingly adopted measures that impact directly on the rights and responsibilities of individuals. This ranges from the imposition of targeted sanctions to the collateral impact of Council mandates when peacekeepers abuse civilians meant to be under their protection. The Council has also established ad hoc tribunals imposing criminal sanctions. More recently, with the endorsement of the "responsibility to protect" by the UN World Summit in 2005, it is arguable that the Council has been given the right — and, perhaps, an obligation — to look within state borders to prevent genocide, war crimes, crimes against humanity, and ethnic cleansing.

On 27 March 2007, the Austrian Mission to the United Nations and the Institute for International Law and Justice at New York University School of Law co-hosted the fifth panel discussion in the ongoing international law series titled "The Role of the Security Council in Strengthening a Rules-Based International System." The panellists discussed the effect of the Council's exercise of its broad legal authority on individual rights and the significance in this context of the responsibility to protect.

1 Targeted Financial Sanctions

Chapter VII of the UN Charter gives the Security Council the authority to take coercive action against states in the interests of international peace and security. Such action can take many forms including the use of non-military measures, including the imposition of economic or other sanctions. Sanctions targeted at key individuals emerged as an important arrow in the Security Council's very limited quiver.

In the 2005 World Summit Outcome Document, member states called upon the Security Council, with the support of the Secretary-General, to ensure that "fair and clear" procedures exist for the listing and delisting of individuals and entities on targeted sanctions lists.[1] On 15 June 2006, Secretary-General Kofi Annan responded with a non-paper reaffirming that targeted sanctions can be an effective means of combating, among other things, the threat of terrorism, but cautioning that such sanctions will only remain useful to the extent they are effective and seen to be legitimate; that legitimacy depends on procedural fairness and the availability of a remedy to persons wrongly harmed by such lists.[2]

Under-Secretary-General for Legal Affairs Nicolas Michel — speaking, like other panellists, in his personal capacity — noted four basic elements that should serve as minimum standards for such a regime.

First, a person against whom measures have been taken by the Council has the right to be informed of those measures and to know the case against him or her as soon as and to the extent possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.

Secondly, such a person has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.

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1 2005 World Summit Outcome Document, UN Doc A/RES/60/1 (16 September 2005), available at <http://www.un.org/summit2005>, para. 109.

2 The letter was referred to in the Security Council debate on 22 June 2006: UN Doc. S/PV.5474 (2006), p. 5.

Thirdly, such a person has the right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.

Fourthly, the Security Council should, possibly through its Committees, periodically review on its own initiative targeted individual sanctions, especially the freezing of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved.[3]

These suggestions have been informed by the work of several key contributors, including the Security Council's Informal Working Group on General Issues Relating to Sanctions, which was established in 1999.

Several new Security Council resolutions have marked significant progress since the 2005 World Summit. Resolution 1730 (2006) focused on strengthening procedural safeguards to protect the rights of individuals by establishing a focal point to receive delisting requests, and adopted specific procedures to govern the handling of delisting requests. (In a letter dated 29 March 2007, Secretary-General Ban Ki-Moon confirmed that the focal point to receive de-listing requests had been created.[4])

Resolution 1732 (2006) effectively ended the work of the Informal Working Group on General Issues of Sanctions, with the Council stating that it had fulfilled its mandate. The Council welcomed the Working Group's report, which listed additional best practices and procedures related to the improvement of the targeted sanctions mechanisms.

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[3] Cf. UN Doc S/PV.5474 (2006), p. 5.

[4] UN Doc. S/2007/178 (2007).

Resolution 1735 (2006) further amended procedures for listing and delisting, including provision for informing persons of their designation on a list and outlining criteria to be considered in a delisting request.

It remains unclear, however, whether the Council has satisfied the need for "fair and clear procedures" in this area, or the minimum standards outlined by the Secretary-General. It appears likely that recent and pending cases in national and regional courts — most prominently those currently on appeal to the European Court of Justice — will prove instructive to future implementation of targeted sanctions and the protection of individual rights.

2 The Responsibility to Protect: Words and Deeds

Several panellists considered issues related to the impact of the "responsibility to protect" on the manner in which the Council approaches crises and fulfils its primary responsibility for the maintenance of international peace and security.

Former Deputy Secretary-General Louise Fréchette noted that despite the current enthusiasm for the "responsibility to protect," the notion is not as novel as is sometimes assumed. In particular, the idea that the United Nations in general and the Security Council in particular have a role to play in protecting individuals is clearly not new: the very creation of the United Nations organization was intended to "save succeeding generations from the scourge of war."[5] The Charter's preamble also notes the shared desire "to employ international machinery for the promotion of the economic and social advancement of all peoples." Further evidence can be found in similar global initiatives occurring immediately after its creation such as the drafting and adoption of the Universal Declaration on Human Rights in 1948.

Taking the notion of responsibility to protect seriously, however, might challenge some basic principles of public international law. Professor Hélène Ruiz Fabri noted that historically state sovereignty has been largely sacrosanct under international law and therefore the imposition of a responsibility to protect on individual states could be interpreted as a significant deviation from existing norms. She readily conceded, however, that while the responsibility to protect may present a challenge to state sovereignty, such challenges are hardly without precedent in international law. The UN Charter itself already contained several specific legal limitations placed on sovereignty which could be seen as obligations to protect the rights of individuals. The notion of peremptory norms provides perhaps the starkest example of a substantial imposition on the sovereign prerogative of state actors which existed long before the recent addition of the formalized "responsibility to protect" to the geopolitical lexicon. This suggests that the concept may be merely a linguistic flourish rather than a substantial deviation from existing international law.

Regardless of the novelty of this new development, the general consensus of the panel was that there is clearly some value in the formalization of this concept. The actual significance of that concept will depend in large part on how the Security Council acts. Recent Council resolutions concerning Darfur, demonstrating significant deference to Sudanese sovereignty, suggests that a tectonic shift in international affairs as a result of the responsibility to protect is unlikely in the short term.

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[5] U.N. Charter, preamble

3 Implementing the Responsibility to Protect

The responsibility to protect is a responsibility, first and foremost, of national governments. Only when a government is unwilling or unable to protect a vulnerable population from the most serious forms of human rights violations does that responsibility fall to the international community.

Implementation of this latter responsibility has been patchy at best — with the failure to act in Rwanda remaining the blackest mark on the history of the United Nations. Here it is important to note that the responsibility to protect embraces separate responsibilities to prevent, to react, and to rebuild. The Council is not the only actor with a role to play, of course. The General Assembly might play a role in developing policies that address prevention in particular, for example, but too often is paralysed in a manner that has marginalized it to the detriment of the whole membership.

The political climate following the end of the Cold War has made many advances in international cooperation possible. The Iraq war has polarized states, though this is likely to be a less entrenched division than that which defined the first four decades of the United Nations' existence. These and other divisions are reflected in the General Assembly, which has too often been prevented from serving its function as the main deliberative body of the United Nations.

In practice, then, the practical implementation of the responsibility to protect is likely to take place primarily through the acts of the Security Council. The Council has proven itself far more agile in responding authoritatively to controversial matters arising in the international system. Council procedures require far less consensus than is required for action by the General Assembly, reducing negotiation time and facilitating decisive action. At the same time, it is precisely these differences from the Assembly that lead many to question the legitimacy of such Council actions.

In any case, given the Council's primary responsibility for international peace and security, how its members understand and operationalize the responsibility to protect is extremely important. There are several potential means through which the Security Council could begin to flesh out the specifics of the responsibility to protect. One would be for the Council to develop its own guidelines related to the responsibility to protect. Another option would be for the Council to pass specific resolutions defining certain aspects of the protection. Precedent for this might be found in the Council's actions elaborating policies concerning the use of targeted financial sanctions.

Legislative action is not the only means by which the Security Council can influence development in this area. The Council need not approve formal guidelines or pass specific resolutions delineating the responsibility to protect, but rather may shape our understanding of the principle by how it responds to issues it finds on its agenda. Special Representative of the Secretary-General for Children and Armed Conflict Radhika Coomaraswamy offered recent advancements in the area of children and armed conflict as an example of how the Security Council may begin to do just this. Resolution 1612 (2005) called upon the Secretary-General to establish a formal mechanism to monitor compliance with the global prohibition against the use of child soldiers. The result was the creation of a systematic information gathering capacity within the countries under scrutiny which has enabled the timely compilation of bimonthly reports that are presented to a new UN working group also created under Resolution 1612 (2005). This oversight structure was the first of its kind and Ms. Coomaraswamy noted several successes under the new framework. Continued achievements in this area could inspire the Security Council to create similar mechanisms to enhance its effectiveness in other areas.

Ms. Fréchette agreed that the establishment of precedent is an important role the Council may play prior to, or contemporaneous with, the drafting of any formal provisions or guidelines. She cautioned, however, that the Council must be careful to demonstrate consistency in how it deals with particular types of crises. The failure to respond with similar reactions to equivalent acts of international wrongdoing detracts not only from the legitimacy of the principle of a responsibility to protect, but also from the credibility of the organization as a whole.

Greater transparency in Security Council decision making would be a useful means of ensuring Council members exercise their powers responsibly. One possibility would be for the Council to implement procedures monitoring its own adherence to the responsibility to protect. Professor Thomas Franck illustrated the point by suggesting that this might take the form of requiring permanent members of the Security Council to issue written explanations explaining any veto of a measure concerning the protection of a vulnerable population. At present, a proffered threat to veto a proposed measure is often enough to keep the matter from even being brought to a vote. The requirement of written explanations would force dissenting states to explain their rationale, thereby providing a purpose to holding votes on potentially vetoed measures, and making it more difficult for permanent members to use their veto power based on arbitrary or illegitimate motivations. Alternatively, the Council or some other body might request an advisory opinion from the International Court of Justice concerning the legal consequences of one state preventing the Council from acting to stop genocide or crimes against humanity.

4 Military and Non-Military Means

Ms. Fréchette stressed the importance of remembering that the responsibility to protect does not always imply a responsibility to intervene militarily. When the public thinks of the matter in this way the military solution becomes the only viscerally satisfactory means of response. Proper fulfilment of the responsibility to protect should be seen to include the responsibility to implement non-military preventative options before grave threats to individuals arise. These non-forcible alternatives should be exhausted prior to any military intercession. Use of military solutions should conform to the precautionary principle and advocates should be forced to bear the burden of proving the necessity of the proposed course of action. Advocates of military solutions should have to meet specified just cause criteria which should be drafted to contain a very high threshold of wrongdoing before military options may be considered. The onus should also be on the proponents of military intervention to demonstrate that their proposal has a

reasonable prospect of success if implemented. In the event military action is taken it should be proportional to the threat and strictly limited to the least aggressive means necessary to end the targeted transgressions.

Feasibility of proposed military options should be an important factor in the decision making calculus, however it is important to be cautious in how we allow the Security Council to argue in favour or against the use of military force based on operational capacity along. Professor Ruiz Fabri noted that many arguments surrounding operational capacity present a red herring that can be used by states to justify or reject intervention based on political rather than humanitarian reasons. Given the virtually limitless military resources at the disposal of the Security Council, it seems clear that operational capacity would almost never present a problem in situations where the political will is sufficient within the Security Council nations. The only time operational capacity might be called into question is in situations where the political will in the P-5 countries militates against intervention for reasons unrelated to actual operational capabilities. This has led to unequal protection of individuals based on various self-interested motivations of relevant decision makers, most notably in Rwanda where hundreds of thousands of lives could have been spared for a fraction of the cost of many less-worthy military ventures. It is therefore up to the Security Council to define the protection of civilians as one of its highest priorities in order to remove false issues of operational capacity from consideration. By defining the responsibility to protect in this way, it will lead to more uniform application of Security Council pressure in analogous situations without regard to the political particularities involved.

When determining the scope of preventative action requirements under the responsibility to protect more consideration needs to be given to early warning situations and the identification of emerging threats prior to the full-fledged eruption of an international emergency. The current focus is limited to post-conflict situations, which is far too narrow and leads to increased cost of implementation. Often major conflicts can be mitigated or even prevented altogether through the strategic implementation of pre-conflict strategies prior to the initiation of armed hostilities.

Of course, any increase in the Security Council's intervention into the internal operations of state governments based solely on the perception that a threat to international peace and security may occur at some point in the future must be directed by strict procedural guidelines to minimize the risk of improper interference with state sovereignty. To form the basis of intervention, any perceived threat must be reasonably imminent; the degree of proximity required will surely be a topic of heated juristic debate as preventative measures are increasingly taken by the Council during the fulfilment of its responsibility to protect.

5 Accountability for Action Taken in the Council's Name

Another important area where the Council can demonstrate its commitment to protecting the rights of individuals is in how it regulates the behaviour of employees working on its behalf. UN personnel routinely come in contact with vulnerable populations during peacekeeping operations. Their status often places them in a position to exert undue influence on individual members of the local population under UN protection or receiving UN aid. Reports of sexual exploitation by peacekeepers in the Democratic Republic of the Congo exposed severe deficiencies in the organization's existing mechanisms to detect and prevent such abuses by its personnel. In particular, a comprehensive report issued by the Permanent Representative of Jordan to the United Nations, Prince Zeid, illustrated deficiencies in four main areas: the standards of conduct for UN peacekeepers; the investigative and enforcement processes; organizational, managerial, and command responsibility; and individual accountability for wrongful conduct.[6]

[6] UN Doc. A/59/710 (2005).

Progress has been made, however, since the original allegations came to light. Ms. Fréchette noted that in the two years since Prince Zeid's report several important advances have been made in preventing and punishing abuse of vulnerable populations by peacekeepers and civilian personnel. For example, the UN now has clarified and strengthened the rules regarding sexual exploitation. Previously, peacekeeper training provided mixed signals with respect to the organization's zero-tolerance policy for sexual relations with local prostitutes. Peacekeepers were informed of the zero tolerance policy, but still were provided with condoms by the Joint United Nations Programme on HIV/AIDS leaving some with the impression that the policy was not enforced. Now peacekeepers receiving condoms are issued warnings about the prohibition against sexual relations with local prostitutes and are informed of the consequences for violations.

In addition, new standards for peacekeepers in high risk areas forbid all forms of sexual conduct with any member of the local population residing in the area of the peacekeeping operation regardless of the circumstances. This new absolute ban is significantly stricter than similar restrictions imposed by national militaries. The rationale for this approach stems from the fact that UN personnel are often able to exercise a considerable degree of influence over members of a protected population. This power differential may allow situations to arise where members of the local population may consent to sexual relations out of a sense of obligation or a desire to receive UN aid. In such situations, the greater aims of the international community are best served by an absolute prohibition which avoids even the appearance of impropriety or undue influence.

Although the UN has taken measures to strengthen such safeguards, several key factors still limit the effectiveness of any restrictions it may impose on its personnel. One problem concerns the adequacy and uniformity of peacekeeper training. The UN does not control the training of the soldiers it uses in peacekeeping operations, rather these soldiers are trained by their host governments in accordance with its own national military standards. There is wide disparity in the training standards employed by the various nations that provide peacekeeping forces to UN

operations, therefore it is difficult to ensure consistency with respect to the knowledge possessed by each individual peacekeeper of all applicable UN restrictions controlling their conduct.

Another problem is that, despite the clarity and thoroughness of the guidelines governing peacekeeper conduct, the UN still has very limited authority to punish soldiers who commit offences during the discharge of their duties. Even when offences are uncovered and processed by the relevant authorities, the organization lacks any hard sanctions it can impose to remedy malfeasance. The lack of ample penalties severely limits the effectiveness of any proscriptions of guidelines established by the organization. For example, the most probable consequence faced by individuals committing acts in violation of the rules is that they will be sent back to their home country. This is clearly an insufficient penalty to punish those who abuse their position with the organization to prey upon the most vulnerable members of the global community, and additional steps will have to be taken to ensure the demands of justice are satisfied in such situations both at the national and international level.

6 Conclusion

The Security Council increasingly figures in the lives of individuals. In the area of targeted financial sanctions, it has taken important steps towards protecting the rights of those potentially harmed; through the responsibility to protect it has expanded its ability to consider the plight of vulnerable populations and the potential responses; and in recent changes to peacekeeping it has begun to address the danger that those who are sent to protect may themselves cause harm.

Appendix: Agenda

The Security Council and the Individual: Rights and Responsibilities

International Law Panel, Tuesday, 27 March 2007, 3:00 pm-5:30 pm

Dag Hammarskjöld Library Penthouse
United Nations Headquarters, New York

Welcome

H.E. Mr. Gerhard Pfanzelter, *Permanent Representative of Austria to the United Nations*

Chair

Professor Thomas Franck, *New York University School of Law*

Panellists

Mr. Nicolas Michel, *Under-Secretary-General for Legal Affairs*

Ms. Louise Fréchette, *former Deputy Secretary-General; Centre for International Governance Innovation*

Professor Hélène Ruiz Fabri, *University of Paris I – Panthéon Sorbonne*

Ms. Radhika Coomaraswamy, *Special Representative of the Secretary-General for Children and Armed Conflict*