

**Building a New Role for the United Nations:  
the Responsibility to Protect**

*A Collection of Comments edited by  
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WORKING PAPER

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## **Preface**

The 2005 World Summit (<http://www.un.org/summit2005/>) to be held between 14 and 16 September 2005 at the UN Headquarters in New York will bring together more than 170 Heads of State and Governments. It is seen as a unique opportunity to take bold decisions in the areas of development, security and human rights. The Summit agenda is based on a set of recommendations outlined in March 2005 by Secretary-General Kofi Annan in his report *In Larger Freedom* (<http://www.un.org/largerfreedom>). These recommendations build on those set forth in the report *A More Secure World* (<http://www.un.org/secureworld/>) issued in December 2004 by the High-level Panel on Threats, Challenges and Change. The General Assembly President Jean Ping who is conducting the informal negotiations with governments released a *Draft Outcome Document* ([http://www.un.org/ga/59/hlpm\\_rev.2.pdf](http://www.un.org/ga/59/hlpm_rev.2.pdf)) on 5 August 2005. Another draft is expected to be published ahead of the Summit.

The Core Group of 32 UN Member States that was formed by Jean Ping to reach agreement on key items focuses on: the definition of terrorism, development, UN Secretariat reform, the creation of a Human Rights Council and a Peacebuilding Commission, disarmament and non-proliferation, and the responsibility to protect. However, also the reform of the Security Council, though highly controversial, ranks high in ongoing negotiations. Originally, the Summit had been intended to evaluate the progress made to achieve the *Millenium Development Goals* (<http://www.un.org/millenniumgoals/>) to be fulfilled by 2015, but the discussions on UN reform are likely to overshadow them.



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## Introduction

*Carlos Espósito and Jessica Almqvist*

Sovereignty implies both powers and responsibilities. None of these responsibilities seems more important than protecting vulnerable populations at risk from civil wars, insurgencies, State repression and State collapse. The responsibility to protect builds on this claim. It is the idea that ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states’ (Independent Commission on Intervention and State Sovereignty, 2003). The High-level Panel on Threats, Challenges and Change envisages a new broad collective security framework that gives further substance to this idea. The principle is also reflected in the recommendations of the report of the Secretary-General. Yet, the actual implementation of this responsibility remains uncertain. This is especially evident in the recommendations of the Secretary-General regarding the use of force and the proposed creation of a Peacebuilding Commission.

### *The Use of Force*

In his report ‘In larger freedom: towards development, security and human rights for all’, the Secretary-General affirms that a basic consensus on security principles is needed, and that an essential part of that consensus must be ‘when and how force can be used to defend international peace and security’. He then identifies three areas of deep disagreement: do States have the right to use military force preemptively to defend themselves against imminent threats? Do they have the right to use it preventively to defend themselves against latent or non-imminent threats? Do they have the right — or perhaps the obligation — to use it protectively to rescue the citizens of other States from genocide or comparable crimes?

The Secretary-General makes a series of recommendations on how to seek that consensus. However, many questions arise from his suggestions: Is it wise not to rewrite Article 51 of the Charter on self-defence? Is it true that jurists accept that ‘imminent threats

are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack?’ How do we deal with the claims of some States that there is a right to use force preventively against latent or non-imminent threats? Is it really sufficient to rely on the authority of the Security Council?

The High-level Panel has recognized that there is an emerging collective international responsibility to protect. The Security Council would have a responsibility to authorize military intervention in certain cases as a last resort based on this emerging norm. The issue is also addressed in the report of the Secretary-General, but difficult questions are left open. In fact he only says that ‘as to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?’ But, in which way does the responsibility to protect impinge on the principle of non-intervention in domestic jurisdictions? How does the responsibility to protect differ from humanitarian interventions? Is it a right or an obligation? How will this responsibility affect the way in which the Security Council adopts its decisions? Is the Security Council the only authority that may take a decision on the use of force in cases where the responsibility to protect is concerned? What are the requisites for that kind of decision?

### *A Peacebuilding Commission*

The High-level Panel and the Secretary-General recommend the creation of a Peacebuilding Commission to prevent failing states from collapse or aid in the rebuilding of failed states. The idea is generally perceived among UN member states as an ‘idea whose time has come’ and one that most countries could support, particularly in Africa. However, several issues need to be discussed and resolved before a sufficiently detailed proposal on this organ can emerge. While there seems to be broad agreement about the need for the UN to assume a more constructive and sustainable role in conflict management of international significance, and even agreement on the general composition and some of the functions of the envisioned Peacebuilding Commission, other issues remain unsettled.

Closer attention to these issues become especially important in the light of the subtle, but relevant, differences that exist between the recommendations of the High-level Panel (on the one hand) and those of the Secretary-General (on the other). First is the question of where the Commission will sit institutionally. Should it be linked to the Security Council or the ECOSOC or be 'freestanding' from both? A closely related issue is that of its core functions and mandate. Should it mainly focus on 'peacebuilding' as defined e.g. in the *Agenda for Peace* (1992), i.e. as 'actions taken to identify and support structures which will tend to solidify peace in order to avoid a relapse into conflict' or should it cover other issues in the broader area of international conflict management, such as conflict prevention (preventive diplomacy), peacekeeping and peacemaking?

Another concern is the extent to which a Peacebuilding Commission would be able to improve the role of the international community in some or all these areas. In particular, what will be the scope of its mandate? What tools will it be given to pursue its objectives? In the area of peacebuilding, which model (or models) will be employed to assist governments (or UN transitional administrations) in the reconciliation of people and groups, reform and rebuilding institutions, structures and economies? To what extent should national interests, ideas and aspirations of the host government and/or civil society of a country under consideration play a role? For example, will the Peacebuilding Commission pursue a policy of transitional justice that advises all countries under consideration to prosecute war crimes, genocide and crimes against humanity committed by outgoing regimes and/or occupying powers? How will the Commission react if its preferred policies or models are eschewed by the host government?

### *Contributions to the Collection*

This working paper consists of a collection of comments that seek to respond to several of the outstanding issues and concerns from the standpoint of the responsibility to protect and brought to the forefront in the context of UN reform. Most of the comments have been prepared by participants in the roundtable discussion *Building a New Role for the United Nations: the Responsibility to Protect* that was held in Madrid on 3 June 2005 and organised by FRIDE in collaboration with the *Centro de Estudios Políticos y Constitucionales* (CEPC).

The first part of this collection is devoted to the use of force and the responsibility to protect. The contributors acknowledge that the responsibility to protect may require the use of force on extreme occasions, and examine the most relevant angles of the issue of the responsibility to protect and the use of force as presented in the report of the Secretary-General 'In Larger Freedom', i.e. whether States have the right—or perhaps the obligation—to use force protectively to rescue the citizens of other States from genocide or comparable crimes when their own States are not able or willing to take that responsibility.

**Steven Ratner** offers several observations on the Secretary-General's vision for the role of military force in international relations, particularly with reference to the views of the United States government on the use of force in the post-September 11 era.

**Rainer Hoffman** then analyses the pre-emptive, preventive and protective uses of force, considering that the Security Council has the power to evaluate in which situations there are threats to international peace. This body also has the mandate to authorize the necessary measures to confront these threats, including the use of force. The comment focuses on the cases of international terrorism and failed states.

**Niels Blokker** focuses on the law on the use of force and the responsibility to protect. The key question he discusses 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 authorise the use of force to bring the crisis to an end? Or, if no such authorisation is given, could it be lawful for foreign states to intervene by force?

**Joanna Weschler** expresses the view of a human rights organisation on the use of force and the responsibility to protect. It holds that the imperative of stopping or preventing genocide or other systematic human rights violations can, sometimes, justify the use of military force.

The second part of the collection focuses on the proposed Peacebuilding Commission. A central aspect of the responsibility to protect is the use of non-military measures for the purpose of preventing and rebuilding failed states. In this context, the Peacebuilding Commission as recommended by High-level Panel and the Secretary-General could assume a crucial role. However, several issues must be settled before the Commission can begin its work, including its core functions, institutional location, models and strategies, composition, accountability, relationship with civil society actors, and funding. The contributors seek to offer important insights to the deliberations and negotiations on remaining issues.

In its November 2004 report, *A More Secure World*, the High-level Panel recommends that the Security Council, acting under Article 29 of the Charter of the United Nations, and after consultation with the Economic and Social Council, establishes a Peacebuilding Commission. Against this background, **Shepard Forman** explores the rationale for the proposed Peacebuilding Commission, examines some of its basic premises, and presents some options regarding its institutional status, including its relationship to the Security Council and other organs of the United Nations, particularly the proposed Peacebuilding Support Office within the Secretariat. He also examines questions related to functions, composition, membership and financing.

**Peter Wallensteen** focuses on the conflict preventive role of the future Peacebuilding Commission. He suggests that for the Commission to be effective it would need to have an independent analytical capacity. Such a capacity would make it possible for the

Commission to bring awareness, commitment and resources to situations that may otherwise develop into severe crises.

**Enrique Yturriaga** reflects on outstanding issues related to the creation of a Peacebuilding Commission from the standpoint of the Spanish Ministry of Foreign Affairs, including where it will be established (institutionally-speaking), its principal functions as well as questions related to funding and peacebuilding models and strategies.

**Nieves Zúñiga García-Falces** analyses the proposal to set up a Peacebuilding Commission within the framework of United Nations reform based on the aims of international peace and security, and the responsibility to protect as set out in the reports of the High-Level Panel and the Secretary-General. She suggests that a practical proposal must be evaluated in accordance with the prime challenge facing the UN in the 21st Century, i.e. putting in place a collective security system that is effective, efficient and equitable managed by an organisation vested with legitimacy.

The creation of a Peacebuilding Commission raises accountability concerns. **Claire Wren** outlines four inter-related dimensions of this field as identified by One World Trust, i.e. transparency, participation, evaluation, as well as complaints and redress. She explains how each of these dimensions can be applied to the proposed Commission and which issues will need to be addressed in the process of its establishment in order for the Commission to live up to expectations regarding accountability.

### **About the Contributors**

**Niels Blokker** is Professor of International Law at Leiden University and Senior Legal Adviser to the Netherlands Ministry of Foreign Affairs. In 2003, he was appointed Professor of International Institutional Law (Schermers Chair) at Leiden University. Mr. Blokker graduated in 1984 and defended his dissertation at the same university in 1989. Since 1984 he has been Lecturer and subsequently Senior Lecturer on Law of International Organizations at Leiden University. In 2000, he was appointed Senior Legal Counsel of the Netherlands Ministry of Foreign Affairs. His publications include *International Regulation of World Trade in Textiles* (1989), *International Institutional Law* (with Henry G. Schermers), and *The Security Council and the Use of Force* (with Nico Schrijver, forthcoming). His research concentrates on Law of International Organizations, with emphasis on the Law of the United Nations. As a member of the Netherlands Delegation to the Preparatory Conference for the International Criminal Court and to the Assembly of States Parties to the International Criminal Court, he participated in the negotiations on the crime of aggression.

**Shepard Forman** is Director of the Center on International Cooperation at New York University. Prior to founding the Center, he directed the Human Rights and Governance and International Affairs programmes at the Ford Foundation, where he also was responsible for developing and implementing the Foundation's grant making activities in Eastern Europe, including a field office in Moscow. Ph.D. in Anthropology at Columbia University and post-doctoral studies in Economic Development at the Institute of Development Studies in Sussex, England. He served on the Faculty at Indiana University, the University of Chicago and the University of Michigan; and conducted field research in Brazil and East Timor. Shepard Forman has authored two books on Brazil and numerous articles, including papers on humanitarian assistance and post-conflict reconstruction assistance. He is co-editor, with Stewart Patrick, of *Good Intentions: Pledges of Aid to Countries Emerging from Conflict and Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*; and with Romita Ghosh, *Promoting Reproductive Health: Investing in Health for Development*. He has also edited *Diagnosing America: Anthropology and Public Policy* which examines the application of anthropological studies to social problems in the United States.

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*Cold War* (1995); *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997 and 2001) (co-author); *International Law: Norms, Actors, Process* (2002) (co-author); and *The Methods of International Law* (American Society of International Law) (co-editor). Besides being member of the Board of Editors of the American Journal of International Law, he is also member of the International Board of the Concord Research Centre for the Interplay between International Norms and Israeli Law and International Visiting Scholar at the Melbourne University School of Law.

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**Joanna Weschler** has been the United Nations representative for Human Rights Watch (HRW) since 1994. She developed and articulated the HRW's strategy towards the UN and established the organization's initial contacts with the UN. Her current responsibilities include ongoing formulation of HRW's strategy towards the UN; review of editorial content of the organization's publications related to the UN; speaking to the media on UN and human rights related issues; and participating as speaker in public events and regularly representing HRW at the United Nations Human Rights Commission and several UN meetings in New York, Geneva and other locations. Prior to her current position, she was the Poland Researcher in Helsinki Watch (now Europe and Central Asia Division of HRW); Brazil Researcher for Americas Watch (now the Americas division of HRW); as well as Director of HRW's Prison Project. She has conducted human rights investigations in countries on five continents and has written numerous reports and

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## Self-Defense and the World After September 11: Implications for UN Reform

*Steven R. Ratner*

Secretary-General Annan devotes a significant section of 'In Larger Freedom' to the UN's place in the maintenance of international peace and security. His analysis and recommendations are in some sense mere elaborations of ideas expressed in earlier speeches and documents, in particular those concerning the UN's responsibility to aid populations whom their governments will not protect. Yet 'In Larger Freedom' of course goes much further, with its chapter on 'Freedom from Fear' clearly influenced by the important work of the High-Level Panel on Threats, Challenges and Change. Annan provides a broad range of recommendations for the UN's members regarding terrorism and organized crime, weapons of mass destruction, and conflict prevention, including peacekeeping and peacebuilding. But the report's five paragraphs on the use of force, though brief, represent the Secretary-General's most forthright discussion of his vision for the role of military force in international relations. In this paper I will offer several observations on this discussion, particularly with reference to the views of the United States government on the use of force in the post-September 11 era.

### *1. The Choice of Issues*

'In Larger Freedom' emphasizes three areas of disagreement among states – over preemptive force, preventive force, and protective force. This division of the *problematique* differs from that of the High-Level Panel, which addressed individual and collective (i.e., non-Security Council-authorized) self-defense, Security Council-authorized force for interstate disputes, and Security Council-authorized force for internal conflicts. Although the Secretary-General's recitation of the issues has a nice alliterative ring, useful for public consumption, students of *jus ad bellum* would note that the High-Level Panel's description better differentiates between the issues regarding Article 51 self-defense and Article 42 measures.

More important, the Secretary-General omits discussion of disagreements over the employment of force *after* armed aggression has occurred. To note two obvious areas:

- With respect to Article 51 action, interpreters of international law continue to disagree about the sort of attack that triggers self-defense. More specifically: (a) The International Court of Justice endorsed a minimal threshold on the amount of force that constitutes an 'armed attack' in the 1986 *Nicaragua v. United States* judgment. (b) In the 2004 *Israeli Wall* advisory opinion, the ICJ, over strong dissent of several Western judges, said that cross-border attacks by non-state actors that could not be attributed to a state did not trigger Article 51 at all. Thus, Israel could not assert that self-defense allowed it to build a wall against suicide bombers from the occupied territories. The briefs filed in both of these ICJ cases suggest that key member states disagree on these issues at least in principle, though it is frankly difficult to know the extent to which most states believe the ICJ's rulings deserve respect on these use of force questions. (c) There is disagreement about the conditions under which a state can be the target of self-defense by virtue of actions by non-state actors. When the U.S. government asserted the right to use self-defense against Afghanistan in 2001, it did so based on a theory of 'harboring' terrorists, originally announced on the night of September 11, 2001, when President Bush stated that it would 'make no distinction between the terrorists who committed these acts and those who harbor them'. This position was at odds with existing customary international law regarding the responsibility of a state for the actions of private actors on its territory. The endorsement of the U.S. action by NATO and the OAS, and the non-protest by other governments, suggests that the United States may have instantly achieved a change in the rules, so perhaps the disagreement is merely among academic and nongovernmental commentators. But if the United States, Russia, or other states that might become the victim of transnational terrorist groups chooses to respond by force against another state without Council approval, now-hidden disputes about the legitimacy of such measures may well emerge.

- With respect to Article 42 action, I believe there is still a significant discord among states about when the Council should authorize force following aggression. The 1991 debates after the invasion of Iraq were characterized by calls for more patience in letting sanctions work, couched in the legal language of the discretion to be afforded the Council under Article 42 in determining if non-military means have proved 'adequate'. And states clearly consider many transborder uses of force not serious enough (at least in terms of their own national interests) for authorizing force under Article 42, e.g., Ethiopia/Eritrea and the Great Lakes area. To his credit, the Secretary-General does consider this question in paragraph 126, where he endorses five criteria for Council action based on the High-Level Panel's report. (See also point 4 below.)

## 2. Pre-Emptive Self-Defense - The Phoenix Rises

In considering the first of the three disagreements, both the Secretary-General and the High-Level Panel squarely endorse the legality of pre-emptive self-defense, i.e., the use of force against an imminent attack from abroad. This is welcome news to me, but it may come as a surprise to international lawyers when, for instance, Annan asserts that '[l]awyers have long recognized that [Article 51] covers an imminent attack' (para. 124). In fact, while many leading U.S. and British scholars have argued for the legality of the practice, pointing to the tacit endorsement of the Israeli first strike of 1967 in support of their claim, most European and other scholars would probably still say that such force is illegal. They would cite as evidence of its illegality the language of Article 51, various statements of governments, and the dangers of an unfettered right to strike first in the case of imminent peril. Indeed, the Bush Administration's September 2002 National Security Strategy made essentially the identical legal claim, much to the chagrin of European international lawyers. The Secretary-General has, I believe, perceptively gauged state attitudes – though perhaps not their public ones – on this question. He has also thrown an important bone to the United States by acknowledging what it – and a few other states – has long publicly claimed: that no state can be expected to willingly absorb the first blow of a sure attack.

## 3. Preventive Self-Defense - Keeping the Genie in the Bottle

Both the High-Level Report and 'In Larger Freedom' restate the obvious in emphasizing that the Council has clear authority under the Charter to respond preventively through military means to threats to, and not merely breaches of, the peace. And the list of five factors to guide the Council in its decisionmaking is eminently sensible. Implicitly, of course, the brief paragraph (125) on this issue is a ringing rejection of the broader claim from the U.S. National Security Strategy. In asserting that the world, or at least the United States, 'must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', the Bush Administration was suggesting that even non-imminent threats, if of sufficient gravity, would trigger Article 51. Bush Administration officials repeatedly echoed this rhetoric in making the political case – especially to the U.S. public – for the Iraq invasion based on the consequences of allowing Iraq to develop weapons of mass destruction. Significantly, they did not base their legal claim to use force on preventive self-defense (but instead on extant Security Council authority) and thus formally insisted that they were neither bypassing the Council nor relying on Article 51.

Clearly the Secretary-General has recognized that legal arguments aside, the United States might one day bypass the Council entirely in situations of less-than-imminent threats. (How many other situations are there, after all, where the U.S. government can claim that a prior authorization for force against a state akin to Resolution 678 remains in effect?) His attempt is perfectly understandable from the perspective of the principles and purposes of the United Nations;<sup>1</sup> but I believe the basic thrust of the Bush doctrine now has broad and deep domestic support such that no U.S. President after September 11 will ever be content with the imminence standard of preemptive self-defense laid down in the *Caroline* case (i.e., 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'). Unless one is content to gloss over the differences by simply not discussing what 'imminent' means, the Secretary-General's position will not end disagreements among states over the scope of Article 51.

## 4. The Proposal for a Security Council Resolution

Conor Cruise O'Brien wrote famously in *United Nations, Sacred Drama* that 'the 'satisfaction' derived from the public offering of the 'glowing phrases' [is] the feeling that the thing feared may be averted, and the thing hoped for be won, by the solemn and collective use of appropriate words'. Though O'Brien was writing about General Assembly and Security Council meetings responding to particular crises, his words hold true for the Secretary-General's proposal (endorsing the High-Level Group's idea) for a Council resolution identifying the issues for deliberations on when force will be used.

The notion of criteria for Council authorization for force has great appeal, in that it could serve as a standard for the Council's members when they are contemplating approving force in the future. Even if the criteria are phrased at a fairly high level of generality – which seems inevitable – they will channel discussion in a useful direction. Of course,

<sup>1</sup> The same hold true of the Secretary-General's approach to humanitarian intervention, which will be addressed in other contributions. Both the Secretary-General and the High-Level Panel emphasize how gross violations of human rights can and should trigger Council military action. But they avoid – surely deliberately – discussing what states should do if the Council does not authorize force. Instead, as has been the Secretary-General's refrain since his 1999 address to the General Assembly, he implores states to act through the Council, which assumes away the problem of unilateral action. Yet to do otherwise would have taken him into the highly difficult waters navigated by the International Commission on Intervention and State Sovereignty and others and simply proved too controversial – and thus distracting -- for most member states. As it is, many of the criteria in paragraph 127 for Council action mirror those that the ICISS and others have devised for out-of-Council measures.

the establishment of criteria is no guarantee that they will be followed; indeed, as is common in legal discourse, they may just change the terms of the debate to match the criteria without really altering the views of the parties. But encouraging states to justify their positions differently from the way they did before can lead to substantive changes in positions over time.

As for the list devised by the Secretary-General, it seems to be lacking two elements – (a) the availability of military resources, and (b) the role for the Council after the authorization for force. With regard to the former, whether the Council delegates authority to a coalition or creates a UN force, its members need to evaluate not only the prospects for success generally (the fifth factor in the current list), but the actual feasibility of any military action in terms of member state commitments. This is now a standard consideration for peacekeeping missions, but needs to be for all Chapter VII authorizations as well. As to the latter, the members of the Council need to reach agreement on its future role once force is authorized. Will it be consulted or will its approval be required at various steps? This sort of consensus up front can help prevent some of the disagreements that arise when the Council delegates authority only to find that the delegee is no longer interested in conferring with the Council.

More important, the Secretary-General's factors seemed aimed principally at preventing the Council from authorizing too many operations. Each asks the Council's members to essentially think very hard before approving force. Perhaps this strategy is simply a counterbalance to the earlier paragraphs in which the Secretary-General notes that the Council already has the authority to respond to all sorts of threats to the peace and is meant to respond to concerns about the overall legitimacy of the Council. Yet if this latter concern is addressed through expansion of the Council's membership, as strongly recommended by the Secretary-General, the problem may well be too much reluctance to use force rather than too much readiness. The criteria thus do not, for instance, ask member states to seriously contemplate the consequences of inaction – a task that the High-Level Committee emphasized in its report (para. 207(e)) but is effectively dropped in the Secretary-General's report.

This sort of question is important both in the context of humanitarian intervention, where lives are immediately in the balance, and in the case of the preventive force for non-imminent threats to the peace that the Secretary-General wants only the Council to approve, rather than letting member states act on their own under a broader reading of Article

51. If the U.S. government perceives that the Council is reluctant to act preventively – something that the Secretary-General's criteria, along with the expanded membership, makes more of a prospect -- then the possibility for broader claims under Article 51 increases. One can only hope that any resolution adopted by the Council restores some balance to the decisionmaking by giving the Council more than just reasons *not* to act.

### ***5. The Feasibility of a Council Resolution***

Whether the Council's members are interested in agreeing upon criteria is another question. On the one hand, the UN's members took twenty-five years to agree on a definition of aggression that was supposed to guide the Council in acting under Chapter VII. Yet that exercise took place in the General Assembly and moreover was frozen for many years by Cold War-related issues. The process proposed by the Secretary-General would be confined to the Council, which now has a practice, stretching back to the Gulf War (and of course to Korea in the first instance) of authorizing the use of force. Surely the various uses of force can be examined to find common areas for discussion.

On the other hand, some members of the Council will still prefer the ad hoc approach, where each case is taken on its own and none is a precedent for future action. This seems to be the case for China and some developing world states, particularly with regard to force to respond to domestic crises. Yet the Secretary-General's proposal cleverly does not ask states in the Council to reach consensus on exactly what sort of domestic crises should trigger an authorization for force – although it is clear that his own view is that genocide and crimes against humanity at a minimum must do so. Rather, his proposed Council resolution would simply note that Council members must agree on the proper purpose of the force – or, as the High-Level Panel put it, that 'the primary purpose of the proposed military action is to halt or avert the threat in question'. This recourse to a high level of generality may permit consensus on a resolution while papering over fundamental differences among Council members as to what exactly constitutes a legitimate purpose. Moreover, as noted, the U.S. government would want to make sure that nothing in the resolution affects a state's rights under Article 51. Although the Secretary-General wisely did not suggest incorporating his views on Article 51 – limiting it to actions after or immediately preceding an armed attack -- into the proposed resolution, the two issues may prove hard to separate.

## The Use of Force and the Responsibility to Protect

*Rainer Hofmann*

In his report 'In larger freedom: towards development, security and human rights for all', the UN Secretary-General affirms that a basic consensus on security principles is needed, and that an essential part of that consensus must relate to the crucial issue as to 'when and how force can be used to defend international peace and security'. He then identifies three areas of deep disagreement: Do States have the right to use military force pre-emptively, i.e. to defend themselves against imminent threats? Do they have the right to military force preventively, i.e. to defend themselves against latent or non-imminent threats? Do they have the right – or perhaps the obligation – to use military force protectively, i.e. to defend the citizens of other States against genocide, ethnic cleansing or other comparable crimes under international law?

Obviously – we all know this - there is a fundamental difference between the mentioned three varieties of the use of military force: the reason for resorting to such force. Whereas the two former ones aim at defending one State, i.e. its population, against either an imminent or a latent, or non-imminent, armed attack by another State or threat emanating from that State, the goal of the third variety is essentially different: Here, the military force of one State is employed with a view to protect not its own population, but the population of another State. This obviously raises a number of additional questions which do not have to be addressed when dealing with the question as to the legality of the use of force in the two former varieties.

But there is a further, additional difference which I think needs to be taken into account: The issue of international terrorism. The events of September 11 and later developments have shown to all of us, that the traditional concept according to which an armed attack which results in the right to resort to self-defence under Art. 51 UNC, or a threat to peace and security which enables the Security Council to adopt measures under Chapter VII UNC, will always be made by, or result from the acts of a state, does not any longer reflect reality. This means that I agree with all those who state that the issue must not be limited to discuss the legality of pre-emptive (anticipatory) or preventive self-defence against situations which are perceived as constituting an imminent or non-

imminent threat and which emanate from actions attributable to a State, but that we also have – and I should like to stress: even more so – to look into the question of the legality of measures of pre-emptive and preventive self-defence against imminent or non-imminent, but latent threats emanating from terrorists and their actions not attributable to any State.

Moreover, an additional aspect should be taken into account: Since the demise of State power in Somalia, we are increasingly faced with the phenomenon of failing or failed states. As to all three varieties of the use of force, it might well be that different parameters apply in order to assess the legality of such action depending on whether military force is employed against the territory of a well-functioning State or a failing or failed State.

Finally, I am convinced that the Security Council has, under the provisions of Chapter VII, the power to decide, in all three scenarios, that there exists a threat to the peace in the meaning of Article 39 UNC and is, thus, entitled also to decide to adopt, or to authorize member States to take, all measures necessary to end that threat, including the use of force.

### *1. The Pre-emptive Use of Military Force*

Let me start by describing what I consider to have been the predominant view among international lawyers concerning the pre-emptive and unilateral use of military force, i.e. as a means of self-defence and therefore without prior authorization by the UN Security Council: According to this view, self-defence was only allowed if exercised in conformity with Article 51 UNC which necessitated that an armed attack actually occurred; this meant, that a mere threat of an armed attack was not considered to justify any pre-emptive military action. This opinion was – and is – based upon the argument that the right to self-defence under article 51 UNC, as an exception to the general rule of Article 2 para. 4 UNC, must be narrowly construed.

I think, however, that the discussion before and after the military attack of the USA and their allies against Iraq in spring 2003 can be understood in such a way that there is now a strongly increasing tendency to allow, under certain circumstances, pre-emptive self-defence against an imminent armed attack. This argument dates back to the *Caroline* – formula and implies that a State might use military force pre-emptively and as an *ultima ratio* measure: The government wishing to resort to pre-emptive self-defence

needs ‘to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation’. It seems – at least to me – that the presently dominant view is to accept the parallel existence of both the Charter right to self-defence and the customary law right to limited pre-emptive self-defence; in view of the development, and proliferation, of modern technology and weapons of mass destruction, this position is indeed convincing: No State can be legitimately expected to wait until missiles with nuclear, chemical or biological warheads have actually reached their targets since in most cases such attacks would be so destructive that re-active self-defence would not be any acceptable option. It is indeed most interesting to see that the UN Secretary-General in para. 124 of his paper entitled ‘In Larger Freedom’ fully subscribes to this view.

Now, what is the legal assessment concerning the pre-emptive use of military force against terrorist attacks? In order to address that question, I should like to begin by remind us of what is the actual state of international law as concerns the exercise of the right to self-defence when an attack – which could be qualified as an armed attack under Article 51 UNC as the UN Security Council did with respect to the attacks of September 11 – has been made by terrorists: I think that international law still demands - for re-active self-defence in such a case to be legal – that the State from the territory of which the terrorists are operating has not only been a ‘safe harbour’ to such terrorists, but has assisted them, be it on a minor scale; thus, I think that the test applied by the ICJ in the *Nicaragua* – Case still constitutes the currently applicable state of international law. This again means that the attack on Afghanistan was lawful although I should like to stress that – for reasons of legal policy – I had strongly preferred the USA and their allies to obtain a pertinent mandate of the UN Security Council. I should like to present the following thesis: If indeed the conditions which are necessary to allow the recourse to pre-emptive use of military force against a State under the *Caroline* – doctrine are fulfilled with respect to an imminent threat of such an attack performed by terrorist groups and it can be established beyond any reasonable doubt that the State from which such terrorists are operating is assisting such terrorists, then the pre-emptive use of military force against such terrorists on the territory of that State does not constitute a violation of the prohibition of the use of force.

Finally, as concerns the scenario of such armed attacks committed by terrorists from the territory of a failing or failed State, the situation is slightly different: While it is clear that also failing or failed States are protected by Article 2 para. 4 UNC, we have the special situation that there is no government in place which does represent state authority in that State. So, if again the conditions for the application of the *Caroline* – doctrine are fulfilled, the pre-emptive use of military force against terrorists in that failing or failed State is legal under international law if the group exercising factual authority over the respective part of the territory of that failing or failed State supports the terrorists or – and here I think one has to make a difference as compared to the situation in a non-failing or non-failed state – is factually not in a position to control the acts of such terrorists. I am aware of the fact that this opinion can be criticized as opening up possibilities for abuse – a kind of ‘slippery slope – argument’ – but I think no State can be expected to refrain from the use of pre-emptive military force against a territory only because there is no government in place which would effectively exercise state authority.

## **2. The Preventive Use of Military Force**

The legal assessment is, however, fundamentally different as concerns the preventive use of military force. This concept - which is by and large based upon the US National Security Strategy of 20 September 2002 - differs profoundly from the concept of pre-emptive (or anti-cipatory) self-defence as understood by those who consider it to form part of currently applicable customary international law: Whereas the latter insists on the imminent character of the attack, the former seeks to justify military action geared to prevent an adversary from developing structures and weapons that, in the future, might justify the assessment that an armed attack is imminent. In other words: In a situation of pre-emptive self-defence, the State which strikes does so in order to forego an imminent strike by the adversary; in a situation of preventive self-defence, the State which strikes does so in order to prevent the adversary from developing the capacity to threaten, in the future, with an imminent attack.

Here I think there is no need whatsoever for an additional right to self-defence outside the Charter law: The intention of a State to possess and to develop weapons of mass destruction might very rightly be considered as a threat to international peace and security in the sense of Article 39

UNC. It is then up to the Security Council to meet its responsibilities to secure international peace and security. Thus, the Security Council might, e.g., establish a system of international inspection or even, if the State would not comply with such an obligation, authorize Member States to use all necessary means, including the use of armed force, to enforce compliance. So, only the UN Security Council is entitled to use, or authorize the use of, preventive military force. Again, it is most interesting to note that the UN Secretary-General in para. 125 of his paper 'In Larger Freedom' clearly states that in situations of latent threats the 'Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security'.

I also think that there is no need whatsoever to deviate from this position as concerns terrorists and failing or failed States. In the absence of the imminence of an armed attack, there is clearly no justification to add to the system established by the UN Charter.

### **3. The Protective Use of Military Force**

Finally, I should like briefly to address the issue of the protective use of military force which, in my understanding does not differ – as to its substance – from those actions which were – and still are – discussed under the notion of *humanitarian intervention*. At the outset, I should like to stress again that the UN Security Council is entitled – and I should like to add: also obliged in the sense of a responsibility to protect - within its powers under Article 39 UNC, to adopt measures against States in order to stop their governments from committing acts of genocide, ethnic cleansing or large-scale violations of the most fundamental human rights.

The real question is, of course, whether States are entitled to act, i.e. to use military force protectively, if the UN Security Council does not act in such a way as to meet its responsibilities. The prime example, of course, is constituted by the NATO intervention against the former Yugoslavia in order to stop the on-going ethnic cleansing in Kosovo. In hindsight it is interesting to note that, before that intervention, most international lawyers considered such an intervention as maybe morally legitimate, but illegal; during and shortly after that intervention, many international lawyers – also in my country and including myself – endeavoured to find and establish legal arguments which, under strict conditions, would justify such protective use of armed force; however, today I think it is correct to

state that most international lawyers, in particular in the light of the pertinent reaction of the international community, consider the NATO intervention – again – as morally legitimate but illegal.

This, I think, leaves us with the task to embark upon developing criteria under which such interventions – I repeat: in the absence of adequate action by the Security Council - might be considered morally legitimate and legal. I should like to propose that such interventions are legal if they conform to the following substantive and procedural criteria: That there exists a clear case of an on-going genocide or large-scale and gross violations of the very fundamental human rights; peaceful sanctions have shown not to end such a scenario; it is clear that the Security Council will not authorize the use of protective military force; the decision militarily to intervene is taken by a regional organisation – or regional arrangement in the sense of Article 52 UNC – according to previously enacted procedural standards; the military intervention is strictly proportionate as to the military means employed and targets attacked and also strictly limited to enforcing an end to such crimes.

## **The Law on the Use of Force and the Responsibility to Protect: Straitjacket or Life Jacket?**

*Niels Blokker*

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.

### ***1. 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'.

### ***2. 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'.

### 3. 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.

## The Use of Force and the Responsibility to Protect: A Human Rights Organization's Perspective

Joanna Weschler

For decades, the prevailing view regarding the role of the international community in the face of atrocities had been grounded in the issue of state sovereignty. In September 1999, Kofi Annan, in his now famous speech at the opening of the General Assembly insisted that sovereignty must give way to the imperative of stopping crimes against humanity. Annan's speech came just several days after the decision by the Security Council to deploy an international force in violence ravaged East Timor, a few months after the Kosovo intervention that lacked the mandate from the Security Council, and at the time when the massive humanitarian disasters of Somalia, the Balkans and Rwanda were still painfully fresh in memory. A long and heated debate followed out of which the concept of 'responsibility to protect' came into sight.

Human Rights Watch has followed this debate with great interest and expectation. Over the past few years, several important documents have been published and moved the issue forward. The December 2004 report 'A more secure world: our shared responsibility' by the Secretary-General's High-level Panel on Threats, Challenges and Change (HLP) in particular offered a number of important points. It called the responsibility to protect an 'emerging norm' and it moved the discussion from whether force *can* legally be used to whether it *should* be used as a matter of good conscience and good sense. It also put forward some important recommendations.

The High-level Panel's report pointed out that the Charter is actually 'not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity' because its prominently stated reaffirmation of the 'faith in fundamental human rights'<sup>2</sup> appears to be restricted by article 2.7.<sup>3</sup>

The report also highlights the fact that in the past decade or so the debate has shifted from questioning

<sup>2</sup> United Nations Charter, The Preamble.

<sup>3</sup> United Nations Charter, Article 2.7: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

the ‘right to intervene’ to the issue of the ‘responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease’. The report endorsed the emerging norm that there is a collective international responsibility to protect in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have been powerless or unwilling to prevent. This responsibility, the report said, should be exercised by the Security Council, with the military intervention being the last resort. It also outlined five criteria for the use of military force. The report also called on the permanent members of the Security Council to ‘refrain from the use of the veto in cases of genocide and large scale human rights abuses’.

The March 21, 2004 report by the Secretary-General ‘In Larger Freedom’ reinforced the notion of the responsibility to protect and recommended that the Security Council adopt a resolution setting out the principles for the use of force in situations where military force is needed to exercise the responsibility to protect and expressing its intention to be guided by them.

Human Rights Watch found of particular importance the two reports’ recommendations regarding the responsibility of the United Nations to protect civilians from atrocities and mass killings committed by their governments. We also supported the five criteria of legitimate protective action laid out in the Panel’s report, though we insisted that in any document regarding criteria for the use of force, there should be a strong reference to international humanitarian law as the indispensable guiding principle of any military action. Furthermore, Human Rights Watch strongly supported the HLP’s recommendation regarding the refraining of the use of veto at the Security Council in cases involving massive human rights violations in the belief that adoption of that practice is essential if the Council is to live up to its responsibilities to protect.

Human Rights Watch is fairly unusual among human rights groups because it has a longstanding policy on the use of military force for protective purposes. War often carries enormous human costs, but we recognize that the imperative of stopping or preventing genocide or other systematic slaughter can sometimes justify the use of military force. For that reason, Human Rights Watch has on rare occasion advocated use of force—for example, to stop ongoing genocide in Rwanda and Bosnia.

Yet military action should never be taken lightly, even for humanitarian purposes and, for that reason, Human Rights Watch’s internal policy will allow us to consider advocating the use of military force by the international community in non-consensual situations only under the following circumstances:

- a) When, in the considered view of HRW, it is the only reasonable measure that can prevent or stop the crime of genocide or the comparable mass killing of non-combatants and
- b) When other measures of a political, diplomatic, economic or other nature have been tried without success or they cannot be reasonably expected to put a stop to the genocide under the circumstances.

This policy therefore requires rigorous analysis of the human rights abuses to determine whether they amount to genocide or ‘comparable mass killing of non-combatants’; and a determination of whether the non-consensual use of force is the ‘only reasonable measure’ to end the crimes.

The recommendations of the HLP report and of the Secretary-General are currently being discussed, both are the General Assembly and in capitals. In September, heads of states will gather in New York and adopt a document that will reflect areas of broad agreement from among the full spectrum of recommendations presented by the reports. It is unclear at the moment to what extent the responsibility to protect and the criteria for the use of force will be included in this area of broad agreement.

An analysis of statements made by member states in late April during the General Assembly’s consultations in preparation for the summit, show a few interesting trends. Whereas there has been a considerable discussion regarding the interpretation of the UN Charter, there are relatively few countries willing to be on the record as opposed to the concept of the responsibility to protect emerging as a binding concept. What is also interesting and telling is that most of those states that did go on record as opposed, have either a long history of trying to weaken United Nations’ effectiveness in human rights or have been plagued by severe human rights violations, or both. The majority of states that did make statements on the subject of responsibility to protect, have gone on record as supportive.

A lot more work will need to be done between now and the September summit, but there could be some cautious optimism cautiously optimistic that the international community will make another step toward realizing its responsibility to protect.

## **High-level Panel on Threats Challenges and Change: Recommendation to Establish a Peacebuilding Commission**

*Shepard Forman*

### ***1. The Rationale***

In its analysis of the United Nations capacity to promote and maintain peace, the HLP identified

‘... a key institutional gap: there is no place in the United Nations system explicitly designed to avoid State collapse and the slide to war or to assist countries in their transition from war to peace. That this was not included in the Charter of the United Nations is no surprise since the work of the United Nations in largely internal conflicts is fairly recent. But today, in an era when dozens of States are under stress of recovering from conflict, there is a clear international obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly ...Strengthening the United Nations capacity for peacebuilding in the widest sense must be a priority for the organization’ (p. 83).

There is by now ample evidence of substantial gaps in the planning, financing and implementation capacities for the critical civilian components of complex missions. While substantial improvements have been made over the years in the international community’s peacebuilding capacities, concepts, policies and practice continue to evolve within the UN system, including the international financial institutions, and among bilateral donors. In proposing the creation of a Peacebuilding Commission and related Peacebuilding Support Office in the Secretariat, the High-level Panel is seeking to build on and consolidate these advances in order to strengthen national as well as the UN’s and international community’s shared capacity to prevent state failure and more effectively manage post-conflict peacebuilding.

In brief, the Peacebuilding Commission is intended to create an authoritative, intergovernmental mechanism that can make the substantive link between security and development and ensure that for each specific country situation a comprehensive, integrated mission plan is developed, that there is adequate coordination among the diverse intergovernmental and national donor agencies, and that sufficient

resources are marshalled to ensure that the bases for sustainable peace and development are put in place.

While there appears to be growing consensus about the need for a more effective mechanism for post-conflict reconstruction and peacebuilding, the guidelines laid out by the High-level Panel raise a number of critical questions about form, function and decision-making authority that must be resolved before any decisive action on the Peacebuilding Commission and associated Peacebuilding Support Office can be taken. This paper seeks to elaborate some of these questions in the interest of promoting constructive debate on the Panel’s recommendation.

In brief, the High-level Panel recommends that:

‘The Peacebuilding Commission should be reasonably small; it should meet in different configurations, to consider both general policy issues and country-by-country strategies; it should be chaired for at least one year ...by a member approved by the Security Council; in addition to representation from the Security Council it should include representation from the Economic and Social Council; national representatives of the country under consideration should be invited to attend; the Managing Director of the International Monetary Fund, the President of the World Bank and, when appropriate, heads of the regional development banks should be represented at its meetings by appropriate senior officials; representatives of the principal donor countries and, when appropriate, the principal troop contributors should be invited to participate in its deliberations; and representatives of regional and subregional organizations should be invited to participate in its deliberations when such organizations are actively involved in the country in question’ (XV.265, p.84).

### ***2. Institutional Status***

The High-level Panel has recommended that the Peacebuilding Commission be established as a subsidiary body of the Security Council, thereby raising a set of questions about the relationship between the two bodies and what alternative options were explored and rejected. A number of considerations argue for its association with the security council, including:

- the political weight and authority afforded by the Security Council;
- the simultaneity needed between peacekeeping and peacebuilding operations;
- the required coordination across phases of conflict – prevention, mediation, peacekeeping and peacebuilding;
- the increased recognition of the need to join up security and development.

Notwithstanding, questions surface with regard to infringement on the mandate and purview of other organs of the United Nations, particularly ECOSOC and the General Assembly, raising the possibility of other alternatives, including:

- Establishing the Peacebuilding Commission as a subsidiary body to ECOSOC which has attempted with mixed success to provide coordination in the development field, including with the Bretton Woods Institutions, and has taken tentative steps in a few cases of peacebuilding.
- Establishing, through Charter revision, the Peacebuilding Commission as an independent organ under the Charter, perhaps as a successor to the Trusteeship Council.

### **3. Functions**

In his Note to the General Assembly transmitting the report of the High-level Panel, the Secretary-General endorses the Panel's recommendation to establish a Peacebuilding Commission, and states that:

‘...work and resources in this area remain too dispersed and I welcome the idea of a new intergovernmental body, as well as that of dedicated capacity in the Secretariat. It is my hope that such a Commission, which would assist States in the transition from the immediate post-conflict phase to longer-term reconstruction and development, would also be available, at their request, to assist Member States in strengthening their own capacity’ (paragraph 14, page 3).

As described in the Panel's report, the Peacebuilding Commission is intended to enhance the security-bound planning, implementation and monitoring capacity of the Security Council, by ensuring simultaneity of critical peacebuilding tasks. By bringing together members of the Security Council, ECOSOC, the International Financial Institutions and major donors, it would help to link at headquarters the diplomatic, security and development dimensions of complex

missions, thereby providing greater support capacity for field operations. It would enable the Security Council to draw in a consistent and systematic way on the knowledge, experience and resources of the World Bank and the International Monetary Fund, as well as the development ministries of Member States, all present in the field but not readily a part of Security Council deliberations.

Left to be determined is whether the Peacebuilding Commission would serve in an advisory or decision-making capacity and, in the later instance, how it would relate to the Security Council; whether it would have functional authority over resources mobilized through the proposed Peacebuilding Fund; how it would draw on and interface with current efforts such as integrated mission planning and inter-agency collaborations; and how precisely it would backstop and provide support for field operations.

Yet, the implications of the Panel's recommendations are that the Peacebuilding Commission would be structured in a way that would enable it to deal with both general as well as country specific issues. These issues of mandate and scope of activities need to be further specified and could include:

#### 3.a. Country-specific Activities

- Provide a forum in which donors and intergovernmental agencies can endorse a common strategy developed in response to local needs and priorities, including the identification and sequencing of priority tasks, by ensuring that there is an integrated mission plan with by-ins from and co-ordination among all relevant stakeholders (UN agencies, departments and programs; the IFIS; bilateral donors; regional organizations, and – critically—affected States;
- Help to ensure timely and adequate funding for the year-to-eighteen month gap period;
- Help to establish sustained country-level funding mechanisms for on-going and longer-term activities;
- Help to ensure sustained donor and UN attention to countries emerging from conflict as the security dimension of peacekeeping missions recedes.

#### 3. b. General Activities

- Provide a standing capacity at the United Nations to provide broad strategic thinking and general policy guidelines in response to the needs

of countries in transition or under stress, and to mobilize resources, as necessary;

- Develop a shared conceptual framework and integrated approach to peacebuilding that bridges political, security and development dimensions;
- Develop criteria and procedures to respond to countries seeking assistance in addressing weaknesses in national capacity and state institutions;
- Act as a convening authority for *variable arrangements* to initiate action in specific cases, recognizing that operational planning and program implementation need to be undertaken at the country level.

These functions pertain by and large to instances of post-conflict reconstruction and peacebuilding, leaving open the critical question of the role to be played by the Peacebuilding Commission with regard to prevention and, in particular, countries at risk.

In his transmittal letter to the General Assembly, the Secretary-General stressed that these prevention activities could be undertaken at the request of the countries in question. This, however, elides the question of intervention and assumes that there will be instances in which countries might seek the advice and resources at the Commissions disposal without detailing what these might be or under what authority they would be dispensed. While it is conceivable to imagine that some countries might appeal for assistance in special circumstances, for example declining capacity because of HIV-AIDS, a set of questions regarding preventive action remain to be resolved, including:

- What role should the Peacebuilding Commission play in forestalling conflict;
- Under what criteria and circumstances could ECOSOC refer a country to the Peacebuilding Commission?;
- Could the IFIs indicate fragile states eligible for some form of collective action?;
- How and under what authority could the Peacebuilding Commission respond in a country context not on the Security-Council agenda?;
- Under what circumstance could the Peacebuilding Commission continue its work in a country after a Security Council mission ends? How should its relationship to the Security Council be structured in those circumstances? ]

### 3. c. Relations to the proposed Peacebuilding Support Office

‘To give the Peacebuilding Commission appropriate Secretariat support and to ensure that the Secretary-General is able to integrate system-wide policies and strategies, develop best practices and provide coherent support for field operations, a Peacebuilding Support Office should be established in the Secretariat’ (para. 265, p. 84).

The Peacebuilding Support office would be comprised of staff drawn for their field experience and technical expertise (e.g. in public administration and management, policing, judicial reform and other essential elements of peacebuilding) from the diverse departments, agencies and programs now engaged in the UN’s currently diffuse pursuit of peacebuilding. Under the guidance of an inter-agency advisory board headed by the Chair of the United Nations Development Group, the Peace Support Office would help to:

‘...integrate system-wide peacebuilding policies and strategies, develop best practices and provide cohesive support for field operations. In addition to supporting the Secretary-General and the Peacebuilding Commission, the Office could also, on request, provide assistance and advice to the heads of peace operations, or to UN Resident Coordinators, or to national governments – for example in developing strategies for transitional political arrangements or building new state institutions’ (XV,267, p.84).

Guidelines for the establishment of the Peacebuilding Support Office are being elaborated elsewhere. However, the following matters need additional consideration regarding its relationship to the Peacebuilding Commission:

**Functions:** Staff of the Peacebuilding Support Office should:

- Provide overall staff support to the Secretary-General (and Deputy-Secretary-General) and through them to the Peacebuilding Commission in developing peacebuilding strategies;
- Ensure that all relevant agencies, departments and programs, including the IFIs and NGOs, participate in producing a comprehensive and unitary integrated mission plan;
- Provide technical assistance in the field, as requested, to SRSG’s and Resident Coordinators;

- Maintain rosters of UN department, bureau and agency personnel with extensive professional and field experience in peacebuilding;
- Establish and maintain a data base of national and international experts, particularly those with experience in recently developed countries and post-conflict cases;
- Provide a lessons-learned and evaluation capacity commensurate with that developed by the Best Practices Unit in DPKO and the Policy Unit in DPA.

While each of these functions would strengthen the civilian planning and implementation capacity of the UN system, particular attention will have to be paid to the institutional locus and reporting lines of the proposed Peace Support Office if its primary integrated mission planning function is to be carried out effectively. Reporting should probably be directed to the Deputy Secretary-General level.

#### **4. Composition and Membership**

The Panel proposes that the Peacebuilding Commission should include representation of Member States drawn from the Security Council, ECOSOC, bilateral donors, and major troop contributors as well as by senior officials of the IFIs and, as appropriate, the regional development banks and regional organizations. At the same time, however, the Panel recommends that the body should be kept reasonably small in the interest of effectiveness, thereby raising a critical issue of how selection might be done.

To accommodate the issues of appropriate participation and effective size, consideration should be given to constituting the Commission as both a *standing body*, charged with the general tasks of policy and oversight previously described, and *variable representation* that could be convened to attend to specific country situations on a case- by-case basis. Even in these circumstances, however, decisions about trade offs between size and breadth of participation will need to be made, recognizing that each choice will have consequences with respect to institutional politics and legitimacy. Among possible options for consideration:

The *standing body* could consist of 12-15 representatives from Member States drawn from the Security Council, ECOSOC and lead donor governments, although this would have the effect of curtailing representation from each of these bodies. For example:

The Security Council could formulate a mechanism to delegate three-five (3-5) Members to represent it on the Peacebuilding Commission. One possible criteria would be to select those Members most involved in peacebuilding activities, or to establish a formula for periodic rotation.

ECOSOC membership could determined on optional formula, including: a) vote to elect two-three (2-3) representatives to the Peacebuilding Commission; b) be represented by its Chair and two Vice Chairs; or c) establish an alternative selection or rotation procedure.

Membership on the Peacebuilding Commission could either (a) be automatic for the top seven-ten (7-10) donors, according to rankings of all assessed and voluntary contributions to UN funds, programs and agencies involved in UN peacebuilding (not including those already represented through the Security Council or ECOSOC); or (b) be based on contributions to the proposed 'Peace building Fund' (see below.)

Member State representation should be at a senior level; however, consideration will have to be given to whether representation should be from the resident Missions or explicitly provide peacebuilding and development expertise drawn from specialized, national post-conflict reconstruction units, or development or finance ministries (participation by video-conferencing may be appropriate).

The World Bank and International Monetary Fund should be represented at the level of President and Managing Director, respectively, or by senior designees charged to speak in the organizations' behalf.

Although not stipulated in the Panel's report, additional consideration should be given to representation by UN funds and programs, perhaps by the Chair of the UN Development Group (UNDG) both the ensure participation by the development side of the Organization and to provide for greater legitimacy.

*Variable representation* for the purpose of developing country strategies and backstopping operations should be determined by the *standing body* on a case by case basis but could consist of:

- Senior representatives of the country under consideration;
- The appropriate SRSR or his/her senior designee for peacebuilding/aid coordination;

additional donors that play a significant role in that country;

- Senior officials of relevant Regional and Sub-regional Organizations on a case-by-case basis;
- Regional actors involved in peacebuilding strategy, as appropriate;
- Country Directors of the World Bank and IMF and a senior official of the appropriate regional development bank.
- Troop contributing countries.

Clearly, representation and membership are different forms of participation and the Panel report makes no distinction between them, although they could carry with them implications for quality of participation and decision-making. Would decisions be taken by vote or arrived at by consensus? How would representatives from the IFIs and regional organizations relate to the proposed body and to their own Boards of Directors? Are the categories for representation stipulated by the Panel the right ones? Should some be eliminated? Others added? Would *variable arrangements* established for specific cases be organized as sub-committees or as part of the *standing body's* plenary deliberations?

#### 4.a. Chairmanship

The HLP recommends that the Chair should be approved by the Security Council for at least one year, leaving open issues regarding:

- Criteria for selecting the chair (e.g. Permanent Member, major donor, other?)
- Length of service (one year or longer);
- Whether the Chair of the Peacebuilding Commission's *standing body*, or separate chairs representing major donors should chair the *variable arrangements*.

#### **5. Financing**

The HLP has recommended the establishment of a \$250 million Peacebuilding Fund to ensure adequate and timely funding of the essential civilian components of a lasting and sustainable peace. The now well-documented gap between relief and development has been narrowed modestly by the recent inclusion of funds for disarmament and demobilization as part of assessed budgets; however, serious gaps continue to hamper efforts at reintegration of former combatants and displaced persons, training and deployment of indigenous police forces, judicial reform, recurrent costs of fledgling government

services, and other essential elements of peacebuilding. In brief, the Peacebuilding Fund would be intended to:

- Finance the costs of critical early recovery and rehabilitation phase activities not covered by assessed budgets;
- Fund the intermediary costs of essential governance activities until mainstream development financing and private sector investment come on board.

The modality, management and location of such a fund remain to be determined.

In considering the proposal for a fund one should keep in mind the potential 'politicization' this could bring to the whole enterprise, the national pressure from donors to the fund, and the potential overlap with other mechanisms, including the UNDP's BCPR trust fund.

**Modality:** three options should be considered for establishment of the Peacebuilding fund:

- A standing fund to be replenished on a periodic basis by willing donors;
  - A revolving fund to be used as an advance account and replenished as pledges for country activities come on board;
  - A draw-down facility whose pre-pledged funds would be released upon approval by the Peacebuilding Commission of a plan of action based on a joint, field-based assessment.
- Management: Decisions regarding use of the fund should be determined by needs in the field based on integrated mission assessment and planning.
- the Peacebuilding Commission should have an advisory, and perhaps, oversight role in the expenditure of funds;
  - Funds could revert to the field to be managed by the Office of the Special Representative of the Secretary-General in support of the essential civilian components of peacebuilding;
  - An appropriate reporting and auditing function should be established.

The Peacebuilding Fund could be established as a UN Trust Fund or located at the World Bank, depending on donor comfort levels and assurance of efficient procedures.

## A UN Peacebuilding Commission: What Could be its Core Functions?\*

*Peter Wallensteen*

Half a century of practice shows that the UN – broadly defined – often acts *after* the outbreak of an armed conflict, that is, when a situation in a country has deteriorated severely. This is a difficult time to intervene in conflict situations since it requires a coherent, long-term strategy and coordination which is often difficult to shape and maintain. Short-term measures may reduce tension or bring a conflict to a halt, and even result in a peace agreement. However, the risks of the recurrence of armed struggle may be great. Recent experience of conflict is a high risk factor.

There is a tendency for post-conflict regions to re-emerge as war zones. Around 85% of civil wars are either occurring in marginalized countries or in post-conflict countries relapsing into new armed conflicts.<sup>4</sup> Countries coming out of civil war face a 44% risk of relapsing into war during the first five years of transition.<sup>5</sup> From this follows that preventive measures are likely to be less costly for the UN and the international community than the start and restart of war.<sup>6</sup> Furthermore, it is a crucial function of the UN to ‘take effective collective measures for the prevention and removal of threats to the peace’ (Article 1.1 of the UN Charter).

Given a mixture of long-term and short-term perspectives, an effective implementation of this objective requires a centrally placed organ to:

- monitor situations that may develop into threats or breaches of international peace and security, i.e. ensure sustained attention;
- find a way to bridge a divide between emergency activities that may be unleashed at

\* See also Peter Wallensteen and Carina Staibano, Attention and commitment: Practical approaches in bridging gaps in UN’s post-conflict peace building capacity, June 2004 [available at: [www.smartsanctions.se](http://www.smartsanctions.se)].

<sup>4</sup> Collier, Elliott, Hegre, Hoeffler, Reynal-Querol, Sambanis, *Breaking the Conflict Trap: Civil War and Development Policy* (Washington D.C.: World Bank and Oxford University Press, 2003), chapter 6.

<sup>5</sup> See World Bank Group, Conflict Prevention and Reconstruction [available at:

<http://inweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/ConflictPreventionandReconstruction>].

<sup>6</sup> See Report of the Secretary-General on strengthening the coordination of emergency humanitarian assistance of the United Nations, 14 May 2002 (A/57/77-E/2002/63).

times of severe conflict and long term peace-building efforts;

- deal with the danger of a financial gap in the implementation of long-term peace building strategies;
- bridge the gap in mandate between those organisations that deal with immediate relief and those occupied with peace building and development activities;
- maintain sustainable interest among leading UN members; and
- keep an international presence even in extreme situations where state structures are weak or non-functioning.

The case of Haiti illustrates that many of these aspects are missing. After the return of democratic conditions in 1994, Haiti soon developed into an increasingly extreme case: the promised democratic reforms were not realised and, as a consequence, international aid to the country began to diminish (prior to the events of 2004). A rapid resurrection of resources after the crisis in 2004 turned out to be difficult.

On a theoretical level a solution to these kinds of problems is to develop a flexible member state mechanism that could cover extreme situations. In fact, there is a need to reform the UN in at least three areas: analysis capacity in the UN Secretariat; member state commitment through existing organs, for instance ECOSOC; and the creation of subsidiary organs of the Security Council. Let me elaborate on the latter.

The High-Level Panel Report *A more secure world: Our shared responsibility* (2004) (hereafter the ‘HLP’) brings forward the idea of a Peacebuilding Commission as a subsidiary organ under the Security Council established in accordance with Article 29 of the UN Charter. Linking efforts of peace building directly to the Council gives ‘automatic’ attention and commitment. Also, nothing prevents the Council from adding other than Council members to such an organ, which would serve to make the Commission more representative. By connecting it to international financial institutions and development and humanitarian agencies there would be possibilities of making this new organ highly operative. The Commission could also bridge some of the divides mentioned earlier. Thus, the idea is highly significant, and the fact that it also has political salience makes it the more important recommendation.

The idea of creating a Peacebuilding Commission has been followed up in the report of the

Secretary-General, *In larger freedom: towards development, security and human rights for all* (2005) (hereafter the 'ILF'). This report constitutes the key document for the deliberations on the UN reform in the 60<sup>th</sup> session of the General Assembly.

However, there are important differences between the two documents with respect to the core functions of the proposed Commission. The HLP states that there is a 'clear international obligation to assist states in developing their capacity to perform their sovereign functions effectively and responsibly' (para 261). The HLP situates the Peacebuilding Commission to face the challenge of state collapse. According to the HLP, the core functions of the Commission should be to:

- identify countries which are under stress and on the brink of state collapse;
- organize, in partnership with the national Government, proactive assistance in preventing that process from developing further;
- assist in the planning for transitions between conflict and post-conflict peace building; and in particular to marshal and sustain the efforts of the international community in post-conflict peace building over a given period (HLP, para 264).

The ILF document also discusses the core functions of the proposed Commission but rests on a somewhat different description of what it could do (ILF, para 115):

- improve UN planning for sustained recovery in the immediate aftermath of war, with particular emphasis on the creation of crucial institutions;
- help to ensure predictable financing for early recovery activities;
- improve the coordination of post-conflict activities of UN activities;
- provide a forum for greater coherence where donors, troop contributors and financial institutions can share information about recovery strategies,
- periodically review progress;
- extend the period of political attention to post-conflict recovery.
- 

In addition, the Secretary-General states that: 'I do not believe that such a body should have an early warning or monitoring function' (ILF, para. 115). Nevertheless, he expects member states to follow the Commission's advice and suggests a standing fund for peace building.

At the outset these appear to be contradictory proposals. While the HLP links the Commission's functions to an understanding of the dangers of state failure and would like to prevent these dangers from leading to war, the ILF points to post-conflict phases with the aim of avoiding relapses into war. There is evidence that both situations are dangerous. State failure may lead to internal wars that can spill over to neighbouring countries or result in interventions from the other side of the border. Not all state failures, however, may follow this fate. Remedies have been found even to severe financial collapses and social unrest (e.g. Argentina). Some failures are more significant than others, and they may be difficult to identify.

Post-conflict situations are more directly linked to the dangers of a relapse into war. It is obvious that states and societies face extremely fragile conditions after a protracted war. The quality of peace agreements and the resources available will be key factors in ensuring a smooth transition. There is, however, no certainty about the time of the transition. The war in Lebanon ended in 1989, but the situation in 2005 may still appear volatile. However, the Council and the Commission could understand either situation as a threat to international peace and security, and thus as part of their agenda. Therefore, the Council and the Commission can – and should – determine which situations they want to deal with.

However, in so doing the Security Council and the Peacebuilding Commission may seek some guidance in accomplishing this task. A central concern is the identification of the dangers of a particular situation and close scrutiny is required so that appropriate actions can be advised. In this respect, then, the ILF is less blunt than the HLP. The latter talks about the need to identify situations at risk. This, in effect, is an early warning function that will require some degree of monitoring of particular situations. However, the ILF rules out such a function. This is to be regretted. For the Commission to be effective it would need to have a capacity for independent and detached analysis on the basis of which it can develop advice and direct its own activities. Without any capacity and ability to take up new issues, the Commission will be dependent on other organs and, most likely, be less effective. It would be unfortunate if this worthwhile reform of the UN did not include such a capacity from the outset, since it could be difficult to create later, when the necessity becomes more obvious.

If the Commission will have an independent analytical capacity, it would be possible to bring attention to particular situations, and call public opinion in favour of early action. The assessments of the Commission would make it a central organ that donors, troop contributors, IFIs and NGOs would listen to, and become a voice of significance. But this capacity does not necessarily have to be construed as a complete system of early warning, while the problem is not the ability of early *warning*, but of early *acting*. The Commission should have a function of bringing awareness, commitment and resources to situations that may otherwise, over a period of time, develop into severe crises. Rather, it is for the Security Council itself to act on emerging crises. If successful, the Commission's work would – in the long term - contribute to reduce the workload of the Council.

However, if there is no analytical capacity within the Commission, it will have to establish linkages to other institutions that have such resources, whether within the UN system, among member states, NGOs or academic communities. Within the UN system, the ILF proposes a Peacebuilding Support Office as well as a Scientific Adviser (ILF, para 189). Both these could be seen as ways of creating access to knowledge that could also benefit the Commission. If, furthermore, the Ministries for Foreign Affairs created their own units for peace building efforts (within development assistance bodies, for instance, whether among donors or recipients) member state networks of great value could develop. Additionally, the Scientific Adviser could be encouraged to establish links to academic institutions and relevant NGOs. This solution will, indeed, be weaker than the establishment of a corresponding analytical function within the Commission itself, but it may also add some diversity of opinion that will enrich the deliberations of the Commission. In fact, these proposals do not exclude each other.

Against this background, it is suggested that the creation of a Peacebuilding Commission should be established; that its present form (as in the ILF) will serve a useful purpose, but also that its mandate should be expanded so as to enable the Commission to make independent public assessments in order to galvanize sustained international efforts of peace building in critical situations.

## **The Peacebuilding Commission: A Spanish Perspective**

*Enrique Yturriaga*

Before presenting some thoughts on the Peacebuilding Commission (PBC) proposed by the Secretary-General in his report, 'In Larger Freedom', I would like to highlight a couple of preliminary ideas:

- Firstly, the creation of a commission of these characteristics is a novelty for the United Nations, given that it is a body that would be built from the bottom-up, that is, beginning with field experience and in turn moving towards its institutional establishment. The PBC would be the combination of a theoretical proposal, which has already been around for a few years, and the logical evolution of the concept of development within the United Nations after decades of development aid activities by the various specialized UN agencies.
- Secondly, it is worth pointing out that the PBC has been eclipsed by the Security Council in the general debate on UN reform. In my opinion, this is positive because it makes the creation of a well-defined and coherent PBC project possible, as all negotiation experiences at the UN show that the more a text is negotiated, the less it resembles the original plan. I think we will all agree that the PBC will only be effective if it receives a clear and precise mandate.

From the Ministry of Foreign Affairs and Cooperation's perspective, these are the points that are considered to be useful for structuring the debate:

### ***1. Security Council or ECOSOC***

The question remains open about the PBC's institutional placement. The United States is the country that has most clearly stated its desire to link the PBC with the Security Council, while a significant number of developing countries have publicly advocated a special relationship with the Economic and Social Council (ECOSOC).

The advantages of linking the PBC to the Security Council are obvious. It would increase the PBC's operating capacity and, in theory, it would benefit from the greater legal weight attached to Security Council decisions. Moreover, it would allow for better coordination with Peacekeeping Operation (PKO) commands, which is a fundamental element in terms of guaranteeing the consolidation of peace. Currently, there is consensus that the UN is not adequately coordinating the transition between peacekeeping and peacebuilding phases, which in a

large percent of cases leads to the unfortunate relapse into conflict after five years. It should also be pointed out that the PBC appears in the Secretary-General's report in the chapter titled, 'Freedom from Fear'. In fact, in its presidential statement on 26 May, the Security Council already assumes the fact that the PBC will be put under its authority.

The advantages of a PBC-ECOSOC link are not insignificant either. Advocates argue that a PBC-ECOSOC relationship would provide the Commission with greater democratic legitimacy (as compared to the Security Council's much criticized lack of legitimacy). A direct link with UN agencies will be essential for the PBC's activities, as it is aimed to improve coordination among the international community in post-conflict situations. In this regard, institutionally placing it with ECOSOC would be more logical than involving the Security Council as yet another actor in inter-agency coordination. This maneuver would lead to further dispersion, which is precisely what is sought to be avoided.

There is, indeed, a third option that involves a body that is halfway between the Security Council and ECOSOC. In my opinion, this would be the ideal; however, I'm afraid that it is not realistic. We must keep in mind the suspicion that currently exists in some Western governments and public opinion sectors with respect to UN bureaucracy. Adding yet another structure that operates like the others and generates further bureaucratic procedures would not be acceptable for delegations like the United States and Japan. I think that the proposal to initially link the PBC to the Security Council and then during its implementation to ECOSOC is the proper solution. However, the relationship between these bodies would have to be carefully defined so that the UN's delicate institutional balance is not altered, and to prevent ECOSOC from being turned into a subsidiary branch – with increased responsibilities in the economic and social fields – of the Security Council.

## **2. Principal Functions and Mandate**

The main responsibility of the future PBC must be to coordinate specialized UN agencies and bodies, both among themselves and with the various international actors (including the international financial institutions) that take part in post-conflict situations.

A multidisciplinary and thematic approach is essential in order to avoid duplications. Such an approach would have several advantages: it guarantees the participation of UN agencies in the

PBC's work (the 'ground phase'), it gives UN work visibility as a single team in which each agency has a specific duty but where all work together towards a common goal, and finally, it enables shared, specific and agreed upon goals to be defined with local authorities.

Wondering about the palliative or preventive nature of the PBC mandate is, if I may say, rather doctrinal. We are addressing conflicts that, for the most part, are recurrent, linked together in vicious cycles (five years, it was mentioned earlier), where a conflict's poor resolution or lack thereof generates the causes of the next one. In this regard, the PBC would do two things, that is, prevent and help to resolve conflicts. The PBC's mandate would also need to have an important component of preventive diplomacy, which would have to be carefully prepared while taking into consideration the political implications of the given conflict. Recent experience shows us that despite theoretical reticence and legal nuances, there is a very strong trend in the international community towards a pragmatic and preventive approach. Situations exist that could foreseeably develop into conflict. Hence, it would be absurd to deprive the PBC of the chance to detect them and, if possible, promote international action before conflict breaks out.

Thanks to the accumulated experience, we can outline what would be the PBC's main responsibilities. Some of the duties, among others, that have been carried out by various UN mandates in conflicts over the last ten years, and which would form part of the PBC's mandate are: disarmament, demobilization and reintegration of armed groups, social and economic structural reform, civil protection, the reestablishment of justice and the fight against impunity, promotion of security and economic recovery at the short and medium terms as necessary pillars to stabilize the country in conflict, institutional reconstruction, rule of law, respect for human rights, etc.

In an Explanatory Note on his idea about the PBC, the Secretary-General has already highlighted some of the responsibilities that he considers important: ensure that the international community supports reconciliation processes, set general priorities based on field experience, mobilize resources – especially financial sustainability (which seems to be the main problem that the PBC must solve) – , and lastly, turn itself into a coordinating organism of the various actors.

The PBC's mandate, which in any case will be consultative, could be designed in two phases. Firstly, it should provide the Security Council with

pertinent information on the conflict so that it can make well-informed decisions. Secondly, it should strive to improve the country's economic and social development, as well as the construction or reconstruction of national capacities, while ensuring the transition from peacekeeping to peacebuilding.

As it was already mentioned, the PBC must ensure primary funding, partly by drafting up and coordinating financial and logistical needs and in turn making appeals to various international actors, and partly through the analysis of existing mechanisms, as well as those that are necessary to guarantee the transition to peacebuilding.

Another possible task to be considered for the PBC could be the periodic review of rehabilitation and development programs and, subsequently, the modification of program goals as the peacebuilding process is in course and progressing, as well as adapting short-term objectives to the medium-term.

One of the most important aspects of the PBC would be to attract and maintain enough political will and media attention to guarantee sustainable efforts from the international community. The case of Sudan is symptomatic of this phenomenon. It was only possible to pursue the country's stabilization when the 'spotlight' was on it; however, all of the efforts made were wiped away by the tragedy of the tsunami in Southeast Asia.

There are theoretical problems when it comes to accepting the preventive aspect of the future PBC. However, we need to be aware that our accumulated experience enables us to map patterns on the evolution of conflicts and study the problems that a society faces upon emerging from one.

The PBC could participate in an early warning system or it could, at least, give some coherence to existing systems. Of course, a lot of care would need to be taken in order to stay within the limits set by the principles and values of the UN Charter and, in particular, not interfere in a country's internal affairs. The experience to which I have referred may also help in terms of drawing up and developing best practice on peacebuilding issues.

### **3. PBC Tools**

The few countries that have made statements on this subject have devised different structures according to the mandate they advocate for the PBC. For example, the United States considers that if a PBC were created, it should be a minimal structure that is funded with voluntary contributions. On the other hand, Denmark has

presented an interesting idea. Based on the premise that initial peacebuilding costs cannot suffer from funding gaps, it advocates that the funding of important aspects like disarmament, demobilization and reintegration of ex-combatants, should come from the PKO budget.

The Secretary-General, for his part, proposes the creation of a Peacebuilding Support Office – within the Secretariat – with a Rule of Law unit. Its duties would be to: prepare substantive documents for the PBC, including the information provided by Member States about their respective peacebuilding activities and financial commitments; provide high-quality inputs to the planning process for peacebuilding operations; and conduct best practices analysis and develop policy guidance.

Both the Secretary-General and numerous delegations have referred to the creation of a Standing Fund for Peacebuilding. This Standing Fund would be permanent, voluntary and replenishable. There are currently several possible models in (IFAD) and out of the United Nations system (Global Fund to Combat AIDS, Tuberculosis and Malaria), which could be useful. The problem with the Fund, however, is that its completely voluntary nature would make the PBC's actions very vulnerable, given that donor irregularity is more of a rule than an exception.

The existence of a multilateral peacebuilding fund would provide financial support in the early stages of a post-conflict situation, and would thereby contribute to the consolidation of rational capacities, especially in regard to the country's political, legal and administrative networks. It would be like fertilizer to a plant, given that international support is decisive in the early stages of institutional reconstruction when the entire state structure has been virtually destroyed.

Moreover, the Fund would anchor the sustainability of UN action beyond the normal cycle of PKO mandates, thereby strengthening the fragile national socio-political fabric and promoting reconciliation in order to break the vicious cycle of violence among the parties involved.

All in all, the Fund would provide credibility and coherence, as coordination is the best way to optimize resources. Nevertheless, on the other hand, the Fund must be adapted to standardized procedures and be held financially accountable to the external auditing procedures that govern the UN's international organisms.

#### 4. Models

A priori, the most successful peacebuilding model was that of East Timor. However, it would be a mistake to take a successful solution and apply it to other conflict situations in other contexts. East Timor and Cambodia are emerging from difficult fratricidal wars, but in both cases there was political will to overcome their internal collapse. I believe that the PBC should operate on a case-by-case basis without trying to apply miraculous solutions to situations that are always complex. Nonetheless, a few interesting lessons can be learned:

- UN action must be concerted. The Secretary-General's ideas about strengthening the role of the resident coordinator are on the right track.
- UN action must include the international financial institutions (IFIs). Generally speaking, the IFIs are the most influential organizations in the macroeconomic stabilization process, and, as such, usually have access to the highest echelons of state power.
- UN action must include close cooperation with the peacekeeping contingents. Security is an indispensable requirement in terms of guaranteeing the reconstruction and stabilization of a country.
- UN action must, without a doubt, include local actors and factors, with direct or sectorial participation of the various actors involved (civil society, political parties, private sector, etc.).
- From an institutional standpoint, the PBC model cannot differ too much in its make-up from that of ECOSOC. There has been talk about having 15-20 members, with some degree of rotation, who are chosen to ensure a balanced geographical representation. However, for operating purposes, a dynamic decision-making system would have to be designed. I firmly believe that the US proposal, which states that the PBC's decisions be adopted by consensus, is not advisable. This option would run the very high risk of paralyzing a body that must be quick due to the nature of its responsibilities (conflict management). Likewise, the participation modalities of civil society and IFIs must also be considered.

#### 5. Considering National Interests

It is essential for a society emerging from conflict to implement a process of national reconciliation and for this society to have a sense of ownership of that process. We are talking about traumatic processes that must include all of the country's social and political forces. Experience shows that all solutions artificially imposed or imported from

the outside ultimately fail if local idiosyncrasies are not taken into account. Clearly, the limit must lie in their compatibility with the principles and values of the UN Charter. The Peacebuilding Commission must maintain country-specific activities as its main objective.

Although preconceived and atypical models cannot be imposed, sector policies in support of reconciliation processes do indeed need to be designed. Once again, experience provides us with positive examples in cases such as transitional justice, where only a neutral intervention supported by the international community could manage to get opposing forces to accept the decision to establish the facts and assign responsibility.

#### 6. Effectiveness

There is the possibility that the target government rejects the actions or makes the PBC's work difficult. Here we would find ourselves yet again faced with more of a theoretical rather than a real problem, as it would not be coherent to demand ground coordination and then refuse it at the heart of the system.

The Security Council, as most know, is already responsible for 'eco-social' issues (e.g. AIDS, children in conflict, etc.), on the basis that these issues affect international peace and security. The concept of risk to international peace and security is, in this regard, sliding towards a sphere that is less and less 'military'. Therefore, the Security Council itself would – after having received the case for review from the PBC – have the authority to decide the course of action in cases in which the government of a country in a post-conflict situation disregards the PBC's activities and proposals.

In conclusion, the PBC project has taken off in a fairly satisfactory manner. Of all of the proposals in the Secretary-General's report, 'In Larger Freedom', this is the one that has received the most consensus among Member States. Preliminary discussions have revolved more around how the PBC would be structured than on the need for its creation. All of this is encouraging, but we must be aware that the PBC forms part of multilateral negotiations that involve very complex package-deal reforms and its mandate could still undergo a great deal of modifications. One has to wonder, after all, if it is worth the effort to create a PBC that lacks a clear and precise mandate and the funds needed to carry it out.

## United Nations Peacebuilding: Challenging Coherence

*Nieves Zúñiga García-Falces*

Peace has been a central aim of the United Nations since its beginnings in 1945, when the devastation caused by World War II provided the stimulus for its creation. With a current average of 30 conflicts per year, peace is still one of its chief aims.

However, peace and security are currently facing new threats, while the roots of armed conflict remain, e.g. poverty, infectious diseases, environmental degradation, conflicts within and between states, genocide and other large-scale violations of human rights, the proliferation of weapons of mass destruction, terrorism and transnational organized crime.

Following World War II, the reference point as regards security was chiefly the State. To avoid new confrontations among states, attempts were made to provide a collective response to aggression against one or several states based on the idea of solidarity. Today's international scenario is more complex since, although the State remains a key actor in signing agreements and managing formally sovereign bodies, non-state actors pose threats to international security. The interconnectedness of current threats and the worldwide scope of repercussions of these threats call for a collective response and responsibility to tackle them based on a principle of necessity.

The abovementioned idea is set out in the High-Level Panel report on Threats, Challenges and Change entitled *A more secure world: our shared responsibility*, published in December 2004 and headed by Anand Panyarachum, former Prime Minister of Thailand, as well as in the report by Kofi Annan dated March 2005 'In larger freedom: development, security and human rights for all'.<sup>7</sup> Shared responsibilities include protecting vulnerable populations that are victims of threats such as civil wars, insurgence, genocide, repression, large-scale violations of human rights, state collapse, among others. According to the first report, such protection should be provided in the name of collective security in a broad sense. The specific terms of the protection, which must be

<sup>7</sup> High-level Panel, *A more secure world: our shared responsibility*, Document A/59/565, at <http://www.un.org/spanish/reforma/highlevelpanel.html>. The Secretary-General's report, *In larger freedom: development, security and human rights for all* at <http://www.un.org/spanish/largerfreedom/>.

achieved through consensus, are still pending. As the text points out, the main actors in combating such threats to meet the major challenge of the 21 Century –achieving a collective security system that is effective, efficient and equitable– are still the sovereign states, but under the principles set out in the United Nations Charter.

In the nineties, the United Nations played an active role in peace-keeping processes<sup>8</sup>, and its achievements include outstanding experiences like the reconstruction of East Timor. However, it has had neither the mandate nor the budget and infrastructure necessary for the longer-term work of peacebuilding, which are crucial in avoiding a resurgence of violence. In fact, the UN has not been equipped by the states, particularly the Security Council, neither to impose peace, e.g. in the Balkans in the nineties or Rwanda in 1994, nor to be consistent in the phase following peace agreement negotiations, as in Angola (1993). The Security Council's long deliberations in the Darfur crisis (Sudan) over the last year and a half highlight this ineffectiveness.<sup>9</sup>

The explanation for the limitations and inaction lies in the power struggles and interests of Security Council members, which determine its decisions. Those struggles result in inhibitions and a lack of specific responses to demands for action from the missions on the ground, as was obvious in 1994 in the case of the genocide in Rwanda, where the UN representative on the ground, the head of the UN Assistance Mission for Rwanda (UNAMIR), Roméo Dallaire<sup>10</sup>, had issued repeated warnings.

The High-Level Panel report maintains that 'there needs to be a single intergovernmental body devoted to peacebuilding and empowered to keep a close watch on at-risk countries and monitor developments there, guarantee concerted action by donors, bodies, programmes and financial institutions, and mobilise financial resources for a sustainable peace'. With the aim of bridging that 'institutional gap', in the words of Kofi Annan,

<sup>8</sup> To ensure that the failures in peace-keeping operations in the nineties will not be repeated Kofi Annan commissioned a group of experts to assess the shortcomings of the UN system and make recommendations to improve it. The result was the Brahimi Report published in August 2000. An exhaustive analysis of this report can be found in *The Brahimi Report and the Future of UN Peace Operations*, The Henry L. Stimson Center, Washington, 2003. A summary of this analysis was published in *Papeles de Cuestiones Internacionales*, CIP-FUHEM, spring 2004, N° 85, pp. 117-130.

<sup>9</sup> In the case of Darfur the UN played an important role in taking the case before the International Criminal Court.

<sup>10</sup> See interview with Roméo Dallaire in *Papeles de Cuestiones Internacionales*, CIP-FUHEM, summer 2004, N° 86, pp. 159-168.

both Panyarachum's and the Secretary-General's reports propose setting up a Peacebuilding Commission. As set out in the former, such a commission would aim to prevent state collapse which might lead to war and would provide assistance to countries in transition from war to peace. The Security Council should create this commission whose chief functions would be to:

- ascertain which states are in serious difficulties and run the risk of collapse (early warning)
- proactively and in partnership with the country's government arrange for aid to prevent the abovementioned process from developing further (preventive action)
- assist in planning for the transition between conflict, once it is over, and consolidating the peace (peacebuilding)
- coordinate and maintain the post-conflict peacebuilding work of the international community during the requisite period (peacebuilding).

Annan outlines the functions of such a commission as follows: post-war establishment of the institutions necessary for sustained recovery; raise reconstruction funds through a variety of mechanisms; improve coordination among the various UN mechanisms following a conflict; create a forum to share information and achieve greater coherence among the different actors involved (UN, bilateral donors, international financial institutions, national government or transition government, contingent-provider countries, regional agents and organizations); regularly examine medium-term processes; sustain political attention at the post-conflict recovery stage.

Creating a peacebuilding initiative is a very sound move and a necessity. Its effectiveness and success will depend on its functioning and composition, which shall be debated by the Member States in September 2005. In this regard, various questions and concerns relating to when and how it will act arise.

### ***1. When and in What Cases Will Peacebuilding Take Place?***

The dramatic experience in Rwanda where, despite the alarm being raised, genocide was not prevented, gives rise to the first query, namely, in which states and which conflicts or peace processes will the Commission act? It does not suffice to state that the UN Peacebuilding Commission will act in countries at risk of collapse or in transition to peace following war, as stated in the High-Level Panel's report. In fact,

humanitarian intervention has been included in the UN framework for decades, but has been employed arbitrarily and not universally.<sup>11</sup>

UN silence in the face of events in Uzbekistan in May 2005, where several hundred people are estimated to have died in a single day, raises the question of whether Uzbekistan and Darfur will be deemed as cases of threats to international peace. Why was it that the most powerful States showed interest in Georgia, Ukraine and Kirgizstan, whereas in the cases of Uzbekistan or Chechenya there was merely caution, and in that of Darfur endless delay?

The UN Security Council is known to act on double standards. Although it may be too much to hope for something very different from a body comprised of states, that fact does not obviate decrying it and recalling that the UN should be a neutral zone devoted to acting for all equally with the protection of people as an ongoing priority. The High-Level Panel's report maintains that: 'Any event or process that leads to large-scale death or lessening of life chances and undermines the states as a basic unit of the international system is a threat to international security'.

That document expressly states that a lack of equity in the response to threats accentuates divisions, and in certain quarters leads to the perception that the supposedly collective security only, in fact, serves to protect the powerful. The response lies in the need for mutual recognition of threat so that collective security may exist. However, is it not naive to attempt to resolve this problem of inequality by means of a new consensus among rich and poor nations, which would also solve the problem of mutual mistrust, on the basis of the idea that we are all responsible for the security of others?

This question leads on to the problem of accountability. In the same way that non-state actors that threaten international security, e.g. terrorist groups, must be monitored and called to account, or that leaders responsible for violating

<sup>11</sup> For an analysis of the exercise of humanitarian action, see Adam Roberts, "The Role of Humanitarian Issues in International Politics in the 1990s" in *Unidad de Estudios Humanitarios, Los desafíos de la acción humanitaria. Un balance*, Icaria, Barcelona, 1999. See also Tom J. Farer, Daniele Archibugi, Chris Brown, Neta C. Crawford, Thomas G. Weiss, Nicholas J. Wheeler, "Roundtable: Humanitarian Intervention After 9/11", *International Relations*, Vol 19 (2), 2005, pp. 211-250; Carl Kaysen and George Rathjens, "The case for a volunteer UN military force", *Daedalus*, winter 2003, pp. 91-103. For a proposal regarding how military intervention should be conducted in an emergency, see Daniele Archibugi, "Directrices cosmopolitas para la intervención humanitaria", *Papeles de Cuestiones Internacionales*, CIP-FUHEM, autumn 2003, pp. 25-37.

the human rights of their citizens (as in the case of the Balkans oppressors, and as an International Criminal Court that had global backing would be able to do) must be judged, is there not a need to establish mechanisms to control states that ought to be acting internationally to protect but are not doing so? Failure to lay down measures to prevent negligence, non-action or neglect in some way presupposes the absolute benevolence of the Security Council.

Given the way that the Peacebuilding Commission is envisaged, it is feasible for it to depend on the Security Council. The proposed Security Council reforms as regards enlargement to new permanent members or rotation do not provide an answer to this concern. There will simply be more States with the power to decide according to their interests, and to avoid -as is the case of the United States refusing to be part of the International Criminal Court- being subject to the same rules as the rest. It is doubtless important for there to be new voices, especially regional ones from the South, but the realistic logic of the State will not disappear as a result.

Therefore, an element to which the states are subordinated is required, one which regulates international relations and equitable action for peace and which ensures human beings the human security that the responsibility to protect demands.<sup>12</sup> In other words, there needs to be a relationship between that responsibility pertaining to the states and to the international system and the obligation to fulfil it. This is something that does not exist at present.

Authors such as Daniele Archibugi advocate the idea of sovereignty having to be replaced by constitutionalism. According to Archibugi, all the actors in political life must be part of a constitutional norm, and cannot be independent of that norm. Furthermore, it is not enough for all the world's states to be democratic, as Kant stated. There needs to be a democratic relationship among them.<sup>13</sup> There are extremely weak points in International law which limit its effectiveness. As the legal expert Monique Chemillier-Gendreau points out, for international law to exist it must be

<sup>12</sup> Report *The responsibility to protect* in <http://www.iciss.ca/members-en.asp>. Regarding the concept of human security, see Andrew Mack, "El concepto de seguridad humana", and Keith Krause, "Seguridad humana: ¿ha alcanzado su momento?", both in *Papeles de Cuestiones Internacionales*, CIP-FUHEM, Summer 2005, N° 90.

<sup>13</sup> See Daniele Archibugi, *Cosmopolitan Democracy and its Critics: A Review*, SAGE Publications and ECPR-European Consortium for Political Research, Vol.10(3), 2004, pp. 437-473.

endorsed by states.<sup>14</sup> No international law can be imposed on a state that has not subscribed to it. However, the fact that a state has subscribed to it is no guarantee of compliance. In this regard, mechanisms required to monitor states' compliance with the law need to be put in place. The Peacebuilding Commission could carry out this function. Were it to do so, it would be advisable for it to be independent of the Security Council. That doubtlessly poses problems regarding structure and operation, but it is better to face facts and not set up a body that may come into existence with its hands tied. It might be possible to seek a way in which power shared between the Secretary-General, Security Council, General Assembly and non-governmental actors could advise, suggest and guide the Commission's operations and impartiality.

## ***2. Addressing Peacebuilding: Features of the Proposal***

Although the proposal to create the commission makes special mention of conflict prevention, it pays greater attention to the processes of post-war reconstruction. The international system usually fails on both counts as it does not respond effectively to the many signs that conflict is about to break out and then attempts to leave too quickly the ones in which it is involved.

Prevention has come to occupy a centre stage among UN aims and, together with the resolution of armed conflict, is its most essential task, as the Secretary-General points out. Kofi Annan addresses prevention, but quickly turns to peace processes and post-conflict situations, especially when suggesting as a preliminary condition that peace agreements must be applied on an ongoing basis and sustainably. The High-Level Panel's report points to economic development as an essential cornerstone on which to establish a framework of preventive action with which to address the remaining threats. In this regard it states, 'development is essential to helping states to prevent or remedy a deterioration in state capability, which is crucial to tackling almost any kind of threat. Also, it is part of a long-term strategy to prevent civil war and put an end to the environments in which terrorism and organised crime flourish'. When addressing the relationship between prevention and development, or to put it another way, between lack of development and

<sup>14</sup> Monique Chemillier-Gendreau, "Quelle justice universelle pour une société plurielle?", paper given at the international meeting *Alianza de Civilizaciones. Seguridad internacional y democracia cosmopolita*, Instituto Complutense de Estudios Internacionales, FRIDE, Madrid, 6th and 7th June 2005.

greater chances of armed conflict, the report advocates a return to the debate about the roots of war and social violence, which virtually ceased after 11 September 2001.

A stable, fair and lasting peace requires that peacebuilding be understood to be a long-term endeavour that involves different stages and aspects needed to end violence, and the establishment of areas and mechanisms that tackle conflict and incompatibilities by non-violent means, while mitigating the chances of a resurgence of violence. There are three distinct phases as follows:

- Crisis management (short term)
- Post-war rehabilitation (medium term)
- Transformation of the context and of the conflict (long term)

A commission devoted to peacebuilding and consolidation would have to span all these levels given the interdependence and overlapping they involve and the fact that on many occasions they are often simultaneous in time. Stable peace cannot be achieved if in practice these phases are not conceived of as complementary and as a part of a whole with a single aim. Demobilising combatants, which is deemed to be the most important factor in determining the success of peace operations, together with disarmament, will not serve any great purpose if they are not followed up with programmes for the combatant reintegration and rehabilitation.

Likewise, neither task will have the same outcome if no process exists to do the following: reconstruct effective public institutions, provide basic services, monitor respect for human rights, attend to victims, establish mechanisms for reconciliation and transitional justice, deal with the structural causes of the conflict, foster employment policies and, in short, lay down the bases for development without violence. Working along these lines is necessary in order to prevent the post-war phase from becoming a pre-war phase that triggers possible violence in the future.<sup>15</sup>

### 2.a. Coordination

This means channelling efforts at different levels (from negotiation, humanitarian aid to victims, disarmament, infrastructures, justice, human rights,

<sup>15</sup> Regarding conflict prevention, see Mónica Rafael Simões, “De la prevención de conflictos a la reconstrucción posbélica. En busca de una paz sostenible”, in *Escenarios de conflicto. Irak y el desorden mundial. Anuario CIP 2004*, Icaria, CIP-FUHEM, Barcelona, 2004, pp. 261- 276.

capacity-building and work sourcing, strengthening local civil society). A variety of actors work on each of these aspects (states, international organizations, humanitarian organizations, NGOs, local actors, other donors). However, in post-war rehabilitation, the usual lack of coordination among local and international actors renders the work less effective. Furthermore, an array of conceptual frameworks, instruments and mechanisms are put in place which are not always suitable or sufficient.<sup>16</sup>

A UN Peacebuilding Commission must play a basic role as coordinator of these various actors. That would imply, in turn, the UN being responsible for establishing a conceptual framework for peacebuilding in broad terms, which would set out the minimum principles that must govern the work of all those involved in the reconstruction process.

This conceptual framework would include respect for human rights legislation and humanitarian international law. That would involve the formal consolidation of the different elements necessary to consolidate peace and would solve current structural shortcomings in the UN system, as well as the disunity and lack of coordination between human rights activities and peace and security missions.

The complementary nature of human rights and peace is particularly clear in situations of genocide. The United Nations’ preventive mechanisms in this respect include the appointment of a Special Advisor, currently Juan Méndez, whose chief functions include alerting the Secretary-General and the Security Council to situations that could tip towards genocide and recommending measures to prevent it. The ultimate aim would be to replace a culture of reaction with one of prevention.<sup>17</sup> This complementarity could serve as an example to democratise the management of the Peacebuilding Commission.

Guaranteeing human rights and humanitarian international law, as well as avoiding impunity regarding crimes against humanity and war crimes are essential factors in preventing conflict. In this regard, transitional justice is a necessary part of peacebuilding work. Besides being contrary to the

<sup>16</sup> In this regard, there are initiatives to lay down the bases for peacebuilding such as the Development Aid Committee set out in the document *Conflicto, paz y cooperación para el desarrollo en el umbral del siglo XXI*, OECD, Paris, 1999.

<sup>17</sup> Juan Méndez y Andrés Salazar, “El desafío de la prevención del genocidio”, *Papeles de Cuestiones Internacionales*, CIP-FUHEM, Summer 2005, Nº 90.

basic principles of justice, impunity has harmful effects and contributes to an increase in violence and crimes.

Although a consensus exists regarding the validity of the rule of law as a requirement for building stable societies in a post-war situation, and with respect to the need to establish mechanisms for justice in cases of serious violations of humanitarian law and human rights, differences commonly occur among groups working for peace and those devoted to defending victims' rights as regards the strategies to adopt, especially in situations of open conflict or regarding the conditions of possible political agreements to end violence. While the former prioritise an end to violence and reconciliation, the latter give greatest prominence to the victims' right to the truth, justice and compensation.<sup>18</sup> The Peacebuilding Commission proposed for the United Nations may be the right actor to create the necessary interaction and cooperation that would mutually reinforce human rights work and peacebuilding. Annan's call for more active participation by the High Commissioner for Human Rights in Security Council deliberations and in those of the Peace Commission is relevant in this regard.

### 2.b. Funding

One of the UN's major problems in being able to carry out post-war reconstruction and peacebuilding is lack of funds. There is great dependence on international funding bodies such as the World Bank and the International Monetary Fund for this kind of funding. Those bodies obligate states to control their spending by imposing their own guidelines, which clash with the principles of the UN missions and other actors. Similarly, in countries such as Angola, the governing elite rejects such international funding as their high income from oil obviates the need for it. As a result, society does not receive the benefits from oil, which are controlled by the elite, nor is there investment in reconstruction.<sup>19</sup>

Having available financial and technical resources is crucial to getting peacebuilding work underway on the ground. Secure funding mechanisms are needed. Making resource availability a criterion that justifies action or a lack of it in a conflict is to

<sup>18</sup> Gaby Oré Aguilar, "Justicia transicional y cuestiones de paz", *Papeles de Cuestiones Internacionales*, CIP-FUHEM, winter 2004/05, N°88, pp. 9-18.

<sup>19</sup> Regarding the case of Angola, see Mabel González Bustelo, "Angola: una monarquía apoyada por las petroleras", *Escenarios de conflicto. Irak y el desorden mundial. Anuario CIP 2004*, CIP-FUHEM, Icaria, Barcelona, 2004, pp. 139-156.

be avoided. Both Annan's and the High-Level Panel report call on states to commit themselves to collaborate in this sense.<sup>20</sup>

### **3. Peacebuilding Challenges for the UN**

In September 2005, the United Nations Member States will discuss the reform proposals set out in the reports by the High-Level Panel and by Kofi Annan. Setting up a Peacebuilding Commission will be one of the points on which to reach agreement and about which there will be further debate. In this regard, certain other aspects, besides those mentioned above, need to be borne in mind in the discussion of peacebuilding by the UN:

- Generally speaking and in theoretical terms, the Commission must lay down the conceptual framework and basic principles of reconstruction and peacebuilding work in which the Universal Declaration of Human Rights and international law must play a major part. At a specific practical level, it must be the point of reference and coordinator of the different United Nations Agencies and other actors working on the ground.
- Early warning should be one of the Peacebuilding Commission's functions within the framework of preventive action that it seeks to implement. However, the real usefulness of early warning will only come into play if it is followed up with action. Therefore, besides warning, mechanisms that would permit action once a warning has been given need to be guaranteed.
- Besides informing on events in a country or specific scenario, the Commission must assess the situation. To do so, it requires independent information.
- To prevent conflicts, it is necessary to have reliable information, to coordinate data from governments, organizations such as the UN and non-state actors, and to act swiftly.
- Work must be fine tuned to each specific context in order to promote the kind of society and reconstruction process most suitable in each case.
- A variety of actors have recently been increasingly involved in peace work (regional organizations and civil society: local authorities, NGOs, private companies, etc.). These new actors must take part in the Commission's field work.

<sup>20</sup> DE NUEVO TIMOFONICA<sup>20</sup> To consolidate peace, the High-Level Panel considers the need for a permanent minimum fund of 250 million dollars to meet the expenses of a new government and for rehabilitation and reintegration programmes.

- The economic and technical resources that enable the Commission to operate on an ongoing basis must be guaranteed. The interest of financial institutions needs to be stimulated and their commitment to peacebuilding secured.
- From an institutional point of view, the Commission must maintain a balanced relationship between the Security Council and ECOSOC, and give equal importance to security and development in peace work. That would respond to Annan's statement that without security there can be no development and without development there is no security. It would also establish an inclusive approach in accordance with UN goals and the importance it attaches to development, as reflected in the Millennium Objectives.

Peter Wallensteen, one of the advocates of this Commission, suggests that the latter must be ancillary to the Security Council in order to settle the Council's problems and reinforce it.<sup>21</sup> It could, however, easily end up being subject to the interests of the states that comprise it. In order to prevent this, an institutional structure that would allow the Peacebuilding Commission to maintain its independence needs to be established. This involves balancing the dialectic between security and development, which is currently marked by the power imbalance between one concept and the other, and, in particular, between the institutions which represent them in the United Nations (the Security Council and ECOSOC). A practical reflection of security in human rather than exclusively state terms, including both economic/social and legal dimensions, would necessarily reduce the verticality separating the two institutions. Peacebuilding, in the broad sense of the term, would be suitable terrain for this, and the Commission would be the means of putting it into practice.

Enhancing the credibility that the United Nations has lost in recent times will partly depend on the Commission's composition and effectiveness. As an instrument it provides a good opportunity to demonstrate the coherence of who should be the main actor on the international stage in accordance with the aims of international peace and security.

## Accountability of the Proposed Peacebuilding Commission

*Claire Wren*

Of all the recent proposal for UN reform the proposal for creating a Peacebuilding Commission is both one of the most eye-catching and, at a first glance, the least controversial. While there still remains some confusion over its institutional structure, it is clear that the Commission will have a co-ordinating and best practice remit, bringing together UN agencies and other actors in the field to focus on the importance of post conflict reconstruction.<sup>22</sup>

For an institution, such as the Commission, that will be working in fraught situations accountability is essential. At its simplest accountability refers to the processes by which individuals, organisations and other entities are answerable for their actions and the consequences that follow from them. However, accountability means more than indicated in this traditional definition, limited as it is, to *post hoc* activity with an emphasis on control. Accountability should be defined more widely using a 'stakeholder' approach. Such an understanding of accountability recognises the need for ongoing involvement in decision-making processes, and emphasises that those affected by a decision should have a right to be involved in these processes.

Although accountability can be regarded as an end itself and as an essential part of democracy, it also has beneficial effects. By including individuals and communities in decision-making processes that will affect them, there will be greater ownership of those decisions. In this way, the decisions may be more responsive to real needs.

Furthermore, organisations can derive legitimacy from accountability. This will be of particular importance for the Peacebuilding Commission. Although part of the legitimacy of the Commission will be derived from the United Nations—an internationally recognised organisation—there is already some controversy over the reporting structure of the Commission. In his recent explanatory note, the Secretary-General suggests a procedure of sequential reporting to the Security Council and the Economic and Social

<sup>21</sup> Paper presented at the meeting *Building a New Role for the United Nations: the Responsibility to Protect*, organized by FRIDE in Madrid, 3 June 2005 and published in this collection.

<sup>22</sup> In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, 21 March 2005, para. 115

Council (ECOSOC).<sup>23</sup> This suggestion contrasts with the recommendation of the High-level Panel according to which the Commission should be a subsidiary body of the Security Council.<sup>24</sup> Thus, the possibility of a confused mandate has already emerged as well as a possible ‘leaking’ of long established concerns about the unrepresentative nature of the Security Council into the Commission.

The Commission will also derive legitimacy from tackling the needs of those in countries where it will be working, giving it a source of legitimacy separate from its institutional status. Accountability can help ensure that the Commission will be an effective body that fulfils its important mandate of promoting peace by responding to the needs of the people it directly and indirectly affects.

One World Trust has developed a definition of accountability that can be applied to any organisation, including international NGOs, transnational corporations and intergovernmental organisations. Its account rests on a wider understanding of ‘organisational stakeholders’. These include:

- 1) groups that are formally associated with the organisation (for example, staff, trustees or members); and
- 2) groups and individuals that are affected by or can affect, directly or indirectly, an organisation’s decisions.

The Trust’s conception of accountability rests on four inter-related dimensions—transparency, participation, evaluation, complaints and redress—which can each be enacted through specified mechanisms.<sup>25</sup> This comment will consider how these four dimensions can be applied to the proposed Peacebuilding Commission and which issues that will need to be addressed in the process of its establishment.

<sup>23</sup> Explanatory Note of the Secretary-General: Peacebuilding Commission, 23 May 2005. p. 7.

<sup>24</sup> A More Secure World: Our Shared Responsibility. Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, 2 December 2004, para.82.

<sup>25</sup> For an organisation to be accountable a number of core mechanisms must be the main feature of all its policies, procedures and practices at all levels of decision making and implementation. See e.g. Blagescu, M., What Makes Global Organisations Accountable? Reassessing the Global Accountability Framework, London: One World Trust, 2004. p. 3.

### ***1. Transparency***

Transparency is a pre-condition for accountability as it ensures access to the information necessary for participation, evaluation and complaints. There is little point in encouraging participation in decision-making processes unless all the pertinent information for the decision has been disclosed.

The Peacebuilding Commission will be working in a highly sensitive context, often dealing with high politics and delicate situations; however, this is not in itself a reason to maintain a culture of secrecy. The Commission must adopt a disclosure policy with a presumption in favour of disclosure and with clear criteria for non-disclosure. The introduction of a disclosure policy at the inception of the Commission will make it possible to consider those whose needs are affected by its decisions and establish a policy that reflects these needs. The policy itself will have to be formulated through an open and accountable process. Without such a process the policy may fail to include important factors, undermining the whole effort towards accountability.

There is furthermore a need for transparency and clarity at the institutional level. Given the different recommendations of the High-level Panel Report and ‘In Larger Freedom’ concerning the institutional location of the Commission, and considering the idea of a dual reporting structure, there is a risk of confusion with respect to the institutional channels of internal accountability. By applying the principle of transparency at the institutional level and ensuring clarity both with respect to reporting mechanisms and decision-making channels a more effective institution will result.

### ***2. Participation***

This aspect of accountability is concerned with the need to engage stakeholders in the decision making process. What is essential is that there is participation by stakeholders at the right time—when decisions are still to be made. Participation entails a correct identification of stakeholders and their subsequent involvement in the decision making process. Engaging stakeholders can not be an added extra, but must be a firmly entrenched aspect of the decision making process.

There are two distinct groups of stakeholders – internal and external. ‘Internal stakeholders’ are those at the institutional level and will be concerned with the Commission’s mandate and targets. ‘External stakeholders’ are those affected by the decisions that the Commission makes in the field and will be concerned with tackling the

needs 'on the ground'. Given their distinct aims there is a potential conflict between the different groups of stakeholders. However, a participatory decision-making process will go some way to aligning the institutional and country levels aims and help resolve some of the potential differences between the two groups of stakeholders.

One of the main functions of the proposed Commission is to bring different actors in the field together to better co-ordinate their peacebuilding efforts. It is anticipated that these actors will not only involve those within the UN family, but also the international financial institutions and relevant countries, thus, forming a core membership at the institutional level. For decision-making regarding a specific country, it has been proposed that there will be variable representation of countries and regional organisations depending on the specific situation. However, neither 'In Larger Freedom' nor the High-level Panel Report or the Secretary-General's Explanatory Note recognise the need to involve civil society organisations. Nevertheless, these organisations are in many cases closest to the people that the Commission is likely to affect—either at the international level or at the project level. This glaring omission will limit both the legitimacy and potentially the effectiveness of the Commission.

By establishing a core membership, and explicitly stating that the group will be small,<sup>26</sup> the participation of different stakeholders at the institutional level is significantly limited. Although there are clearly reasons for this limitation—it is presumed that efficacy is high on the list—it will be very important to ensure that the core members are correctly identified and that other needs and interests not directly represented in the core group will be considered through other means. Although the Secretary-General has suggested some criteria for membership there will inevitably be a degree of geo-politics involved. By focusing on the need to identify the stakeholders it is to be hoped that some of these problems will be resolved.

The proposed variable representation in different post-conflict situations raises the possibility of a structure that could be used to ensure participation by all the stakeholders in a particular project. However, several practical issues must be considered. One aim of the Commission is to

provide a forum for the co-ordination of Peacebuilding efforts; yet there are no plans for the Commission to have country or regional offices. This is a challenge when ensuring participation of local stakeholders in country-level decisions of the Commission.

There are always practical difficulties in ensuring that the correct groups are identified as participants in any decision-making process, however, in the problematic situations within which, by definition, the Commission will operate these difficulties will be even more pronounced. The issues to be addressed will vary from ensuring that 'might is not right' in societies that may have long been controlled by brute force to the involvement of an interested diaspora that may be spread around the entire world. The Commission must also be culturally sensitive and consider questions such as the language used for involvement in countries that host linguistic differences.

### 3. Evaluation

Evaluation is where One World Trust's understanding of accountability contrasts most with more traditional conceptions. Evaluation is not concerned with an 'after-the event' review; rather, it is an ongoing process that monitors performance against objectives set with stakeholder participation. It is essential in the learning process that is part of the broad aim of accountability. Such evaluation incorporates a consideration of the Commission itself and its processes as well as its performance at the country level.

Although the goals of the Peacebuilding Commission will often be at the macro level, it will need to establish the necessary steps to achieve its goals (usually through the involvement of stakeholders in a participatory decision-making process). The Commission will also often be working in a complex and fluid environment where the country-level situation may change rapidly as the Commission will be dealing with the most fragile States which are often highly susceptible to system shocks.<sup>27</sup> The challenge for the Commission will be to create a timely evaluation process that fits the fluidity of the situation within which it will be working, allowing for a reassessment and realignment of the goals to reflect the situation. In doing this it is essential that the evaluation mechanisms do not

<sup>26</sup> In his explanatory note, the Secretary-General suggests between 15 and 20 members.

<sup>27</sup> Prime Minister's Strategy Unit, *Investing in Prevention*, London: Cabinet Office, 2005. pp. 7-9.

hinder the work of the Commission, but are flexible enough to adapt to different contexts while still providing the necessary information from which the Commission can learn and adapt its strategies accordingly.

The Secretary-General's Explanatory Note refers to a periodic review process.<sup>28</sup> Such a process could be developed into an effective evaluation mechanism. It is heartening that the need for such a process has already been recognised by the UN when considering the establishment of the institution. However, while the recommendation of the Secretary-General only goes so far as a country-level review process, it will also be necessary for an evaluation process for the whole institution.

Depending on the final structure of the body the Commission may be working with unclear and multiple mandates. An effective evaluation process will help resolve some of these conflicts and clarify confused communication lines and overlapping mandates.

#### **4. Complaints and Redress**

Complaints and Redress is the dimension of last resort. Complaints and redress mechanisms should enable stakeholders to hold an organisation to account when the other dimensions and respective mechanisms have failed. For *One World Trust* complaints and redress mechanisms are non-judicial mechanisms are non-judicial means of dispute resolution through which an organisation's internal and external stakeholders lodge and receive a response to their grievances. Redress does not necessarily mean compensation; it can also mean an apology or a change in policy. The complaints and redress mechanisms are analogous to the traditional understanding of accountability and allows stakeholders to literally hold an organisation to account for the decisions that it has made.

For a complaints and redress mechanism to be effective it is necessary that it is independent and demonstrably so. Given the situations in which the Commission will be working there will be particular difficult balancing act to be achieved. It is essential that the mechanism is low cost both for the Commission and the individual or organisation that is filing the complaint. Such a mechanism must be accessible to those in need; otherwise it will have little purpose.

However, it must also be ensured that the complaints and redress mechanism can not be easily co-opted for political ends. Inevitably there will be 'losers' from any peace. While not prejudging these cases it is important to ensure that the complaints and redress mechanisms can not be co-opted to hinder the peace process. The difficult balance that needs to be struck is between access and efficiency.

#### **5. Conclusion**

Although the creation of a Peacebuilding Commission that is accountable to all its primary stakeholders will take some time, effort and consideration, in the long run it will allow the Commission to be more effective. The four elements must all be embedded into the Commission both at the policy and the project level. In embedding these elements accountability becomes not just an 'added extra' but an essential part of the Commission.

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<sup>28</sup> Op. cit., p. 7.

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