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**Workshop on Humanitarian Intervention
Malmö University**

Reflections on the Responsibility to Protect

Keynote Address

by

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Distinguished Colleagues,

First of all, let me thank you for the invitation to deliver this Keynote address. I have read with great interest the papers distributed so far, and I am sure that we will have very interesting discussions today.

The Workshop is on humanitarian intervention. As you can see from the program I have entitled my address "*Reflections on the Responsibility to Protect*". The choice is deliberate since I prefer to use that concept.

This is not to say that the problems relating to responsibility to protect and humanitarian intervention are that much different. As a matter of fact, I think that there is a tendency to overemphasise the differences between the two concepts in the debate.

Under all circumstances the idea of using force to protect civilian populations is certainly not new. What may differ from the past is that the reasons for using force may have changed. Professor Alexis Heraclides' paper for the Workshop provides an interesting overview of the development over time and in particular since the 19th century.

What I intend to do today is sharing with you some reflections based on my experiences as a practitioner, and in particular during my ten years as the Legal Counsel of the United Nations. The failure of the UN to address effectively the situation in Rwanda occurred only a month after I took up my position in the UN Secretariat in March 1994. Another situation of special interest in this context is Kosovo in 1999.

You will also notice that because of this practical experience I see my role today as an advocate in defence of the Charter of the United Nations and its spirit. Any emerging state practice, if there is one, that action through the use of force can be taken outside the scope of the UN Charter would in itself constitute a threat to international peace and security.

I will try to address the topic in three distinct parts: the legal, the political and the ethical aspects. I trust that you realise that the main focus will have to be on the legal aspects.

The legal aspects

The natural point of departure is of course the Charter of the United Nations. Let me go straight to the most important development that occurred in September 2005, when the UN General Assembly adopted the World Summit Outcome.¹ In this resolution we find the two famous paragraphs 138 and 139:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community

should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

This latter provision was reaffirmed by the Security Council in resolution 1674 (2006) of 28 April 2006.

Let us now focus on situations where there is a need to use force, because this is really where the most difficult problems in connection with responsibility to protect arise. Here, I would like to state at the very outset that I get very concerned when I hear people suggesting that the use of force in the exercise of responsibility to protect under certain circumstances should be legitimate without Security Council authorisation.

Of course, this occurred when NATO attacked Serbia in 1999. I was greatly troubled when this happened, and in October 1999, I made the following observations at the Annual Conference of the Canadian Council on International Law:

Let me express the hope that the members of the Security Council (with or without changes in its composition) will be able to unite in the future in situations when gross violations of human rights makes it necessary for the world community to intervene. Such a demonstration of unity would in and of itself serve as a deterrent to prospective warlords and others who want to resort to arms.

Furthermore, recent developments demonstrate with horrifying clarity that what on its face may be seen as an internal conflict in reality poses a clear threat to international peace and security. The situations in Rwanda and Kosovo are obvious cases. In such situations, under Article 39 of the Charter, the Security Council has an obligation to determine what measures should be taken in accordance with the Charter to maintain or restore international peace

and security. If the members of the Council bow in unity to this obligation, they will also in unity realize that it is more effective to take measures at an early stage in order to prevent that the situation deteriorates and necessitates intervention by coercive means.

In the exercise of their duties, the members of the Council will in the future act under the eyes of an increasingly well-informed general public. I am sure that the members of the Council would agree that they will have to act with credibility in these situations; or else they may leave others with no other choice but to act on their own in disregard of the letter of the Charter. At the same time: Will such action, providing that it is proportionate, in the eyes of the general public be seen as a violation of its spirit? I think not!

Seen in this perspective, the members of the Council have, in a sense, the same responsibility to protect the Charter and its viability, as national legislative organs have to protect the constitution of the State.²

In April 2001, I gave further thought to the problems that emerge when the Security Council is unable to unite when a well-informed general public realises that this is precisely what the Council should do. I spoke on the topic *“To intervene or not: The dilemma that will not go away”* and concluded on the note that there is a solution within the Security Council itself; the members of the Council have the key to the solution and they must all be aware that they are the custodians of a system of collective security that would be very difficult to restore, if destroyed.³

Unfortunately, the Council still has a long way to go. Most disturbingly, we have witnessed the attack on Iraq in 2003 and the attack on Georgia in 2008, both in violation of the UN Charter and performed by permanent members of the Security Council.

I am sure that you are aware of the ongoing discussions on extension of the membership of the Security Council. On 10 December 2008, I wrote a letter to UN Member States under the title *“Security Council Reform: Rule of Law More Important Than Additional Members”*.⁴

The main point in this letter is that international peace and security will be under serious threat in the future unless the rule of law is established both at the national and international level. The way in which the members of the Security Council, and in particular the permanent members of the Council, conduct themselves will be the determining factor in what must be a global effort to establish the rule of law.

I suggested that the permanent members must now lead the way by fully respecting their obligations and bow to the law. If this does not materialise, it will damage the UN Charter system of collective security. An enlarged Council without a firm and credible commitment to respect the law risks making this system inoperable.

In the letter I also referred to the responsibility to protect. It is important to bear in mind that the Security Council in making a decision whether to use force or not, is not restricted to the situations enumerated in the General Assembly resolution – the World Summit Outcome. The main UN organs construe the Charter independently,

and the Council is therefore free to make its own assessment. This applies in particular when the Council considers whether to authorize or endorse the use of military force in a particular situation.

In this context, I made reference to the five basic criteria of legitimacy elaborated by the High-level Panel on Threats, Challenges and Change and made the point that they should assist the Council in making a systematic and credible analysis.

You will recall that the Panel had suggested that the Council, in considering whether to authorise or endorse the use of military force, should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy:

- (a) The seriousness of the threat,
- (b) The question of proper purpose,
- (c) The question whether the action is the last resort,
- (d) The question whether the means are proportional, and
- (e) The question whether there is a balance of consequences.⁵

The criterion last mentioned is in my view of particular interest. In the words of the Panel: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

It goes without saying that this criterion would be a determining factor when the Council considers whether any UN Member State would be prepared to contribute troops to the operation and when possible troop contributing States make their own assessment. But above all, in case this assessment is made in a transparent manner, there is every reason to believe that a decision to use force or not to use force would be understood and respected by the world community.

In my 10 December letter to UN Members, I actually suggested that the permanent five members, who because of their veto power can block any amendment to the UN Charter, rather than considering at the present stage additional members of the Council, should adopt a binding declaration containing the following four elements:

- To scrupulously adhere to the obligations under international law that they have undertaken and in particular those laid down in the Charter of the United Nations;
- To make use of their veto power in the Security Council only if their most serious and direct national interests are affected and to explain, in case they do use this power, the reasons for doing so;
- To refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state unless in self-defence in accordance with Article 51 of the Charter of the United Nations or in accordance with a clear and unambiguous mandate by the Security Council under Chapter VII; and
- To take forceful action to intervene in situations when international peace and security are threatened by governments that seriously violate human rights or fail to

protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity or when otherwise the responsibility to protect is engaged.

I cannot stress enough how important it is that we defend the integrity of the UN Charter. During my tenure in the UN 1994-2004, I read the Charter with growing respect. Not simply because it was my duty to defend it, but because of its contents and the fact that those who negotiated it were people of a generation that had experienced two world wars. We should be careful to guard the wisdom that they handed down to us. We should also remember that the UN Charter trumps other international agreements (Article 103).

In his report of 12 January 2009 “Implementing the responsibility to protect” the Secretary-General of the United Nations referred to three pillars of responsibility to protect:⁶

- The protection responsibilities of the State
- International assistance and capacity-building
- Timely and decisive response

Reflecting on the development so far, he stated that it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome. This is what he said:

Those provisions represent a remarkably good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and the abiding principles of responsible sovereignty.⁷

I believe that the Secretary-General is right. However, this is a field of international law that is developing, and, as I just said, the main organs of the United Nations, among them the Security Council, construe the Charter independently. The Charter is a living document, and I am sure that we will see further development here since the Council is not restricted to the situations enumerated in the General Assembly resolution but is free to make its own assessment.

On 14 September 2009, in response to the Secretary-General's report, the General Assembly adopted resolution 63/308, in which the Assembly reaffirmed its respect for the principles and purposes of the Charter of the United Nations and recalled the 2005 World Summit Outcome, especially its paragraphs 138 and 139. The Assembly took note of the Secretary-General's report and of the timely and productive debate on the responsibility to protect that the President of the General Assembly had organised in July 2009 with full participation by Member States and decided to continue its consideration of the responsibility to protect.⁸

This brings me to the question of intervention by regional organisations or coalitions of the willing. Let me in this context refer to four provisions in the Charter:

Article 52 (1): Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the

maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Article 53 (1): The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council - - - . (The references to “enemy states” that follow here are no longer relevant; the General Assembly has decided that they will be removed when the Charter is amended next time.)

Article 54: The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

Article 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

As it appears, the Charter foresees that regional organisations are always welcome to engage in work to establish or maintain international peace and security. However, in order to use force, they need permission by the Security Council.

I am always concerned when I hear the argument that other organisations or coalitions of the willing should be entitled to use force “when the UN is unable to act”. I think that this idea should be strongly refuted for two reasons. First, it would bring us back to the society which the authors of the UN Charter knew so well and wanted to avoid in order “to save succeeding generations from the scourge of war”. Second, it would in a sense “let the Security Council off the hook” in situations where a well-informed general public sees that the Council should act.

In my view, it is very important to defend the integrity of the United Nations and the authority of the Security Council in this field. The argument should therefore be that we live in the 21st century and the Council must live up to the trust that the UN Members have conferred on it under Article 24 of the UN Charter.

I would therefore, in response to those who maintain that the Security Council does not have an obligation to act, argue that if the five criteria that have been identified by the High-level Panel on Threats, Challenges and Change are met, the Council actually has an obligation to intervene including by the use of force in order to live up to its mandate under Article 24 of the UN Charter.

Let me in this context refer, as I often do, and to the advice that the InterAction Council of Former Heads of State and Government gave to the major powers in their Communiqué of June 2008. Among their recommendations are the following:

- Acknowledging that the challenges mankind faces must be addressed through multilateral solutions within a rule-based international system;

- Recognising that the Charter of the UN permits the use of force by states only when authorised by the Security Council or where it is exercised in self-defence if an armed attack occurs or when the threat is imminent;
- Also recognising that the Charter does not allow for the preventive use of force;
- Emphasising that unauthorised use of force, including such as the invasion of Iraq, by the so-called Coalition of the Willing States contributes to the weakening of respect for international law;
- Insisting that states observe scrupulously their obligations under international law, in particular the Charter of the United Nations and encouraging the leading powers to set an example by working within the law and abiding by it, realising that this is also in their interest;⁹

Allow me also to refer to my address in San Diego some time ago: “Who Needs Reforming the Most – the UN or its Members?”¹⁰

With respect to the Security Council, reference is often made to the fact that its composition reflects the geopolitical situation in 1945. This is true. But the most important reform that the Security Council should undergo at present and which does not even require an amendment to the UN Charter is that the members of the Council consequently bow to the law. Accusations of applying double standards undermine the Council’s authority.

One often hears the argument that the Security Council is a political body. So it is. But this does not mean that the Council is not bound by the law. In a State under the rule of law also political organs must bow to the law. So, too, must it be at the international level. An obvious example is that the members of the Security Council must respect the UN Charter, in particular the rules governing the use of force, and must observe international human rights standards.

Now you may wonder how all this works in practice. Let me therefore refer to four situations where responsibility to protect was at issue. The situations are described by the Deputy President for Policy at the International Crisis Group Donald Steinberg in an article under the title "Responsibility to Protect: Coming of Age?" which I recommend for reading.¹¹ He points to the following four situations:

- The failed elections in Kenya followed by vicious inter-ethnic riots and killing in January 2008;
- The reaction of the junta in Myanmar in May 2008 to the natural disaster caused by Cyclone Nargis;
- The crossing of the Russian troops into South Ossetia and then into Georgia proper in August 2008; and
- The calls for forceful action against President Robert Mugabe's campaign of repression and manipulation of assistance that began to proliferate towards the end of 2008.

Having analysed the four cases he describes them simplistically (his own word!) as three steps forward and one step back and concludes that this progress should not blind us to the fundamental challenges to be met if the concept of responsibility to

protect is to be translated into effective action to protect people from mass atrocity crimes at the international, national and community level.

I tend to agree with Donald Steinberg here. Since I am presently the Legal Adviser to the Panel of Eminent African Personalities that is still engaged in the peace process in Kenya, might I add that the situation there is still of concern. A few days ago a new draft constitution was tabled in the National Assembly. Let us hope that Kenya will be able to succeed in adopting a new constitution and strike a new course for the future.

The political aspects

This brings me to my second point, the political aspects.

I will touch upon this point only briefly. And I do so because of the fact that it has been suggested in the papers for the Workshop that the United Nations is unable to deliver when it engages in peace missions where the mandate is said to include capacity building.

This is a very important observation, and I am in no way attempting to deny the difficulties that the Organisation is encountering in this context. From my practical experience I could refer to Kosovo and East Timor, where the United Nations in fact had to govern the two regions.

To govern a country or a region puts tremendous demands on the Organisation. Among the major challenges are law enforcement and the administration of justice. Unless the UN can establish reasonable security and deliver justice, people will soon lose confidence, and the UN mission will be met with criticism and even resentment.

These aspects must be taken into account by the Security Council when it considers intervening by the use of force. An intervention of this nature may actually entail that the UN draws upon it the responsibility of governing the mission area.

I know that you will be discussing capacity building during the Workshop. Let me just share with you some thoughts that often come to my mind when I hear about the establishment of missions with the mandate of assisting a State by building capacity in a situation where there is internal conflict.

Serving in the Ministry of Justice in the early 1970s, one of my tasks was to draft together with three colleagues a new secrecy act. This work required that we paid visits to or interviewed members of the civil service from every nook and cranny of the national, regional and local administration of my country. This task gave us a unique insight into the complexity of a modern society. In fact, we were humbled.

This experience is from a relatively homogeneous society that has been allowed to develop in peace over many, many years. When a UN operation is launched, the reality is that even under the best conditions the ability of the local government to run an efficient administration is very limited. The knowledge and the capacity are simply not present.

This means that peace operations of this nature are very delicate. It is obvious that there might be a temptation for the UN mission to simply take over and work to establish an administration that will satisfy the requirements in the near-term perspective, while the local authorities would be at a loss when the UN mission withdraws. The point has been made that the UN mission must work with the local authorities and not on its own.

But the overriding problem here is that the United Nations could actually end up in a situation where it would be responsible for the administration of a country or a region, including with the obligation to uphold law and order, with very limited resources and often with an almost non-existent national contribution. This is obviously an element that must be taken into consideration when the Security Council considers establishing a peace operation.

It goes without saying that considerations of this nature are political rather than legal.

Ethical aspects

Coming finally to the ethical aspects, I reiterate what I have said on earlier occasions. The issue is relatively simple: we cannot accept in the 21st century that fundamental human rights are violated and that crimes against international humanitarian law are being committed on a large scale without consequences.

Here we must view the situation in a broader context, including the fact that international criminal law has been developed and that international criminal tribunals have been established, in particular the International Criminal Court operating under the Rome Statute.¹² We therefore have a very strong moral obligation to intervene – to respond to the responsibility to protect.

This means that the necessary resources have to be mobilised so that the United Nations is in a position to act when this is required. But in certain situations these resources may not materialise. The analysis that the Security Council must make will then lead to the sad but inevitable conclusion that the world community is unable to act. If the UN or a UN authorised arrangement cannot muster enough resources to intervene in a credible and responsible manner we ultimately have to face the fact that no coercive action can be taken.

Let me end by quoting para. 66 in Secretary-General Ban Ki-moon's report of 12 January 2009:

In sum, as the United Nations community comes to articulate and implement a response strategy consistent with both the call in paragraph 139 of the Summit Outcome for “timely and decisive” action and the provisions of the Charter, including its purposes and principles, this will make it more difficult for States or groups of States to claim that they need to act unilaterally or outside of United Nations channels, rules and procedures to respond to emergencies relating to the responsibility to protect. The more consistently, fairly and reliably such a United Nations-based response system operates, the more confidence there will be in the capacity of the United Nations to provide a

credible multilateral alternative. This would also help to deter or dissuade potential perpetrators of such crimes and violations.

The last sentence should be read with particular attention for the simple reason that this is where an important element of the solution of the problem lies. Just as the criminal justice system is a necessary component in our societies at the national level, so it is necessary to develop a similar system at the international level.

And we must by concerted efforts, including in particular by responsible, credible and even-handed action by the United Nations Security Council, make certain that the system created by the Charter of the United Nations for the maintenance of international peace and security, including assuring human rights for all human beings, can be effectively upheld.

Thank you for your attention!

¹ A/RES/60/1.

² See Hans Corell *From Territorial Sovereignty to Human Security*. In: Proceedings of the 28th Annual Conference of the Canadian Council on International Law, Ottawa, October 28-29, 1999. Kluwer Law International (2000) (231-241). Also as *De soberania territorial à segurança humana*. In: *Política Externa*, Vol. 9 N^o1 Junho – Julho – Agosto 2000: 92-103. The address is also available at <http://www.un.org/law/counsel/ottawa.htm>

³ Keynote address by the Legal Counsel to the Conference on the Future of Humanitarian Intervention, held at Duke University, on 19 April 2001 (“To intervene or not: The dilemma that will not go away”), available at http://untreaty.un.org/ola/media/info_from_lc/duke01.pdf

⁴ Available at <http://www.havc.se/res/SelectedMaterial/20081210corelllettertounmembers.pdf>

⁵ UN Doc. A/59/565, para. 207. See in this context also Gareth Evans *"The Responsibility to Protect and September 11"* available at <http://www.crisisgroup.org/home/index.cfm?id=2281&l=1>

⁶ UN Doc. A/63/677.

⁷ UN Doc. A/63/677, para. 67.

⁸ See Official Records of the General Assembly, Sixty-third Session, Plenary Meetings, 96th to 101st meetings, and corrigendum (A/63/PV.96–101). See also *A Meeting Summary: Reflections on the UN General Assembly debate on responsibility to protect* prepared in October 2009 available on the website of the Global Centre for the Responsibility to Protect at <http://globalr2p.org/>

⁹ Available at <http://www.interactioncouncil.org/sessions/communique/s26.pdf>

¹⁰ Who Needs Reforming the Most – the UN or its Members? In: *Nordic Journal of International Law*, Vol. 76 (2007) No. 2-3 (p. 265-279). Also available at <http://www.havc.se/res/SelectedMaterial/20071108corellwhoneedsreforming.pdf>

¹¹ Available at <http://www.crisisgroup.org/home/index.cfm?id=6401&l=1> See also *The Georgia-Russia Crisis and the Responsibility to Protect: Background Note* by the Global Centre for the Responsibility to Protect available at <http://www.globalr2p.org/pdf/related/GeorgiaRussia.pdf> and *Statement by Professor Noam Chomsky to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect* of 23 July 2009, available at <http://www.un.org/ga/president/63/interactive/protect/noam.pdf> and *The Responsibility to Protect: From Document to Doctrine—But What of Implementation?* In Harvard human rights journal, available at <http://www.law.harvard.edu/students/orgs/hrj/iss19/hamilton.shtml#fnB18>

¹² Available at <http://www.icc-cpi.int/>