60 years Genocide Convention

Opening remarks by Joris Voorhoeve, 7 December 2008, International Court of Justice, The Hague

Introduction

The Genocide Convention of 1948 was a major step towards recognition of the right of population groups to be different from others on religious, ethnic, racial or other grounds. All groups of people have a right to live and develop in peace, not be destroyed in war or civil war, or be eliminated by other measures such as starvation. The convention makes those persons aiming at the destruction of such groups punishable under international law. The general concept of crimes against humanity, which played already a key role in the Nuremberg and Tokyo Tribunals, was specified by this convention against wilful destruction of specific population groups.

It was regrettable that the Convention remained in the background for several decades, and that the leading Western democracy, the U.S., delayed ratification till 1988, perhaps mainly because of a doctrinal issue, concerning the obligations which follow from international law for its citizens, and priority over national law. As a multicultural, multiracial and multilingual democracy, the United States itself embodies the right to be different. As the leading member of the Security Council and the second largest democracy after India, it has a special responsibility to ensure implementation of the convention.

It is fortunate that the Genocide Convention could play an important role in the indictments before the International Criminal Tribunal for the former Yugoslavia. Hopefully, all major suspects will be put on trial before this Tribunal is formally disbanded by the Security Council.

Prevention

Even more important than prosecution, arrest and trial of suspects of genocide is of course effective prevention. The doctrine of the responsibility to protect would achieve this, if it were binding international law and would be applied in all relevant cases by the UN Security Council. But the Security Council has not yet shown real commitment, since the doctrine was set forth as an *ethical political* guideline. There is no instance yet of the doctrine being applied effectively by the Security Council. In the cases of the Darfur crisis in Sudan, the East Kivu crisis in Congo and the humanitarian crisis in Myanmar (Birma) after serious floods, political and media commentary suggested that these were occasions to act

according to this doctrine. But the Security Council abstained from applying the doctrine. The Members of the Council agreed the doctrine did not bind or was not applicable.

It is clear from these and other examples that state sovereignty still prevails strongly over questions of state, human and group security. Only when direct national interests and other national values of main members of the Security Council support upholding the security of a particular population group in danger, the Council may be willing to act. Any veto of the Great Five or a grouping of 7 non-permanent members can stop application of the doctrine.

Declaration of Safe Areas

A forerunner of the doctrine of the Responsibility to Protect is the declaration of "safe areas" or "zones of protection" by the Security Council in the 1990s. The Kurdish people in the north of Iraq, after the first intervention against Saddam Hussein of 1991, found some protection after the Security Council imposed a no fly zone. The enforcement of the zone north of Bagdad by airplanes of three veto-holding states did create a more or less protected area, which probably saved many Kurdish lives.

Second, in the war in the former Yugoslavia between 1991 and 1995, the Security Council introduced in 1993 safe areas by resolution, covering Sarajevo, Srebrenica, Tuzla, Zepa, Gorazde and Bihac. Of these, Srebrenica and Zepa fell to aggressors in July 1995; the enclaves were not defended by UN blue helmet soldiers. Most of the captured males of both enclaves were executed.

The fate of these enclaves and the constant killing of civilians during 1993-95 in Sarajevo and Tuzla seriously discredited the concept of safe areas or safe havens. Of the six safe areas in the former Yugoslavia, four survived, however, to see the Dayton Peace agreement, which was negotiated after the fall of Srebrenica and Zepa and was imposed by NATO and other countries with a Security Council mandate.

Noteworthy is the case of Gorazde, which tells us how an endangered enclave can be saved. After the fall of Srebrenica and Tuzla, the UN and troop contributing countries met in London on July 21st, 1995, to see how the imminent attack on Gorazde, too, could be halted. NATO members issued a stern new message to the leaders of the attack in Belgrade and Pale. If Gorazde would be overrun, too, NATO members would respond by airstrikes against sensitive targets of the opponent elsewhere, far away from Gorazde itself. Gorazde itself was very much

like Srebrenica and Zepa, entirely surrounded by enemy forces, and not defensible on the ground. In effect, at the London Conference, NATO re-introduced defence by *deterrence,* which had saved West Berlin in the Berlin crisis of 1948, and more generally had helped to keep the peace in Europe during the Cold War.

During the Cold War, deterrence came to be associated with nuclear deterrence, but deterrence is an age-old military concept, applying also to situations without weapons of mass destruction. It simply means that side A threatens side B with unacceptably huge damage if B trespasses a certain line of territory or action. The French word, *dissuasion*, may indicate the idea in a more diplomatic fashion than the English deterrence.

I presume NATO's warning against Belgrade in 1995, issued with the support of the US, Britain and France, halted further aggression against Gorazde. I assume the political leaders in Belgrade understood that it would hurt their interests if Gorazde would be overrun, as those three states, which had considerable air power over the area, would really take military action against important Serb targets.

I submit that enforcing protected humanitarian zones in countries at war or in civil war is an idea which should *not* be discarded on the basis of its dismal failure in Srebrenica and Zepa. Both the case of Gorazde and that of Northern Iraq show what conditions should be met to make the idea work. More important than a UNSC resolution *declaring* an area to be safe, will be an announced, credible deterrent capacity, to deter aggression against large concentrations of refugees and other civilians, by holding enemy targets elsewhere at risk. This requires that main Security Council members, among whom should be at least one veto-holding power, even better a coalition of them, and even better an alliance like NATO, should put its prestige on the line and deter an attack of the area by holding military targets hostage, such as the enemy's headquarters, munitions storage, airfields and other carefully chosen non-civilian targets.

Next to the condition of credible air deterrence, the safe area should be clearly delineated and be geographically defensible for some time by ground forces. Ideally, the UN should augment, or temporarily take over, the administration of the area, provide some basic legal order for the refugees and the local population inside, supply the area with essential goods and services to the refugees and indigenous population, and control the in- and outflow of persons carrying weapons, by disarming those persons at all entry and exit points.

The area should not be a recruiting ground for warring parties, not serve as a base

from which to attack, and be demilitarized, with a zone around it in which heavy weapons are forbidden. This would need to be enforced by a coalition of willing states, mandated by the Security Council. One may add other conditions, such as a military exit strategy and a political plan for the future of the area after an armistice or peace deal, dealing with reintegration, autonomy or separation.

The point is, that in present and future forms of contemporary armed conflict, the concept of what may better be called **internationally protected humanitarian zones** may help to save many lives of civilians, in case the UN and a relevant coalition of main military powers are really prepared to support the zone when it comes under attack, also with deterrent air power against enemy targets elsewhere. This may help to reduce the risk of genocide and other gross crimes against humanity in the area concerned.

Issuing a declaration that an area of refugees and/or an endangered population is a "UN protected area" is within the legal powers of the Security Council, if the Council decides that the situation is a threat to international peace and security, acting on the basis of Chapter VII of the UN Charter. In practice, Security Council members will often be inclined, however, to dispute that there is an urgent or even genocidal treat. An imminent threat is generally hard to prove. Few aggressors against the safety of populations in certain areas make announcements beforehand, as they keep their intent secret, to avoid timely countermeasures.

If this reasoning is correct, and if in the future the Security Council declares that an endangered area is a protected humanitarian zone, then the Council should also provide the legal basis for the conditions which are mentioned: enforcement of demilitarization of the area, imposition of a zone around it without artillery and other heavy weapons, international support for the administration of the zone, and unrestricted international access for humanitarian assistance.

One might carry this thinking one step further and consider adding a legal basis in the Genocide Convention for protection of humanitarian zones. Adding such a protocol would give the R2P (Responsibility to Protect) some teeth for such instances in the future.

I expect, however, that veto-holding powers will not be eager to take on such an obligation. Still, it might be useful to explore this as an avenue that might help give some teeth to the ethical norm of the R2P.

The International Criminal Court

Prevention of war crimes, crimes against humanity and genocide will be strongly served by growing strength of the International Criminal Court. Its arrest warrants are a message to all present and potential perpetrators of such crimes, be they political or military leaders, militia, armed gangs, or civilian administrators engaged in such crimes.

Let us hope that the US, under its new leadership, will overcome its previous hesitations against the International Criminal Court and come to recognise the significance to the interests and values of the US *itself*, in joining the ICC in the near future.

The Responsibility to Protect

My last introductory remark concerns the doctrine of the responsibility to protect in case of natural and man-made disasters. This doctrine is debated and criticized particularly by non-Western countries, as assuming a more or less imperialistic, neo-conservative or neo-colonial responsibility to justify Western military interventions which would brush aside governments of developing countries. This criticism enables the opponents to score a point against so-called Western dominance and "neo-colonial humanitarianism".

The R2P was invoked by some countries (particularly the French foreign Minister Kouhner) and commentators in the recent case were the Birmese government halted urgent international humanitarian assistance to its own population after serious flooding. But reference to R2P was not needed and probably not helpful. I submit it would have been wiser to only invoke the Convention on Social, Economic and Cultural Human Rights. This Convention stipulates that governments have to take care of the basic needs of their peoples. It has been ratified by the vast majority of states and is binding international law, however deficient its world-wide implementation still may be.

Governments which deny their people food, medical and other basic care necessary to survive, are in violation of basic human rights treaties. This applies unfortunately to many governments in the world, too many to mention, as the number of hungry and malnourished has reached 963 million in 2008 according to FAO. It will rise further in 2009-2010, as a result of the recession in many countries.

The obligation to provide for basic socio-economic rights leads to the conclusion that the R2P is, in a way, a specification of the general responsibility of governments to take care of their populations' needs. These tasks are grounded in the global human rights treaties. Such a focus on these treaties may make

application in specific cases less vulnerable to political criticism than the not yet legally binding documents on the R2P.

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I conclude by wishing you a very fruitful conference which I hope will strengthen the future of the Genocide Convention. I congratulate the Library of the Peace Palace, the Amsterdam Centre for International Law and the Centre for Holocaust and Genocide Studies for this initiative and express my appreciation for the authorities and institutions which made this important conference possible.