

Memorandum

March 19, 2022

Ukraine and the Responsibility to Protect (R2P)

1. The principle of Responsibility to Protect (R2P) entails a political obligation of the international community adopted in 2005 by the United Nations. Members of the United Nations ever since confirmed their commitment to prevent and remove atrocious acts against humanity. The scope of R2P entails genocide, war crimes, ethnic cleansing and crimes against humanity. War crimes in particular include targeting civilians and intentional use of starvation. Ukraine at this very moment is entitled to invoke the principle of R2P and to seek immediate protection of its population within its territory. While the primary obligations under the R2P belong to each individual state, secondary (subsidiary) obligations are attributed to the international community. This subsidiary responsibility is activated when a state is either unwilling or unable to fulfil its responsibility to protect. Thus, under the principle, Ukraine today is entitled to obtain full and effective support from the international community in addressing the effects on the population, caused by the armed Russian attack of February 24, 2022. R2P is able to reduce a painful moral dilemma increasingly felt.
2. In the face of daily reporting, governments all over the world will come under increasing moral pressure from public opinion to take action. Expressions of solidarity will turn into frustration and bitterness. Democracies, despite all the help granted, will lose legitimacy and undermine the effort to preserve a democratically elected government and self-determination in Ukraine. R2P offers, upon invitation by Ukraine, the political foundations of limited intervention and protection of the civil population. It can be reasonably balanced against the risk of enlarging the war beyond the boundaries of Ukraine.
3. Based upon the 2001 [Report of the International Commission on Intervention and State Responsibility \(ICISS\)](#), the UN General Assembly adopted the principle of R2P in the World Summit Report of 2005, *Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*, paras 138 and 139 ([A/Res/60/1](#)) of 24 October 2005:

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 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 manifestly fail 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.

4. Since 2005, the R2P principle has been further developed and was endorsed in a series of [reports](#) by the UN Secretary-General. It entails, as a matter of last resort, also enforcement by military means. It was more recently confirmed in the 2021 UN General Assembly Plenary Meeting on the Responsibility to Protect and in Resolution 75/277 entitled "The Responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity" ([A/Res/75/277](#)). The resolution mandates continued annual reporting by the UN Secretary-General.
5. While R2P is accepted as a political principle, it has not been established as a principle of treaty law beyond existing instruments or customary international law. It is, however, a powerful argument to bridge moral dilemmas and realities in the face of gross atrocities and to politically commit the international community to take appropriate and well-measured action on the ground, in addition to economic sanctions and supplies, justified by collective self-defence.
6. Obligations of the international community under R2P not only apply when a government is unwilling to protect its population. It also applies when it is unable to do so. The 2001 Report of the International Commission on Intervention and State Sovereignty explicitly mentions as a ground for military intervention in para 4.19: *"large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation."*
7. Ukraine, due to the unprovoked armed attack by the Russian Federation, is willing, but no longer in a position to protect its population from war crimes on its own. It depends upon support by the international community to this effect. It is entitled to invoke the principle of R2P.
8. Ukraine repeatedly calls upon the international community for support, including the installation of a no-flight zone over Ukraine by the international community and by NATO in particular. The Ukrainian President has repeatedly invited such action. Ukraine's sovereignty thus is not an obstacle to measures taken under the principle of R2P. At any rate, considering that R2P suggests that state sovereignty implies the responsibility of states to protect the life and security of those under their control as a prerequisite for exercising sovereignty, the usual objections and restrictions to R2P and humanitarian intervention from the point of sovereignty do not apply in the case of Ukraine. The country is willing, but unable to provide protection on its own.
9. R2P has mainly focused on internal strife, as this was the cause for R2P in recent decades. Open land war and attack have not been at the forefront, but are not excluded from the scope of its application. War crimes are explicitly included and not limited to civil war.

10. [The International Court of Justice](#), by order of March 16, 2022, adopted provisional measures in the case *Ukraine v. Russian Federation* based on the Convention on the Prevention and Punishment of the Crime of Genocide. The Court ordered the Russian Federation to suspend military operations commenced February 24, 2022, and to ensure that any military and irregular armed units take no further steps in military operations. Moreover, we note that the Russian Federation refuses to accept the notion of open warfare and depicts the aggression in terms of a special military operation, allegedly with an understanding that it takes place within its own sphere of influence. The Russian Federation's own rationale for its invasion of Ukraine provides no basis for a lawful objection on the ground that R2P does not apply to this theatre of international conflict. In fact, the allegation of genocide in the Russian controlled areas of Donetsk and Luhansk as the main motivation put forward by the Russian Federation for the aggression in terms of a "special peacekeeping operation" itself confirms the basic existence and application of the principle of responsibility to protect.
11. R2P in the United Nations in principle depends upon collective measures taken under Chapter VII UN Charter and thus by the Security Council. The 2011 NATO-led intervention in Libya was based on Security Council Resolution 1973 ([S/Res/1973\(2011\)](#)) adopted, with Brazil, Germany, India, China and Russia abstaining. Such authorization is required if R2P measures are taken without the consent of the country concerned.
12. However, to the extent that Ukraine calls for R2P and consents, the issue of authorization by the Security Council does not arise. Action taken in support of R2P under Article 51 UN Charter and the right to collective self-defence does not apply, as measures are not taken against the will of Ukraine. There is no need to call upon the controversial precedent of the NATO aerial bombing campaign of Yugoslavia in 1999 and subsequent efforts in Kosovo (KFOR) that are implied expressions of R2P and were taken without authorisation of the United Nations as a matter of humanitarian intervention.
13. To the extent that the Russian Federation challenges R2P measures by taking recourse to the Security Council and seeks to stop R2P operations, the use of the veto power amounts, in my view, to an abuse of right. No country is above the law. While the UN Charter does not formally oblige a Member to abstain in matters concerning itself, the configuration gives way to exceptional decisions of the General Assembly under the Uniting-for-Peace Resolution of 3 November 1950 [[\(A/Res/377 \(V\)\)](#)]. The [General Assembly](#) condemned the armed attack on March 2, 2022 and called for unconditional withdrawal by a majority of 141 States, 35 abstentions, and Belarus, North Korea, Eritrea, Russia and Syria opposed. It reached the 2/3 majority required. It may equally do so to remove objections to R2P by the Russian Federation in calling for, and endorsing, R2P operations of the international community in Ukraine.
14. The threat of recourse to atomic weapons by the Russian Federation and the risk of World War III are – according to the US and NATO – the main objections to taking action and implement a comprehensive no-flight zone over Ukraine, essential to defend its territory and to protect its civil population. R2P, however, calls for, and justifies, more limited measures for the protection against war crimes against the civil population. These measures clearly differ from measures supporting military efforts to support Ukrainian defence forces and to influence the balance of power on the battlefield. They cannot reasonably induce any recourse to offensive warfare and weapons of mass destruction as a matter of last resort. While irrational reactions by the

Russian Federation cannot be completely excluded, the political obligation to R2P obliges upon balance to run the residual risk.

15. The civil population of Ukraine under R2P must immediately benefit from supplies of water, food and medicines. Civilians, in particular women and children, must be allowed to leave cities under siege in protected corridors. R2P forms the basis for protected corridors through which supplies and exodus can take place.
16. These corridors should urgently be negotiated and their safety must be guaranteed by all parties. In case of failure to achieve agreement with the Russian Federation rapidly, the corridors should be defined by Ukraine upon consultation with the international community. It should be enforced in support of Ukraine under R2P by the international community. The enforcement of R2P does not depend upon consent by those causing the problem in the first place.
17. Supplies and transports should be organised by Ukraine and nations obliged to act under the principle of R2P. These corridors should be open to all humanitarian actors, in particular the International Committee of the Red Cross. The Red Cross flag should mark all vehicles and airplanes involved. Switzerland in particular could be called upon as a neutral country and depository state of the Geneva Conventions to assume appropriate responsibilities in facilitating and supporting these operations, jointly with the International Committee of the Red Cross.
18. NATO, or a coalition of the willing, or individual states should use armed forces to escort and enforce these corridors. They should make available air cover and protect convoys from air, artillery, armored and infantry attacks. No-fly zones would be limited to the protection of the corridors. They would be strictly limited to the purpose of R2P. They would be communicated accordingly.
19. This mission responds to the principle of proportionality. It does not exceed what is necessary to achieving the goals of R2P: the protection of civil population of Ukraine and the proliferation of war crimes by random shelling of houses, cities and villages. The effort is strictly humanitarian and does not alter the balance of power, unlike measures otherwise taken under collective self-defence in support of the Ukrainian army, yet short of involving military personnel within the jurisdiction of Ukraine.
20. Finally, R2P also applies outside the borders of Ukraine in supporting neighbouring countries, in particular Poland, Romania, Moldova and Hungary in receiving refugees and in providing for allocation to other countries by means of transportation, shelter and employment until return of refugees to Ukraine will be possible. Efforts must also be made to support Ukrainian refugees in Russia. All these measures are equally placed under the principle of R2P and form part of the overall humanitarian engagement.

Berne, March 19, 2022

Dr Thomas Cottier
Professor of Law
World Trade Institute
University of Berne
thomas.cottier@wti.org