

International Law and the Responsibility to Protect

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I. Introduction

For the past several years, international scholars and practitioners have recognized the notion of the responsibility to protect within the broad concept of human security. In 2009, Ban Ki-moon submitted a report on implementing the responsibility to protect,¹ which was endorsed by the UN General Assembly.² In September 2009, a major thematic debate took place at the General Assembly to consider the relevance of the notion of the responsibility to protect in a contemporary international context. The task involved discussions on the criteria for appropriate action.

Since the Kosovo crisis in 1999, the international community has been involved in an extensive debate concerning the legal basis of “timely and decisive responses.” The notion of the responsibility to protect relates to the international law permitting the international community to act in order to carry out its “responsibility.”

However, as Ban Ki-moon explained in his report, though such actions might be the most visible and dramatic instruments in the responsibility to protect repertoire, they are just the tip of the proverbial iceberg.³ The Secretary-General’s 2010 report on the responsibility to protect focused on early warning and assessment. This report called for early engagement and a balanced and dynamic understanding of the evolving conditions on the ground in each situation.⁴ Additionally, in 2011, Ban Ki-moon submitted a report on the role of regional and sub-regional arrangements in implementing the responsibility to protect.⁵

Recently, a stronger emphasis has been placed on the responsibility to prevent significant crimes from occurring in the first place. The second pillar, providing assistance to states that lack the capacity to protect populations, offers promising opportunities to improve the implementation of the responsibility to protect.⁶ Alex Bellamy pointed out that a system of early warning, which is a core component of the responsibility to protect, should identify potential crises before they escalate, creating an important new window of opportunity for preventive action.⁷

In this paper, I would like to discuss the evolving nature of the notion of the responsibility to protect

¹ UN Document, A/63/677, January 12, 2009.

² UN Document, A/RES/63/208 (2009), February 3, 2009.

³ UN Document, A/65/877-S/2011/393, June 27, 2011, para. 30.

⁴ UN Document, A/64/864, July 14, 2010.

⁵ UN Document, A/65/877-S/2011/393, June 27, 2011.

⁶ Walter Kemp, Vesselin Popovski, and Ramesh Thakur, eds., *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State*, United Nations University Press, 2011, p. 235.

⁷ Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, Routledge, 2011, p. 200.

by analyzing the practices and deliberations of the international community on this notion, with special focus on the theory of international law.

II. Outstanding Problems and Conflicts of Interest Concerning the Responsibility to Protect

There are serious conflicts of interest among states with respect to implementation of the responsibility to protect, in particular on the question of who will decide and who will intervene. During the UN General Assembly's thematic debate on the responsibility to protect, held in July 2009, many states expressed their views on this issue. By examining their statements, we can identify the outstanding problems that the debate revealed.

As President of the General Assembly, Nicaragua argued that the most effective means of avoiding large-scale human suffering is not the use of military force but the creation of a more just and equal world order.⁸ Egypt, speaking on behalf of the Non-Aligned Movement, expressed concern about the possible abuse of the responsibility to protect, either by expanding its application to situations beyond the four key areas or by misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of states.⁹ France insisted that natural disasters combined with deliberate inaction on the part of a government that refuses to provide assistance to its population or ask the international community for aid should not lead to human tragedies in which the international community can only look on helplessly.¹⁰

China stated that the government of a given state has the primary responsibility to protect the citizens of that country, and the implementation of the responsibility to protect should not contravene the principle of state sovereignty. China also noted that it is imperative to avoid abuse of the concept and to prevent it from becoming a form of humanitarian intervention. China argued that any crisis must be addressed within the framework of the United Nations and no state should be allowed to unilaterally implement the responsibility to protect.¹¹ Venezuela insisted that implementation of the third pillar of the responsibility to protect—deterrent military intervention—would not be necessary as it represents a challenge to the basic principles of international law, such as the territorial integrity of states, non-interference in internal affairs, and the indivisible sovereignty of states. Venezuela did not agree that the Security Council would be an appropriate organ to authorize armed or coercive action when the responsibility to protect must be enforced as a last resort, because it is impossible to guarantee that this approach would not be implemented selectively and serve as a pretext for imperialist countries to intervene in weak countries for political reasons.¹²

Cuba argued that the notion of the responsibility to protect does not exist as a legal obligation in any instrument of international law or in the Charter of the United Nations, and pointed out the Security Council's utter failure to act during Israeli attacks on Lebanon and Gaza, when obvious acts of genocide and war crimes

⁸ UN Document, A/63/PV.97, July 23, 2009.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ UN Document, A/63/PV.98, July 24, 2009.

¹² *Ibid.*

were occurring.¹³ Russia insisted that states should be measured and cautious in addressing implementation of the responsibility to protect and warned against taking rash or hasty steps to apply the concept arbitrarily to specific countries. It argued that an over-broad interpretation would be not only counterproductive, but also dangerous in terms of harnessing international efforts to promote international peace and security.¹⁴ Sudan warned that the concept of the responsibility to protect provides no explicit or airtight provisions to allay the fear that one country or a group of countries or organizations might abuse this principle.¹⁵

Implementation of the responsibility to protect involves the difficult task of clarifying and proving the existence of certain criteria for appropriate action.

III. Protection of Civilians and the Responsibility to Protect

Kofi Annan argued that, in situations where the international community is faced with genocide or massive human rights abuse, it would not be right for the UN to stand by and let atrocities unfold with disastrous consequences for many thousands of innocent people. While he was well aware of the sensitivities involved in the dispensation of the responsibility to protect, he believed that the UN must embrace this responsibility, and when necessary, act on it.¹⁶

Ban Ki-moon followed Annan's approach on the notion of the responsibility to protect. Special Adviser Edward Luck pointed out that Ban Ki-moon's approach is "narrow but deep," resisting appeals to broaden the scope beyond the four crimes and violations agreed to at the 2005 Summit, while proposing that a variety of policy tools under Chapters 6, 7, and 8 of the UN Charter be utilized to prevent, deter, and respond to serious violations.¹⁷ Ian Johnstone pointed out that both Secretaries-General played key roles as norm entrepreneurs.¹⁸

In 2011, the Security Council adopted Resolutions 1973 and 1975 concerning the situations in Libya and Côte d'Ivoire. The Secretary-General explained in his report that the Security Council cited the responsibility to protect in the preamble of a Chapter VII resolution in the case of Libya.¹⁹ Some scholars regard Resolutions 1973 and 1975 as implementing the responsibility to protect in practice.²⁰ With Resolution 1973, the Security Council reiterated the responsibility of the Libyan authorities to protect the Libyan population²¹ and authorized the member states to take all necessary measures to protect civilians and civilian populated areas

¹³ *Ibid.*

¹⁴ UN Document, A/63/PV.100, July 28, 2009.

¹⁵ *Ibid.*

¹⁶ UN Document, A/59/2005.

¹⁷ Edward C. Luck, "The United Nations and the Responsibility to Protect," Policy Research Paper, The Stanley Foundation, 2008.

¹⁸ Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations*, Oxford University Press, 2011, p. 78.

¹⁹ UN Document, A/65/877-S/2011/393, June 27, 2011, para. 30.

²⁰ Anne Peters, "The Security Council's Responsibility to Protect," *International Organizations Law Review*, vol. 8, 2011, p. 5.

²¹ UN Document, SC/RES/1973(2011), March 17, 2011, P.P.4.

under threat of attack.²² With Resolution 1975, the Security Council reaffirmed the primary responsibility of each state to protect civilians²³ and stressed on its full support given to the UNOCI to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence.²⁴

Vesselin Popovski pointed out that Security Council Resolution 1970 described atrocities against peaceful demonstrators and activated the responsibility to protect, but Security Council Resolution 1973 described the situation in Libya as a civil war and the protection of civilians came to life in parallel with the responsibility to protect.²⁵ In the case of Libya, legal authorization was restricted to four military tasks: surveillance and monitoring, humanitarian assistance, enforcement of the arms embargo, and enforcement of a no-fly zone. However, NATO exceeded UN authority in this case.²⁶

The principle of the protection of civilians has developed from a long history of international humanitarian law. However, the Brahimi Report warned of a potentially large mismatch between desired objective and available resources for peacekeepers to extend protection to civilians,²⁷ and that if an operation is given a mandate to protect civilians, it also must be given the specific resources needed to carry out that mandate.²⁸ Victoria Holt and Tobias Berkman pointed out that the protection of civilians is an implicit job of peacekeeping forces, but it has not been the traditional goal of peace operations.²⁹ Therefore, efforts to operationalize the responsibility to protect should address both types of missions: full-scale responsibility to protect military interventions and peace operations with protection mandates.³⁰

IV. State Responsibility, Responsibility of the International Community, and the Responsibility to Protect

In this section, I will analyze the issue of the responsibility of states and of the international community concerning the notion of the responsibility to protect. According to the primary responsibilities of territorial states in pillar one, Ekkehard Straus describes the existing legal obligations of the territorial states to prevent and punish genocide, war crimes, crimes against humanity, and ethnic cleansing. Crimes against humanity are deemed to be part of international *jus cogens* and states must ensure that their organs and officials do not commit such crimes. In its judgment in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*,

²² *Ibid.*, O.P.4.

²³ UN Document, SC/RES/1975(2011), March 30, 2011, P.P.9.

²⁴ *Ibid.*, O.P.6.

²⁵ Vesselin Popovski, "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'," *Security Challenges*, vol. 7, no. 4, 2011, p. 5.

²⁶ Ramesh Thakur, "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism," *Security Challenges*, vol. 7, no. 4, 2011, p. 20.

²⁷ UN Document, A/55/305-S/2000/809, August 21, 2000, para. 11.

²⁸ *Ibid.*, para. 63.

²⁹ Victoria K. Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, The Henry L. Stimson Center, 2006, p. 181.

³⁰ *Ibid.*, p. 184.

the International Court of Justice identified the specific obligations of states to prevent and punish genocide.³¹

At the same time, according to the notion of the responsibility to protect, states have accepted the residual responsibility of the international community; if a territorial state is unwilling or unable to grant protection, it is incumbent upon the international community to step in.³² The idea of responsible sovereignty exists within this perspective.³³ Jennifer M. Welsh and Maria Banda pointed out that while the original ICISS report did not explicitly call for legal reform to enshrine the responsibility to protect, the commissioners did leave the impression that international morality and international law should be more closely aligned.³⁴

Ian Johnstone pointed out that while the responsibility to protect is not hard law, it does reflect an emerging consensus that “humanitarian intervention,” at least when authorized by the Security Council, is warranted and may be expected.³⁵ We can identify several different arguments regarding the criteria for such actions.³⁶

The first argument is that actions without Security Council authorization are always illegal from the viewpoint of international law. Due to the principles of non-intervention and the prohibition of the use of force, unilateral intervention has been regarded as illegal within the international community for a long time. The second argument is that since humanitarian activities do not conflict with the exclusive jurisdiction of states, they are legally permissible and there is no conflict with Article 2(7) of the UN Charter.

The third argument is that the actions for humanitarian purposes are not restricted by Article 2(4) of the UN Charter because it does not prohibit the use of force in a manner that is consistent with the objectives of the UN. Moreover, the protection of human rights is an important UN objective. However, opponents maintain that Article 2(4) cannot be interpreted as permissive of such actions, either because this norm bans virtually all uses of force or because allowing the exception would open the door to unacceptable abuse. The fourth argument pertains to new customary international law that permits actions against large-scale and persistent violations of human rights. This argument can be applied to certain situations, like genocide, which involve a violation of *jus cogens*. However, it is uncertain whether there exists an *opinio juris* of a majority of states.

The fifth argument regards international law that permits the international community to act in order to carry out the responsibility to protect in the case of a fundamental dissociation of a state. For example, in Somalia, where there was no government capable of maintaining law and order, the international community could act as a temporary government. This process must first recognize that there is a threat to international

³¹ Ekkehard Strauss, “A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect,” in Alex Bellamy, Sara E. Davies, and Luke Glanville, eds., *The Responsibility to Protect and International Law*, Martinus Nijhoff Publishers, 2011, pp. 48–51.

³² Anne Peters, *op.cit.*, p. 6.

³³ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, The Brookings Institution, 1996.

³⁴ Jennifer M. Welsh and Maria Banda, “International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?,” in Alex Bellamy, Sara E. Davies, and Luke Glanville, eds., *op.cit.*, p. 133.

³⁵ Ian Johnstone, “The Secretary-General as norm entrepreneur,” in Simon Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics*, Cambridge University Press, 2007, p. 133.

³⁶ Jun Matsukuma, “The Emerging Norms of the Responsibility to Protect,” *The Seinan Law Review*, Vol.38, No.2, 2005, pp. 1-13.

peace and security and subsequently decide on the measures to be taken by organizations, including the Security Council. Such measures must be authorized by the UN Charter, particularly Chapter 7, and the duration and aim of the intervention has to be specified. In this argument, the focus is on the status of states, with the implication that in failed states the bar of sovereignty may be lowered. Accordingly, it is possible for the international community to act in order to legally carry out the responsibility to protect.

In 2007, the 10th Commission of the Institut de Droit International provisionally concluded that massive deprivations of human rights may constitute threats to the peace within the meaning of Article 39 of the Charter of the United Nations and that the Security Council is competent to organize or delegate the conduct of humanitarian intervention for such threats to the peace.³⁷ The commission also concluded that international law does not yet permit unilateral humanitarian interventions that have not been authorized by a competent organ of the United Nations. However, the commission also touched upon the controversial issue of unilateral intervention, arguing that recent practice indicates that this may be in the process of adjustment and it appears that in grave circumstances, unilateral humanitarian interventions that have not received the authorization of the United Nations may be deemed lawful.³⁸

Luck argued that there are some indications that when a state commits a serious breach of a peremptory norm, the international community should cooperate to end the breach using lawful means.³⁹ According to Luck, the clearest statement of this is found in Article 41 of the ILC's carefully elaborated Articles on Responsibility of States for Internationally Wrongful Acts. However, as the ILC itself acknowledges in its commentary on the draft Articles, it is open to question whether a positive duty of cooperation currently exists, and Article 41, in that respect, may reflect the progressive development of international law.⁴⁰

In the context of the UN Charter, it is important to choose the term "responsibility" to protect because we find the term "responsibility" in Article 24(1) concerning the primary responsibility of the Security Council for the maintenance of international peace and security.⁴¹ However, Ambassador Bolton decided not to accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.⁴²

On May 15, 2012, Switzerland, Costa Rica, Jordan, Liechtenstein, and Singapore proposed the draft General Assembly resolution on enhancing the accountability, transparency, and effectiveness of the Security Council. We can find the following provision in the Annex of this draft resolution.

³⁷ 10th Commission, "Present Problems of the Use of Force in International Law," B. Sub-group on Humanitarian Intervention, Institut de Droit International-Session de Santiago (2007), September 21, 2007, p. 201.

³⁸ *Ibid.*

³⁹ Edward C. Luck, "The United Nations and the Responsibility to Protect," *The Stanley Foundation Policy Analysis Brief*, 2008, p. 5.

⁴⁰ *Ibid.*

⁴¹ UN Document, A/66/L.42/Rev.2, May 15, 2012.

⁴² Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the United Nations (August 30, 2005).

The following measures are recommended for consideration by the permanent members of the Security Council:

20. Refraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.

However, the Swiss Ambassador withdrew this draft resolution later on facing increasing pressure from the permanent members.⁴³ On the abstention of voting of certain members of the Security Council on the resolution on Libya, Ramesh Thakur once argued that the difference between aspiring and pretending to be a global power will depend in part on a country's capacity and willingness to use military force both to defend its own immediate interests and as a guardian of international interests.⁴⁴

V. Human Security and the Responsibility to Protect

In this section, I would like to refer to the relationship between two human security approaches, one focusing on the responsibility to protect and the other focusing on freedom from want. In my view, these two approaches are not necessarily contradictory, but mutually complementary. Thus, it is important for the international community to explore a practical way to realize all of the elements of human security through mutual cooperation.

The international community defines the terms "responsibility to protect" and "human security" on the basis of varied interpretations. In the resolution adopted in July 2010, the General Assembly of the United Nations recognized the need to continue deliberating about human security in order to achieve a consensus.⁴⁵ The March 2010 report by the Secretary-General considers human security separately from the responsibility to protect.⁴⁶

At this time, the possibility of forming a firm consensus on this issue among the international community does not exist. The General Assembly is expected to have no alternative but to reach a consensus based on a narrow definition of the issue; however, the notion of human security originally included various elements, such as the responsibility to protect and governance. Even as the General Assembly adopted the resolution, the discussion relied on a broader definition of human security, which could enable the issue to continue to be of significance.

Human security is not a legal issue; rather, it is a policy issue. The significance of mainstreaming the idea of human security into the various activities of the United Nations is that such mainstreaming would improve the framework of international cooperation. The additional value of human security lies within this framework.

⁴³ UN Document, GA/11234, May 16, 2012.

⁴⁴ Ramesh Thakur, *The People vs. the State: Reflections on UN Authority, US Power and the Responsibility to Protect*, United Nations University Press, 2011, p. 237.

⁴⁵ UN Document, A/RES/64/291, July 27, 2010.

⁴⁶ UN Document, A/64/701, March 8, 2010.

VI. Protection of Persons in the Event of Disasters and the Responsibility to Protect

Since 2008, the International Law Commission has been discussing laws relating to the protection of persons in the event of disasters. Some members of the ILC indicated the relevance of the responsibility to protect on this subject, but the ILC concluded that they do not apply the responsibility to protect to the issue of disaster response.⁴⁷ Interestingly, Valencia Ospina, Special Rapporteur of the ILC on this agenda, referred to the notion of the offices of humanity elaborated by Emer de Vattel in the primary report.⁴⁸ In this context, I would like to refer to the traditional concept of the offices of humanity, which is often regarded as the origin of humanitarian assistance.

In his book, *The Law of Nations, or the Principles of Natural Law*, Emer de Vattel argued that the offices of humanity consist of the fulfillment of the duty of mutual assistance.⁴⁹ Vattel insisted that if a nation is suffering from famine, all those who have provisions to spare should assist it in its need. To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized nation is to be found which would refuse absolutely to do so.

Yet, we should note that Vattel also pointed out that a nation has no right to force another nation to accept its offer of help, and that an attempt to do so would be a violation of that nation's natural liberty. According to his theory, every nation has a perfect right to ask for assistance and the offices of humanity from another if that nation thinks it has need of them, but does not have the right to demand them.

Attempts to link human rights and humanitarian assistance issues have a long history in the UN context. The processes of the adaptation of the relevant General Assembly resolutions are examples; yet, the succeeding debates over the right to humanitarian assistance were not able to make a meaningful practical contribution, and additionally, as mentioned above, the ILC recently announced that the responsibility to protect did not apply to disaster response. Thus, in this century, we should aim ahead of Vattel's theory in order to ensure that no human being is ever deprived of access to basic human needs in the event of a disaster.

VII. Conclusion

This analysis leads to the conclusion that it might be useful for the international community to consider the individual outstanding problems in implementing the responsibility to protect from the perspective of international law, even though the notion of the responsibility to protect itself has not been regarded as a legal norm.

⁴⁷ UN Document, A/64/10, 2009, paras. 147–183.

⁴⁸ UN Document, A/CN.4/598, May 5, 2008.

⁴⁹ Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle* [*The Law of Nations, Or, Principles of Natural Law*], 2 vols., 1758.

According to Bellamy, the notion of responsibility to protect has played a useful role in diplomatic discourse, served as a lens to guide policy planning and decision making, and generated political impetus to implement already existing legal commitments and policy agendas.⁵⁰ Anne Orford pointed out that the project of implementing the responsibility to protect at the UN is an attempt to consolidate the pre-existing but dispersed practices of executive rule into an integrated system⁵¹ and that if humanitarian action in the name of protection is to continue, it needs to be recognized that in practice it involves a theory of the state or the subject of law.⁵² It is worth noting that Orford also argues that the project of implementing the responsibility to protect concept aims to consolidate and integrate the practices of executive rule initiated by Hammarskjöld.⁵³ However, as several governments argued during the General Assembly's thematic debate on the responsibility to protect, there is still the possibility of abuse by intervening states even if the Security Council authorizes the use of force. For example, in the case of Libya, NATO exceeded its UN authority.

In the future, we should see the notion of the responsibility to protect as a comprehensive political goal of the international community, rather than a norm in customary international law, and should examine practical ways to implement it.

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⁵⁰ Alex J. Bellamy, *op.cit.*, pp. 197–198.

⁵¹ Anne Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011, p. 189.

⁵² *Ibid.*, p. 195.

⁵³ *Ibid.*, p. 209.