

Between sovereignty and humanity: The constitutionalisation of international law

Anne Peters, Prof. Dr. iur., Basel

Introduction

At the conference of the European Society of International Law in Cambridge in September 2010, I listened to the key note speech of the President of the Asian Society of International Law, a lady who is also the Chinese judge at the International Court in The Hague, Professor Xue Hanqin. Judge Hanqin gave a presentation about what she called the three core concepts of international law: state, order, power.¹ I would like you to keep this in mind when I now share with you my perception of the recent and ongoing developments of the international legal order.

1. Where we stand: the epoch of post-1989

International law as it stands now has been decisively shaped by the events of 1989, which marks the end of the ideological split of Europe, and to some extent of the entire world into 'East' and 'West'. 1989 has been the most important caesura after the end of the Second World War, because it has ended the permanent blockage of the UN Security Council, has led to the foundation of the World Trade Organisation (the WTO) and of the International Criminal Court, and has dramatically increased the status of ratification of the universal human rights instruments. All these facts can be considered, with some simplification, a consequence of the fall of the Berlin wall.

Neither the terrorist attacks on the world trade centre on 11 September 2001, nor the financial crisis of 2008, nor the rise of China whose economic power this summer surpassed that of Japan to become world's no. 2 economy, have transformed the international legal order in a similarly profound way. However, the more recent events have cut back the overly idealist and naïve expectations addressed at the 'new world order' after 1889, and have given way to a more realist assessment.

2. Future trends

So we find ourselves in an 'epoch' of international law which began in 1989. Let me briefly speak about the near future trends I am reckoning with. I do not believe that we will soon witness revolutionary ruptures. I do not expect, for instance, that the United Nations will soon be dissolved, and a League of Democracies be founded instead. I do not expect that the international constitutional principle of equality of states will be abolished, and replaced by a system of formal hierarchy among states. Nevertheless, gradual, evolutionary transformations will continue to take place.

As far as structure is concerned, the trend which has been some been deplored as 'fragmentation' will continue. I consider this trend to be a normal phenomenon of differentiation, and a sign of the maturity of the international legal order, and not as per se pernicious or dangerous. As far as the sources of international law are concerned, the significance of soft law as a pace-maker for the creation of hard law, as a complement to hard law, and even as a substitute of hard law will mount. As far as the legal persons or actors are concerned, the so-called non-state actors, that are NGOs, business actors, and individuals, will continue to rise in factual importance and in legal significance.

¹ Xue Hanqin, keynote speech delivered at the 4th ESIL Biennial Conference in Cambridge, 2-4 September 2010.

On the other hand, a re-assertion of the role of the state, visible for example in the tight re-regulation of the financial sector, is visible as well. In substance, the constituent principles of the prohibition of the use of force and sovereign equality of states will persist, but they are evolving. It is exactly this point on which I would like to focus.

3. Sovereignty as responsibility to protect

The principle of sovereignty is being ousted from its position as a *Letztbegründung* (first principle) of international law. State sovereignty must and can be justified. It is today increasingly accepted that the normative value of state sovereignty is derived from and geared towards humanity. By ‘humanity’ I here understand the legal principle that human rights, interests, needs, and security must be respected and promoted. State sovereignty is not only limited by human rights, but should be seen to exist only in function of humanity. Consequently, conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing but on the basis of a presumption in favour of humanity.²

a) The contents of R2P: four elements

The key word is here: responsibility to protect.³ It is abbreviated in the jargon of professionals as ‘R2P’. The concept of R2P has been invented by a commission of legal and political experts, politicians and high UN-staff, called the ‘International Commission on Intervention and State Sovereignty’ (abbreviated ICISS). That Ad-hoc commission had been established by the Canadian Government, following a call by the UN Secretary General Kofi Annan. It worked under the co-chairmanship of Gareth Evans (Australia), who had before been President and Chief Executive of the Brussels-based International Crisis Group, and Mohamed Sahnoun from Algeria, who was then a Special Advisor to the UN Secretary-General. This ICISS Commission in 2001 published a report entitled ‘The Responsibility to protect (2001)’.⁴

The historical reason for installing that Commission were the widespread perception of two failures of the United Nations to authorize sufficiently robust interventions in Ruanda in the face of ongoing genocide in 1994, and in Kosovo in 1999, where – although this is less clear - genocide seemed imminent. These failures of the United Nations, notably of the Security Council, or of its members, have triggered an intense debate on so-called ‘humanitarian interventions’ that are interventions in favour of rescuing human lives from genocide and slaughter.

Against this background, the intention of the ICISS-report was to replace the highly controversial concept of humanitarian intervention by shifting the terms of the debate from sovereignty as control to sovereignty as responsibility and from a right to a right to intervene to a responsibility to protect (if need be through intervention).⁵ From that perspective, R2P is not an adversary of sovereignty, but its ally.

² Anne Peters, *Humanity as the A and Ω of Sovereignty*, *European Journal of International Law* 20 (2009), 513-544.

³ See Anne Peters, ‘The Security Council’s Responsibility to Protect’ 8 (2011) *International Organisations Law Review* (forthcoming).

⁴ ‘International Commission on Intervention and State Sovereignty’ (ICISS), *The Responsibility to Protect (2001)*, <http://www.iciss.ca/pdf/Commission-Report.pdf>.

⁵ Seminally Francis Mading Deng and others, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, Washington DC 1996)

The focus is no longer on the states' duty to refrain from action and intervention, but inversely on a possible duty to act internationally.⁶ This shift has been encapsulated in the slogan: 'From non-intervention to non-indifference.'

The paradigm shift is based on four consecutive arguments: First, if we take human needs and human rights as a starting point, every state has the sovereign responsibility to protect its population from crimes that threaten their human existence.

Second, a state that grossly and manifestly fails to discharge these duties has its sovereignty suspended. This means that its sovereignty no longer functions a shield against outside intervention.

Third, in a system of multilevel governance and under the principle of solidarity, the residual or subsidiary responsibility to protect falls on the international community. The explanation is that in the current global system of multilevel governance, competences and obligations must be allocated to that level of governance on which governance functions can be effectively performed.

Fourth, the international community may only act through the Security Council, but not through individual states acting unilaterally. Anything else would open the door for abuse of the responsibility to protect by superpowers.

b) Textual bases

In the General Assembly's World Summit Outcome Document of 2005, the world's heads of states have endorsed the responsibility to protect the sense just explained.⁷ Later, some Security Council resolutions have in turn confirmed the Summit Outcome document. These legal documents have narrowed the concept of R2P and circumscribed it more precisely. It is now agreed that the responsibility to protect populations relates (only) to the core crimes as defined in the Statute of the International Criminal Court (namely genocide, war crimes, and crimes against humanity including ethnic cleansing).

At the Millennium Summit of 2005, the heads of state and government advanced a three-pillar strategy: Pillar one is protection responsibilities of states; Pillar two is international assistance and capacity-building, and pillar three is timely and decisive response. The 2009 Report of the Secretary-General on Implementing the Responsibility to Protect,⁸ which was endorsed by the General Assembly,⁹ confirmed this pillar-structure. Overall, the concept is now framed as 'narrow but deep', in the words of the Secretary-General.¹⁰

⁶ See in favour of third states' *duty* to protect Mario Bettati and Bernard Kouchner, *Le devoir d'ingérence* (Denoel, Paris 1987). See for philosophical arguments: K-C Tan, 'The Duty to Protect' in T Nardin and MS Williams (eds), *Humanitarian Intervention* (New York University Press, New York 2006) 84-117.

⁷ Resolution adopted by the General Assembly, World Summit Outcome Document, UN Doc A/RES/60/1 of 24 October 2005, paras 138-39. '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. (...).'

⁸ Report of the Secretary-General: Implementing the Responsibility to Protect (UN Doc A/63/677 of 12 January 2009) paras 49-65 ('Pillar three: timely and decisive response').

⁹ GA Res. 63/208 (3 February 2009) takes note of the Secretary-General's Report of 2009.

¹⁰ Secretary-General 2009 (A/63/677) (n 8) para 11 lit. c).

c) The legal quality of R2P

While the (rather narrow) scope, substance and pillar-structure of the concept of a responsibility to protect are meanwhile settled, its precise legal status is not. It remains controversial whether R2P is a hard and fast legal obligation, only a political concept,¹¹ soft law,¹² or an emerging legal norm.¹³ In a three-day long General Assembly debate in July 2009 on R2P,¹⁴ in which 49 states took the floor, five governmental delegations explicitly considered R2P not to be a legal principle. These five opposing states were China, Brazil, Guatemala, Venezuela, Morocco, and Monaco.¹⁵ Liechtenstein called R2P a ‘political commitment of the highest order’.¹⁶ In contrast, Canada explicitly found R2P to be a legal principle.¹⁷ Bangladesh called it an ‘emerging normative framework’.¹⁸ Many proponents of a legal obligation, including seven states in the General Assembly,¹⁹ have argued that R2P (with the narrow contents now accepted) is rooted in pre-existing treaty obligations,²⁰ notably in the Genocide Convention, the Geneva Conventions on Humanitarian Law, and the Human Rights Covenants. Some scholars opine that the concept does not add anything new and might therefore be superfluous or even dangerously misleading.

d) The added value of R2P: Conceptual innovation

My position is that although the idea of R2P can partly be based on existing international law, it is not legally superfluous. It is useful because it pulls pre-existing norms together and places them in a novel framework. This systematization or is apt to reinforce the normative power of those principles. The whole is more than the sum of the parts. R2P therefore has some added legal value, notably a conceptual one, independent of whether it is qualified as a binding legal norm as such.

¹¹ In that sense Andrew Clapham, ‘Responsibility to Protect – Some Sort of Commitment’ in V Chetail (ed), *Conflicts, sécurité et coopération/ Conflicts, Security and Cooperation: Liber Amicorum Victor-Yves Ghebali* (Bruylant, Brussels 2007) 169-92, at 191.

¹² Jennifer M Welsh and Maria Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?’ (2010) 2 *Global Responsibility to Protect* 213-31 (230).

¹³ In that sense Sandra Szurek, ‘La responsabilité de protéger, nature de l’obligation et responsabilité internationale’ in Société française pour le droit international (ed), *Colloque de Nanterre, La responsabilité de protéger* (Pedone, Paris 2008), 91-134, at 93.

¹⁴ GAOR (A/63/PV.97-100) of 23, 24, and 28 July 2009.

¹⁵ Brazil (A/63/PV.97, at 13); Guatemala (A/63/PV.97, at 14); Morocco (A/63/PV.98, at 13); China (A/63/PV.98, at 24); Venezuela (A/63/PV.99, at 9); Monaco (A/63/PV.99, at 12).

¹⁶ A/63/PV.97, at 22.

¹⁷ A/63/PV.98, at 26: ‘We have at our disposal a sophisticated normative legal framework based on international law.’

¹⁸ A/63/PV.100, at 22.

¹⁹ New Zealand (A/63/PV.97, at 25); Netherlands (A/63/PV.97, at 26); Austria (A/63/PV.98, at 1); Switzerland (A/63/PV.98, at 5); Nigeria (A/63/PV.98, at 26); Mexico (A/63/PV.99, at 18); Sri Lanka (A/63/PV.100, at 2). Chile made this statement with regard to the territorial states’ obligations (A/63/PV.98, at 10).

²⁰ See Edward C Luck, Special Adviser to the Secretary General, ‘Remarks to the General Assembly on the Responsibility to Protect’, New York 23 July 2009, at 3: ‘[I]t is a political, not legal, concept based on well-established international law and the provisions of the UN Charter.’ Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 *Review of International Studies* 445-58, at 447-8, 450: ‘anchored in existing law’, and resting upon the undisputed obligation to prevent and punish genocide. See also Laurence Boisson de Chazournes and Luigi Condorelli, ‘De la “responsabilité de protéger” ou d’une nouvelle parure pour une notion déjà bien établie’ (2006) 110 *Revue Générale de Droit International* 11-18. The authors argue that R2P does not go beyond the obligation to respect and to ensure respect under international humanitarian law (common art 1 of the Geneva Conventions) and is therefore nothing new.

4. No substantive legal obligation of Security Council members to intervene

The ensuing question of now whether the Security Council, or rather its members, especially the five permanent members of the Council, are – in the face of genocide – saddled with a legal obligation to intervene, more precisely to vote positively on a proposal for a resolution to authorise military intervention. Such an obligation has been clearly rejected by the then Permanent Representative of the United States of America to the United Nations, in a statement on the draft of the World Summit Outcome Document of 2005, John Bolton. Bolton stated: ‘We do not accept that neither the United Nations as a whole, nor the Security Council, or individual states, have an obligation to intervene under international law.’²¹

So a hard and fast legal obligation has not yet been endorsed by governments and therefore does not form part of international law as it stands. Therefore, the failure of the Security Council members to intervene in Darfur to bring to an end the massacres did not trigger their legal responsibility, although this passivity was in contravention of the solemn pledge made in the Summit Outcome document.

Why are states and lawyers reluctant to accept R2P as a fully legal obligation, not only as a political or moral one, incumbent on the Security Council and its members? One explanation is that the Security Council may authorize, but can in factual terms not compel military action. The Security Council’s authorization designed to fulfill the international community’s responsibility can only be a first step, a necessary but not sufficient condition for actually discharging the responsibility to protect in a situation where non-military means were of no avail. The Council is ultimately dependent on the political will of those states whose economic sanctions have bite and which contribute troops.

So would not a positive obligation of Security Council member to concur in a Council decision to intervene additionally imply that states would also act unlawfully if, after the adoption of such a resolution, they refused to contribute troops? Endless chains of legal obligations would result. Thinking through the idea of a legal obligation up to this point demonstrates the limits of international law. These prospects might deter states from wanting to become a member of the Security Council in the first place, and thus turn out to be counter-productive for alleviating the plight of endangered populations in real life.

5. Procedural obligation justify inaction

It might be a wiser course not to ‘legalize’ R2P completely in terms of a *substantive* legal obligation of all states and the UN, whose non-fulfillment would trigger legal liability. My suggestion is to focus on the procedural aspect instead. R2P has arguably already given rise to the *procedural* obligation of the members to justify a veto of a permanent member / or the refusal to concur by the non-permanent members.

The procedural obligation to justify a negative vote flows from the international rule of law, under which also the Security Council operates. Under the rule of law, there is an obligation to state the reasons on which legal acts are based.

A permanent member of the Security Council may for instance justify its veto by pointing out that an ongoing civil strife in a state like Sudan does not involve genocide-like mass crimes which would demand Security Council intervention. It may even (though less persuasively) rely on its national interest in maintaining good neighborly relations with the government of Sudan, because preservation of this interest forms part of an international system of states. A member can however not give the reason that it would like to condone crimes in order to ‘cleanse’ a region.

Generally speaking, the obligation to give reasons forces law- and decision-makers to base their acts on claims regarding the general interest rather than on selfish appeals. This has been

²¹ Letter of the Permanent Representative of the United States of America to the United Nations (30 August 2005).

called the ‘civilizing force of hypocrisy’.²² These reasons, even if they may be hypocritical, still have the consequence of generating better outcomes, because the ‘bad’ arguments are officially banned and have therefore much less power to influence the ultimate decision that has been reached.

This applies also to the Security Council. The obligation to give reasons leaves the exercise of the veto within the realm of discretion of the permanent member, but still forces the member to rationalize its decision. This allows other states and the public to criticize these reasons. On the long run, an obligation to justify the veto is apt to rule out those most blatant abuses that can simply not be rationalized. It is therefore useful that, in the current stage of development of international law, R2P has already reversed the onus of justification for voting behavior of the members, especially the permanent members, of the Security Council.²³

6. Conclusion

Let me sum up: The ongoing process of a humanization of sovereignty is manifest in the emerging legal principle of responsibility of protect. For the time being, responsibility to protect means for the Security Council and its members that there is a procedural obligation to give reasons for non-intervention in an R2P-case. This humanization of sovereignty is a cornerstone of the current transformation of international law into an individual-centered system. Some observers even speak of a ‘humanization’ of international law as a whole. This ‘humanization’ is – in my eyes - also a core building block of the constitutionalisation of international law.

But the process of constitutionalisation is far from all-encompassing. It is accompanied by antagonist trends. Please also remember the Chinese Judge Hanqin and her key words of state – order – power.

²² Jon Elster, ‘Deliberation and Constitution Making’ in Jon Elster, *Deliberative Democracy* (CUP, Cambridge 1998) 97-122, at 111.

²³ Christopher Verlage, *Responsibility to Protect* (Mohr Siebeck, Tübingen 2008), at 250-53 with further references.