Responsibility to Protect (R2P)

A New Paradigm of International Law?

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Responsibility to Protect and the Competence of the UN Organs

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Premise

The doctrine of the responsibility to protect has theoretical underpinnings. It is commonly considered to be a logical development of a particular conception of sovereignty. Beyond the many controversies as to its precise meaning, this conception is commonly deemed to have a core content, widely accepted in legal and political thought. It basically refers to the notion of statehood and broadly expresses the idea that States are free to determine and to carry out their own political stance. In other words, the traditional notion of sovereignty expresses the idea that States are fully self-determined entities which possess the plenitude of the political power inwards and are entitled to act on a basis of equality with other states outward, in the international arena.

The doctrine of the responsibility to protect is based on a different conception of sovereignty, sometimes referred to as functional sovereignty. In the functional perspective, States are not free to pursue their political stance, subject only to international obligations freely entered into by means of conventions or deriving from customary law. Sovereignty is conceived as having been bestowed upon States by international law for discharging basic governmental functions for the benefit of the community of individuals under their jurisdiction.[1] Among the basic functions conferred upon a State, which constitute its very *raison d'être*, one should include, pre-eminently, the protection of fundamental individual rights. In this new perspective, a State is not conceived of as a legal person yielding political power for the pursuit of its own interests; it rather constitutes one of the sub-units of the political organisation of mankind. It discharges its basic functions by virtue of a delegation of power on behalf of the international community. The failure by a State to protect effectively the fundamental rights of the individuals under its jurisdiction thus entails that the international community is entitled to revoke the delegation of powers and to discharge this duty *in lieu* of the defaulting State.

1 See the report *The Responsibility to Protect*, adopted in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).

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One can easily perceive the implication of this doctrine. It touches upon fundamental concepts which are of focal importance for determining the role of the international legal order such as the notion of sovereignty. Traditionally conceived of as an instrument of coordination of the activities of a plurality of sovereign entities, this notion is conceived in this new perspective as an instrument allocating powers and prerogatives to secure the world public order.

The doctrine of the responsibility to protect seems thus to subvert the traditional conceptualisation upon which the legal balance of the international society has relied for centuries. Yet, the issue is whether this conception, often expounded by recourse to political and philosophical arguments, has found a place in positive law and what its far-reaching implications are.[2]

In this paper, I will refrain from dealing with these fundamental issues, which would require much more legal skill than I possess. My task is more modest by far. My purpose is only to inquire about the legal implications the doctrine has for the system of State responsibility established by contemporary international law and for the institutional and normative setting of the UN.

The main point of this paper is that the doctrine of the responsibility to protect mainly thrives in the institutional framework provided by the United Nations. This entity is the most plausible candidate for the position of enforcer of human rights on behalf of the international community. It is the only one when collective action is needed. However, the assignment of a duty to protect entails significant changes in the competence and decision-making procedure of the UN's organs.

The paper will be divided into three parts.

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2 For recent reappraisals of the notion see C. Stahn, *Responsibility to Protect: Politic Rhetoric or Emerging Legal Norm?*, in *American Journal of International Law*, 2007, p. 99 ff.; L*a responsabilité de protéger. Actes du colloque de Nanterre de la Societé française de droit international*, Pédone, Paris, 2008; Laurence Boisson de Chazournes, *Responsibility to Protect: Reflecting Solidarity?*, in Wolfrum, Rüdiger, Kojima, Chie (Eds.), *Solidarity: A Structural Principle of International Law, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, 2010, Volume 213, Springer, Heidelberg, Dordrecht, London, New York, 2010, p. 93 ff.; see also the comments by Ch. Tomuschat, p. 112, H. Neuhold, p. 113, M. Wood, p. 117, Y. Chen, p. 119 and J.A. Frowein, p. 121: A. Rausch, *Responsibility to protect. Eine juristische Betrachtung*, Peter Lang, Frankfurt a. M., 2011; A. Orford, *International Authority and the Responsibility to protect*, CUP, Cambridge, 2011; P. Hilpold, *From Humanitarian Intervention to Responsibility to Protect: Making Utopia True ?*, in U. Fastenrath, R. Geiger, D.E. Kahn, A. Paulus, S. von Schorlemer, Ch. Vedder (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, OUP, Oxford, 2011, p. 462 ff.; Id., *Intervening in the Name of Humanity: R2P and the Power of Ideas*, in *JCSL*, 2012, p. 1. ff.

In the first, the implication of the doctrine in the framework of the law of State responsibility will be examined, with a view to seeing what the role of the UN is in that system. In the second part, the analysis will focus on the system of competence of the UN organs and specifically of the SC. This section will mainly deal with the proposed changes to the decision-making procedure of the SC aimed at fitting it for its new duty. The third section will be devoted to the implementation of the responsibility to protect in the aftermath of the Libyan crisis. In that part, we will see how recent developments can endanger the future development of this doctrine. Some final comments and recommendations will follow.

I The R2P Doctrine within the System of State Responsibility

1. By way of introduction, I would like to quote a brief excerpt from the report of the Secretary General of the UN entitled "Implementing R2P." In para. 14, the Secretary General wrote, "[t]he responsibility to protect, first and foremost, is a matter of State responsibility."

This gives us a methodological direction for a study of the role and content of the doctrine within contemporary international law. To assess the doctrine against the background of the law of State responsibility requires one to determine first the primary rules the breach of which prompts the application of the doctrine and, second, the allegedly special consequences flowing from that breach.

How the doctrine of the responsibility to protect fits within the basic conceptual scheme of the law of State responsibility is not easily perceived. Notoriously, international law has developed a distinction between the ordinary regime of State responsibility and the aggravated regime. Whereas the first is of general application, the second applies only to grave breaches of fundamental interests of the international legal order. Breach of ordinary obligations establishes a bilateral legal relationship between the injured State and the wrongdoer. Egregious breaches of fundamental values establish a collective relationship between the wrongdoer on the one side and the international community as a whole on the other. It seems safe to assume that the duty of the territorial State to protect fundamental rights is established in the interests of the international community as a whole. A failure in that duty should therefore be equated with a grave breach of fundamental interests of the international community.

The special regime of State responsibility envisaged by the Articles on State responsibility for qualified breaches merely consists in additional substantive

and procedural consequences to those envisaged for conduct in breach of ordinary obligations. The additional substantive consequences are listed in Art. 41 of the Articles on State responsibility, which imposes an obligation on States to cooperate to bring the breach to an end and an obligation not to recognise as lawful situations created by the breach. Additional procedural consequences are set out in Art. 48, para. 2, b) and c), which confers on States not specially affected the right to claim cessation of the breach and compensation in the interests of the beneficiaries of the breached rule, and in Art. 54, which bestows upon them the power to adopt "lawful measures" of enforcement.

However, the special consequences envisaged by the Articles on State responsibility do not include those entailed by the doctrine of the responsibility to protect, namely the possibility to replace the defaulting State with other entities in its duty to protect individual fundamental rights.[3]

As expressly stated by Art. 55, the legal regime laid down in the Articles on State responsibility, largely corresponding to customary international law, is of a residuary character only. It follows that "the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State [could be] governed by special rules of international law." However, a demonstration that the responsibility to protect has already evolved into a special legal regime of State responsibility has not been convincingly offered.

In a different perspective, one can wonder whether the implementation of the responsibility to protect vis-à-vis the defaulting territorial State is governed by institutional mechanisms.

Although falling outside the scope of the Articles on State responsibility, institutional forms of reaction to wrongful conduct are not extraneous to the system of international responsibility. In a conceptual perspective, they can be the most appropriate response to heinous conduct in breach of collective or universal values. It is precisely the existence of these interests and values, which pertain to the community and not to its individual members, that requires institutionalised means of reaction. Significantly, Art. 59 declares that the Articles on State responsibility "are without prejudice to the Charter of the United Nations." This provision implicitly points out that the commission of

3 This possibility cannot be based on Art. 41, para. 3, which points out that the consequences listed in the previous paragraphs are not exhaustive and that other consequences can ensue for the wrongdoer from other rules of international law. This provision, however, refers only to additional substantive consequences and does not concern the implementation of international responsibility.

wrongful conduct may prompt institutionalised forms of reaction which find their legal basis in the UN Charter.

At first sight, institutional reactions by the UN are not easily reconciled with the object and purpose of the Charter, which does not give the UN organs the competence to deal with the consequences of wrongful conduct. At a closer look, however, the inclusion of Art. 59 in the system of state responsibility appears perfectly logical. First, the two legal regimes—that of State responsibility under customary international law and the institutional regime set up by the Charter of the UN –, albeit distinct, overlap to some extent, so that wrongful conduct may also constitute a threat to peace under Art. 39 of the UN Charter. It should follow that, beyond the consequence listed under the law of State responsibility, the same conduct also entails other consequences envisaged by the UN Charter. Second, the classical conception of international responsibility, as based exclusively on the identification of the State or States injured by a breach and therefore entitled to claim the consequence of the wrongful conduct, is rapidly changing. More and more, the idea that breaches of fundamental interests of the international community necessarily entail institutional forms of reaction is gaining ground. This idea, very promising in the perspective of the responsibility to protect, seems worthy of being examined more closely, starting from the premise that the UN is the only institution that can claim to be representative of the interests of the international community.

II Responsibility to Protect by the UN?

The UN has repeatedly announced its availability to play that role and to undertake the secondary responsibility to protect human rights *in lieu* of the territorial state. This development was possibly also inspired by the intent to avoid leaving the matter entirely in the hands of individual States. In order to attribute this role to the UN, however, a number of hurdles ought to be overcome.

First, the UN's action encounters statutory limitations. The powers assigned to the SC under Chapter 7 can be employed only in the presence of preconditions and for the pursuit of objectives pre-determined by the Charter. In particular, the SC can act under Chapter 7 only in the presence of a threat to peace, a breach of the peace or an act of aggression, and its action is functionally limited to maintaining or restoring international peace and security.

To justify the attribution to the UN of functions relating to the responsibility to protect, therefore, one must alternatively demonstrate that this responsibility fulfills the conditions laid down by the Charter or that an enlargement

of the set of objectives assigned to the UN action under Chapter 7 has taken place.

A precise analysis of this issue falls outside the scope of the present analysis. Action necessary for discharging the UN's responsibility to protect, and in particular action involving use of force, may be based on a broad but still reasonable interpretation of the provisions of the Charter, in particular of the notion of threat to peace, which, under Art. 39, constitutes the essential premise for interventions based on Chapter 7. Alternatively, in a constitutional perspective, the enlargement of the functions assigned to the UN can be based on recent practice, which more and more tends to assign to the UN functions relating to its role as a structure of government of the international community. In this perspective, military force could be used not only to prevent or respond to a threat to peace, but also to enforce fundamental values of the international community. This tendency may be underpinned by a number of conventions which attribute to the UN a role not expressly contemplated by the Charter but connected with its primary responsibility to maintain and restore international peace and security.[4]

The second step in this line of argument consists of demonstrating that the UN possesses the means to discharge the new functions efficiently. The assignment to the UN of new functions connected with the responsibility to protect requires that the duty to protect be implemented in the framework of the institutional and normative setting of the UN. However, the procedural rules of the Charter do not enable the UN organs to react promptly to situations of humanitarian crisis and to fulfil their duty to protect.

The most comprehensive attempt to adjust the system of the competence of the various UN organs was made by the Secretary General in his report "*Implementing the Responsibility to protect,*" of 12 January 2009 (A/63/677). On the one hand, the report is inspired by the intent to attract the responsibility to protect within the legal framework of the UN and, thus, to vest the doctrine with an institutionalised environment. On the other hand, it advocates a series

4 The example which first comes to mind is Art. 8 of the Genocide Convention, which confers upon either contracting party the right to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3." See G. Gaja, *The Role of the United Nations in Preventing and Repressing Genocide*, in *The UN Genocide Convention: A Commentary* (P. Gaeta ed.), Oxford, 2009, p. 405 ff.; A. Zimmermann, *The Obligation to Prevent Genocide; Towards a General Responsibility to Protect ?*, in *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, *supra*, note 2, at 629 ss.

of changes to be made in the institutional setting of the UN to enable it to live up to its new role.

It is worth pausing on the changes concerning the two main political organs of the UN: the SC and the GA.[5]

The report tends to convey the idea that the existence of a duty to protect may be at odds with the complexities of the decision-making process of the SC, and, in particular, with the power of veto given to each of the five permanent Members. In order to overcome this hurdle, the report envisages a special responsibility for the permanent Members: "within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect."

Interestingly, the report tends to focus on a duty of the States within the SC rather than of the SC itself. The States members of the Council and, in particular, the permanent members have the duty not unduly to hamper SC action by using their voting rights.[6] Although tantalising, this perspective is not free

5 There are only minor changes to the role of the SG. The report assigns to the SG the role of keeping the SC and the GA informed and of promoting action. Para. 619 of the report reads: "the Secretary-General has an obligation to tell the Security Council—and in this case the General Assembly as well—what it needs to know, not what it wants to hear. The Secretary-General must be the spokesperson for the vulnerable and the threatened when their Governments become their persecutors instead of their protectors or can no longer shield them from marauding armed groups." This function fits well within the political role assigned to him by the Charter, in particular, by Art. 99.

6 This conclusion would entail the previous demonstration that the responsibility to protect has already evolved into a fully-fledged legal rule requiring every single State to use its powers and prerogatives as a member of the UN in order to secure the protection of the fundamental rights. For the reasons stated above, such a demonstration cannot be easily assumed. However, a positive duty of the States members of the SC to prevent or to repress serious violations of fundamental rights may derive from specific obligations such as, for example, Common Art. 1 to the four Geneva Conventions of 1948, according to which "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" and Art. 1 of the Genocide convention, according to which "(t)he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." See A. Zimmermann, *The Obligation to Prevent Genocide; Towards a General Responsibility to Protect ?*, *supra*, note 5.

from inconvenience. To demonstrate that a State has disregarded its duty and has abused its voting right appears, even intuitively, a *probatio diabolica*.[7] Presumably aware of these difficulties, the report indicates that the duty of the permanent Members to assist the SC in the discharge of its responsibility to protect should be strengthened by a "mutual understanding" among the SC members. The existence of such an understanding would give each of the parties the power to control compliance by the others and, possibly, to enforce it.

The report points to another instrument designed to facilitate the implementation of the responsibility to protect. The GA should have the power to intervene, and even to recommend measures implying the use of force, in the event of a failure of the SC to act.

> The General Assembly has an important role to play, even under pillar three. Its peace and security functions are addressed in Articles 11, 12, 14, and 15 of the Charter. Article 24 of the Charter confers on the Security Council "primary," not total, responsibility for the maintenance of peace and security, and in some cases the perpetration of crimes relating to the responsibility to protect may not be deemed to pose a threat to international peace and security. Moreover, under the "Uniting for peace" procedure, the Assembly can address such issues when the Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members. Even in such cases, however, Assembly decisions are not legally binding on the parties.

The assignment to the GA of a secondary role might constitute a powerful incentive for the SC to discharge its primary responsibility to protect. However, from a legal perspective, this assumption is not immune to criticism. First, it is based on a recurrent misconception of the institutional dynamics of the SC. The failure by the SC to adopt a decision as the result of the veto of one or more of its permanent Members does not amount to the blocking of the procedure.

7 The presumption that a State which votes against a draft resolution authorising use of force violates an obligation deriving from its responsibility to protect would entail that R2P embodies an obligation to vote in favour of whatever measure is allegedly directed to stopping massive violations of human rights. For different views on this point see A. Peters, *The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members*, in *From Bilateralism to Community Interest*. *Supra*, note 2, at p. 297 ff., esp. at p. 314 ff.; and P. Palchetti, *Sulla responsabilità di uno Stato per il voto espresso in seno ad un'organizzazione internazionale*, in *Rivista di diritto internazionale*, 2012, p. 352 ff.

It rather amounts to a rejection of the proposal. It would be bizarre to assume that the SC voting mechanism works properly only if a proposal is adopted. The rejection of a proposal can hardly be considered as evidence of the malfunctioning of the SC, and rather represents one of the possible outcomes of the procedure. Moreover, far from constituting a pathology of the procedure, the requirement for unanimity of the permanent Members expresses on the legal plane, the political balance of powers on which the entire system of the UN rests.

III The Libyan Crisis: A Yardstick for the New Functions Assigned to the UN?

The difficulty to frame the R2P doctrine within the system of competences of the UN organs is epitomised by the events following the Libyan crisis in the first half of 2011.

A quick reference to the main points of the crisis, largely notorious, will serve our purpose.

- SC Resolutions 1970 and 1973 expressly referred to the R2P doctrine in order to justify the UN's intervention;
- In particular, in Resolution 1973, the SC found that the Libyan authorities had failed to abide by their duty to protect civilians and, in fact, were actively involved in massive attacks on civilians;
- The adoption of that resolution was made possible by the abstentions of two permanent members and other non-permanent members. Although politically disagreeing with the proposed action, those members nonetheless abstained from using their power of veto.

These events may be seen as an implementation, albeit imperfect, of the scheme advocated by the abovementioned report of the UN SG. The various UN organs have considered that the need to prevent a major humanitarian crisis justified the intervention of the UN on behalf of the international community. Though funnelled through the comprehensive notion of threat to peace, the two Resolutions 1970 (2011) and 1973 (2011) are clearly based on the idea that the competence of the UN extends to the protection of the civilian populace from aggressive action by the State authorities. In this context, the decision of some permanent members to abstain, albeit politically dissenting from the launching of the operation, seems to express their will not to hinder the SC in discharging its new responsibilities.

However, this new harmony in the name of humanitarian values was soon dispelled by subsequent events and, in particular, by the action designed to implement the authorisation to use military force laid down by Resolution 1973 (2011). The implementation demonstrated a gradual and progressive detachment between the military action and its stated humanitarian purposes, and soon dissolved the unity of intent within the international community and among the permanent Members of the SC. The intervening States seem to have considered that the ultimate objective of the military action was to prompt regime change, seen as a necessary political condition to secure long term respect for human rights. Other States and international organisations expressed the view that military action went well beyond the humanitarian objectives and was aimed at altering the balance of power in Libya in favour of the intervening States. The dubious consistency between the military action and its stated humanitarian purposes was highlighted by the two permanent States whose abstention had made the SC authorisation possible, by other States, members and non-members of the SC, and by international organisations which acted side by side with the SC in the first phases of the action.[8]

Ultimately, this split has seriously undermined the credibility of the UN as the sole entity with the legitimacy to act on behalf of the international community and to exercise the responsibility to protect.

The Libyan case etc. Libyan case has shown the main weakness of the doctrine of the responsibility to protect, the implementation of which rests, through the screen of the SC resolutions, on unilateral intervention by the most powerful component of the international community. After the precedent of Libya, it seem unlikely that the other Members of the SC and, in particular, the permanent Members will authorise military action designed to protect the civilian populace threatened by impending humanitarian catastrophe unless the SC proves able to exercise strict control of military action so as to avoid unilateral deviations.

The lesson to be drawn from the Libyan crisis is ambivalent and, in the end, amounts to a true dilemma. On the one hand, the system of the unilateral implementation of SC authorisations does not appear appropriate when the responsibility to protect is at stake. On the other, and from a realistic viewpoint, no State will be available to employ financial and human resources in a military intervention without having in mind a return in political, economic or strategic terms.

8 See the declaration of the Russian foreign Minister, Sergiei Lavrov, at the Russia- NATO Council session of the 4th of July in Sochi: "We honestly admit that we have no common view with NATO on how this resolution [1973] is being implemented…" (www.globalsecurity.org).

For all these reasons, the Libyan crisis represents a litmus test for the operation of the new system. The aftermath of that crisis seems to demonstrate that the unilateral implementation of Resolutions 1973 (2011) is having far-reaching implication and can potentially disrupt the attempt to frame the responsibility to protect by the institutional and normative framework of the UN.

This unhappy outcome is further upheld by the events concerning the Syrian crisis, which presents a factual paradigm analogous to that presented by Libya. On October 4, 2011, Russia and China, backed by Bric states and others, failed to pass a draft resolution the text of which echoed the responsibility to protect of the Syrian authorities, even if not contemplating any authorisation to use force. The Libyan precedent hung heavily over the debate. From the declarations of the representatives of States which voted against the proposal or which abstained, the preoccupation emerges that the mention of the doctrine of the responsibility to protect in the resolution might have expressed political support from the SC for unilateral action and, ultimately, might constitute a blind mandate for regime change.[9]

Concluding Remarks and Recommendations

The hallmark of the R2P doctrine, which distinguishes it from the old doctrine of humanitarian intervention, is the emphasis on the duty of the international community instead of the defaulting territorial State to secure fundamental human rights.

9 See various interventions at the SC 6627th meeting, Tuesday, 4 October 2011, 6 p.m., S/PV.6627. In particular, see the declaration of the Representative of South Africa, Sangqu: "We have seen recently that Security Council resolutions have been abused, and that their implementation has gone far beyond the mandate of what was intended. He further expressed his concern that this draft resolution not be part of a hidden agenda aimed at once again instituting regime change, which has been an objective clearly stated by some." Even more explicit was the declaration of the Representative of the Russia Federation, Churkin: "The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect." Another draft Resolution, S/2012/538, proposed by France, Germany, Portugal, the United Kingdom and the United States, threatening sanctions on the Syrian regime was vetoed on the 19 July 2012 by Russia and China. For an account of the debate see S/PV.6810. See also the draft Resolution presented at the 6711th meeting of 4 February 2012.

The new function assigned to the international community seems to require a development in the competence of the UN, which allows it to change from a mere system of collective security to an entity having the power and even the duty to ascertain the existence of a grave breach of fundamental human rights and to stop it. The political precondition for using the system of collective security in the service of human rights is the impartiality of the SC and the independence of its action from the strategic goals of its members.

The Libyan crisis was the litmus test for the functioning of the new system. In spite of the great expectations it raised in the international community and in world public opinion, it has revealed the fragility of the legal paradigm underlying the responsibility to protect. In consequence, therefore, this doctrine is suffering serious setbacks and one cannot envisage whether it can survive it.

In order to re-launch the responsibility to protect within the UN framework, the Secretary General should consider other options and further adjustments, which do not pertain solely to the decision making procedure but also, and perhaps foremost, to the process of implementing R2P through UN action. The focus on SC supervision should soothe the anxieties of States about possible abuse of the mandate. Procedures aimed at establishing SC control could include a more precise definition of the humanitarian objectives, a final term for the mandate with the consequence that the furtherance of the military operations beyond that term must be based on a new resolution, a system of liaison between the SC and the command chain on the ground, the establishment of a commission entrusted with the control of the respect for humanitarian law by the intervening States.