

FROM RIGHTS TO RESPONSIBILITIES

The international community's responsibility to protect vulnerable populations

ANDRÉ STEMMET

This article aims to explore possible avenues that the international community can use in order to justify forcible intervention in sovereign states in cases where gross and systematic violations of the human rights of the population take place, but where the legal authority for such intervention is not forthcoming from the United Nations Security Council. Two possible justifications are identified: the doctrine of humanitarian intervention, which despite being controversial, enjoys a measure of acceptance due to the practice of states in this regard, and the notion of an international responsibility to protect vulnerable populations and individuals. The latter option, despite a vague and uncertain legal basis, offers several advantages: it focuses on the suffering of human beings and not on the rights of states, it enumerates clear and definable thresholds for intervention by the international community and acknowledges that intervention is only one step in the process of achieving peace, to be preceded by preventive action and followed by post-conflict reconstruction. It is submitted that elements of the notion of an international “responsibility to protect” are to be found in the Constitutive Act of the African Union and especially the Protocol on the Establishment of the Peace and Security Council. Furthermore, the principles underlying this notion, as developed by the International Commission on Intervention and State Sovereignty may serve as guidelines in decisions by the Assembly to authorise interventions in AU members.

“... if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”

Kofi Annan, Secretary-General of the UN

“The whole of our common morality, in which we speak of obligation and duty, right and

wrong, moral praise or blame... this network of beliefs and practices on which all current morality seems to me to depend, presupposes the notion of responsibility and responsibility entails the ability to choose between black and white, right and wrong... and the whole constellation of moral values in terms of which most people... do in fact live”¹

Sir Isaiah Berlin, British philosopher

Introduction

At the beginning of the twenty-first century it is generally accepted that one of the basic norms of the international legal order and international society is that all human beings have inalienable human rights. The fundamental rights of human beings, foremost of which is the right to life, are contained in a dense and integrated web of universal and regional human rights treaties, while also being reflected in the domestic constitutions of many states. The state, on the basis of being party to international or regional human rights treaties, is in this way being obligated towards other state parties to such treaties to uphold and protect, and ensure the protection of, the fundamental human rights of its citizens.

This theoretical model for human rights protection ascribes to the traditional principles of international law and the modern state system: that states are sovereign and equal, assumptions also underlying the Charter of the United Nations. Because of these assumptions, it was traditionally considered that a state was bound only by those treaty obligations it specifically consented to. Furthermore, states were also prohibited from interference in "matters essentially within the domestic jurisdiction of any state", as this principle has been captured in Article 2(7) of the Charter.

While the Charter then reflects the basic assumptions of state sovereignty, it did in one important respect limit sovereignty: the prohibition of the use of force by states in their international relations (unless authorised by the Security Council or in self-defence), contained in Article 2(4). In cases where inter-state conflicts did occur, the legal framework provided by international humanitarian law served as the instrument to protect civilian populations.

However, neither international law nor the international situation is static. A number of tentative and weak provisions on human rights protection contained in the Charter have provided the spark for international law to develop to the point where it is now generally accepted that certain human rights norms are of a peremptory nature (*ius cogens*), binding

states irrespective of whether they have consented thereto in a treaty, in this way undermining the non-intervention provisions contained in Article 2(7). Such *ius cogens* norms include the prohibition of genocide, crimes against humanity, war crimes, enforced disappearances, murder and torture, and their violation is now considered to be a matter of international concern.

The state and the nature of conflict have also undergone change. The decade of the 1990s represents a turning point in the biography of the state: developments such as the resurgence of ethnic and religious conflicts within states, the syndrome of the weak/failed state unable to protect its citizens against gross human rights abuses and cases of the brutal repression of democracy and human rights by the very governments obligated to protect their citizens, challenged traditional assumptions regarding the state and international order. It further became clear that there exists a direct link between the security of the state and what became known as human security: gross human rights abuses and intra-state conflicts and their effects may, if left unchecked, destabilise regions and even affect the international system as a whole. Furthermore, the elevation of human rights to a matter of international concern raised the legitimate expectation that the international community should act in cases where the objects of human rights protection, the individual and vulnerable groups, fell victim to gross human rights abuses by the state or where the state was unwilling or unable to provide protection.

The aim of this article is to explore recent developments regarding possible avenues open to the international community for the protection of populations being subjected to grave human rights abuses in cases where military measures are required to do so, but the legal authority from the Security Council is not forthcoming, as was the case with NATO's unilateral action against the Federal Republic of Yugoslavia in 1999 over ethnic cleansing in the Kosovo province.

These developments resulted in a dilemma for international law, succinctly summarised by Rytter² as follows:

“On one hand, the development of international law in the twentieth century has been dominated by the common experience of two world wars, convincing the international community that recourse to the use of force to solve international disputes is not only a violation of state sovereignty but, in the long run, is also detrimental to the international community at large. The UN Charter has therefore generally outlawed all use of force between states, except for self-defence against an armed attack and use of force authorised by the UN Security Council.

On the other hand, international law is increasingly concerned with the protection of individuals, thereby limiting the sovereignty of states to treat their own citizens at discretion. Since 1945, numerous instruments have been adopted for the protection of basic human rights and for the protection of civilians during armed conflict. The most fundamental norms of human rights and international humanitarian law are now considered obligations towards the international community as a whole (*erga omnes*).”

As the Charter prohibits the use of force in international relations unless it has been explicitly authorised prior to the action by the Security Council upon determining the existence of a threat to the peace, a breach of the peace or an act of aggression in terms of Chapter VII powers, the doctrine of humanitarian intervention has often been advanced as a legal justification for military intervention in the absence of Security Council authority.

Humanitarian intervention

The practice of the use of armed force by a state or group of states in order to terminate gross human rights violations in another state and in violation of such state’s sovereignty and territorial integrity, has its roots in the intervention by European states in the Ottoman Empire in order to protect their citizens or the minority Christian populations. Since the adoption of the Charter in 1945 a number of military interventions in states where civil wars or gross human rights abuses

took place, have taken place in the absence of Security Council authorisation, notably the Tanzanian intervention in Uganda in 1979, the Indian intervention in East Pakistan (Bangladesh) of 1971 and “Operation Provide Comfort,” undertaken by the Allied forces in Northern Iraq in 1992 in order to protect the Kurds against Saddam Hussein’s forces.

In order to justify these interventions, the intervening states revived the pre-Charter doctrine of humanitarian intervention in view of the prohibitions on the use of force and interference contained in Articles 2(4) and 2(7) of the Charter. Apart from being open to abuse, the legitimacy and legality of such a doctrine of intervention without authorisation from the Security Council remains a controversy among states and legal scholars with no consensus in sight, and which has been rekindled by NATO’s intervention in Kosovo in 1999. Harhoff³ summarises the three approaches regarding the legality and legitimacy of the doctrine as follows:

1. “The affirmative position, which asserts—on various grounds—that humanitarian interventions are indeed both legitimate and lawful under international law and that the Kosovo intervention, accordingly, had a sufficient legal basis;
2. the legalist position, which adversely denies the lawfulness of resort to armed force beyond the accepted special cases—regardless of the purpose—and therefore rejects the legality of the Kosovo intervention; and
3. the reformist position which holds that international law is currently unable to provide any clear position on the legality of humanitarian interventions and, in the absence of such clarity, *accepts* the possibility that humanitarian interventions after all might be considered lawful under certain conditions and therefore focuses on the attempt to identify these conditions and reform the law.”

Harhoff comes to the conclusion that “contemporary international law is currently unable to provide a clear answer to the question of whether or not unauthorised armed interventions for humanitarian purposes are unlawful.” He concluded that NATO’s intervention may

be considered as part of an emerging customary law principle, and can therefore not be dismissed out of hand as unlawful. Other scholars who hold this view have drawn a “checklist” of prevailing conditions that will lend legitimacy to such an operation.

The following criteria to justify humanitarian intervention have been developed:⁴

- gross and egregious breaches of human rights involving the loss of life of hundreds or thousands of people, amounting to crimes against humanity in a sovereign state, either by the central authorities or with their connivance or support or because of their total collapse such authorities cannot impede those atrocities;
- the Security Council is unable to take any coercive action to stop the massacres because of disagreement amongst the P5 or the exercise of the veto;
- all peaceful avenues to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted;
- a group of states (and not a single state) decides to attempt to halt the atrocities, with the support, or at least the non-opposition, of the majority of UN member states;
- armed force is exclusively used for the limited purpose of terminating the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose.

Other scholars, however, follow the traditional approach, arguing that human rights developments did not have an influence on the importance and interpretation of Article 2(4), that state practice does not support such a rule and that it is open to abuse, while also rejecting justifications for intervention based on “necessity” or “emergency”.⁵

A possible solution to this seemingly intractable dilemma between legal and moral considerations has been proposed by Rytter⁶ who argues that interventions like the one in Kosovo should not be justified in legal terms, but that an emergency exit from international law, justified solely on moral grounds, should be recognised in *ad hoc*, extreme cases only: “This leaves open the door for intervention in extreme cases of human suffering, but at the

same time avoids jeopardising the existing, hard-earned international legal order and the central role of the Security Council”.

The responsibility to protect vulnerable populations

The controversy regarding the doctrine of humanitarian intervention and the inability of the international system to, in a number of deserving situations, afford protection, as well as a challenge by UN Secretary-General Kofi Annan to the international community to find innovative ways to address the conflict between the concept of state sovereignty and the moral duty to protect populations at risk, led the Canadian Government to establish the International Commission on Intervention and State Sovereignty. Consisting of twelve eminent persons from all continents, it commissioned a study with the aim of finding an alternative and less controversial approach to the discourse on intervention.⁷ In terms of this approach, the focus should not be on a right to intervene, but rather that the international community should rather recognise a “responsibility to protect” civilian populations against excesses such as massacres, mass starvation, genocide and ethnic cleansing, whether perpetrated by governments or non-state actors. This new paradigm acknowledges that the primary responsibility to protect populations rests with the state concerned, but holds that when that state is unable or unwilling to fulfil this responsibility or is itself the perpetrator, the threshold for international action is reached. Marking a further shift in thinking on the issue, it is submitted that the notion of the “responsibility to protect” is an umbrella concept not only consisting of reaction to events, but also including a “responsibility to prevent” and a post-conflict “responsibility to rebuild”.

According to one of the co-chairs of the Commission, former Australian Prime Minister Gareth Evans, changing the terminology from “intervention” to “protection” has the advantage of evaluating the issue from the point of view of those in need of support instead of that of the interventionist state. This also entails a

paradigm shift under the impact of human rights on the understanding of the essence of the concept of sovereignty: a shift from a paradigm of control to one of responsibility and respect for the rights of citizens.⁸

Evans defines the “responsibility to protect” as “a duty to react to situations in which there is compelling need for human protection.” The threshold for intervention by other states is a failure of preventive measures and an inability or unwillingness by the state in question to act. Once this threshold has been reached, other states may apply coercive measures, including political, economic or judicial action. Military force, however, may only be employed in extreme cases, upon six interlocking principles being satisfied: the just cause threshold, the precautionary principles of right intention, last resort, proportional means and reasonable prospects of success, while finally the “right authority” must be obtained.

Just cause

The Commission derived the “just cause” requirement from the philosophical tradition of “just war”. Military intervention for the purpose of protecting a population is considered as exceptional and extraordinary, to be limited to the following situations:

- 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; or
- large scale ethnic cleansing, actual or apprehended, forced expulsion, acts of terror or rape.

While the criteria for intervention are very strict, the anticipatory element is to be welcomed, bearing in mind the cases of Bosnia, Rwanda and Kosovo.

The precautionary principles

Right intention

The primary purpose of the intervention must be to terminate or avert human suffering. The possibility of abuse will be less in cases of collective or multilateral action than when a single state undertakes the intervention.

Last resort

As military force is an extreme measure, it can only be justified when all non-military alternatives for the prevention or peaceful resolution of the crisis have been considered, and there exists a reasonable belief that lesser measures would have been unsuccessful.

Proportionality

This ancient legal principle also originating in just war doctrine, holds that the scale, duration and intensity of the military action should be the minimum required for obtaining the protection objective.

Reasonable prospects

Also originating from just war doctrine, this precautionary principle requires that military intervention should only take place if there exists a reasonable chance of halting or averting the suffering that justified the intervention, with the consequences of action not likely to be worse than those of inaction.

The right authority

The most appropriate body to authorise military intervention for human protection purposes remains the UN Security Council. However, should such authority not be forthcoming, may be as a result of an “unreasonable veto”, the legal basis for military action is threatened. In such a situation, two institutional options are identified: one for the General Assembly to authorise intervention in terms of an emergency special session under the “Uniting for Peace” procedure, or for regional or sub-regional organisations to act under Chapter VII of the Charter and obtain *ex post facto* authorisation from the Security Council (as was the case with the ECOWAS interventions in Liberia and Sierra Leone in the 1990s.)

Evans⁹ concedes with regard to the “responsibility to protect” that this new principle cannot be said to be customary international law yet, but he argues that it is sufficiently accepted in practice to have attained the status of a *de facto* emerging norm. This is a controversial statement: it is not known that any state or international organisation has as yet sought to

justify military intervention on the basis of a responsibility to protect. In contrast, humanitarian intervention has gained a measure of legality on the basis of state practice.

However, despite the fact that the notion of the responsibility to protect lacks the required state practice to provide it with a foundation in international law, it offers a clear and comprehensive theoretical framework for approaching one of the major challenges facing the international community at the beginning of the twenty-first century. Its major contribution to the discourse on the protection of vulnerable individuals and groups is to balance the rights associated with state sovereignty with the responsibility conferred on the state by the development of human rights law. Although underscored by a measure of state practice and despite the attempts by eminent jurists and others to enumerate acceptable criteria for intervention (strongly paralleling those proposed as the basis for the responsibility to protect), the doctrine of humanitarian intervention lacks this focus on the changing content of sovereignty.

Customary international law, based on the practice and opinions of states, is a notoriously elusive concept, as is evident from the inconclusive debates on the customary law status of humanitarian intervention. Treaties serve to codify and clarify international legal principles and the legal basis of doctrines remains uncertain in the absence of such codification. In view of the widely differing interpretations of sovereignty in the international community, it is not foreseen that the concepts of the “responsibility to protect” or humanitarian intervention will in the near future be the subjects of treaty negotiations. The discourse on restructuring the international peace and security architecture in order to create legal certainty regarding protective interventions will therefore still continue unabated and inconclusive for a considerable time.

The African Union

The problems experienced by the international community to effectively address intra-state conflicts and prevent and terminate gross human rights abuses and the paradigm shifts occurring in the discourse on the subject,

however, appear to have had an effect on the drafting of the Constitutive Act of the African Union (AU) and relating instruments dealing with peace and security.

While the AU’s predecessor, the Organisation for African Unity, was firmly built on the rock of sovereignty, the protection of state sovereignty contained in the principle of non-interference in Article 4(g) of the Constitutive Act of the AU is relativised by the next provision: an inherent right by the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, enumerated as war crimes, genocide and crimes against humanity¹⁰. Given the nature of the grave circumstances provided for, it stands to reason that besides non-forcible measures, the use of military force has been mandated by this provision.

The Protocol Relating to the Establishment of the Peace and Security Council of the African Union operationalizes the AU’s peace and security mandate. The principles contained in the Protocol show strong similarities to the norms and principles underlying the concept of the “responsibility to protect”. The Protocol balances the principles of respect for the sovereignty, territorial integrity and equality of Member States and the principle of non-interference (contained in Article 4(e)–(h)) with a strong emphasis on the promotion and protection of fundamental human rights and freedoms (Article 3(f) and 4 (c)), while confirming in Article 4 (j) the right of the Union to intervene in a Member State without such state’s approval. The preventative mandate has been well developed: provision is made for anticipation and prevention of conflicts (Article 3(b) and 7(b)) and early responses to contain crisis situations (Article 4(b)). A strong focus on post-conflict peace-building and reconstruction (Article 6(e) and 7(b)) and humanitarian action in case of disasters (Article 6(f)) emphasises that the protection of populations at risk entails more than coercive military action, reminding of the “responsibility to rebuild” dimension of the notion of protection.

Article 7(f), providing that the Peace and Security Council must approve the modalities for intervention consequent to a decision by the Assembly, offers the opportunity to the

Council, working creatively, to also develop the principles upon which the Assembly could consider intervention, and in this regard the six principles developed by the International Commission on Intervention and State Sovereignty can provide valuable guidance.

The Preamble's confirmation of the UN Security Council's primary responsibility for the maintenance of international peace and security and its provisions relating to closer co-operation with the UN in addressing security issues in Africa, relate to the question of authority. It creates the opportunity for action by the AU in urgent cases, seeking *ex post facto* authority from the UN Security Council, a procedure mirroring one of the institutional solutions proposed in the International Commission's study.¹¹ It is submitted that, in practice, it is highly unlikely that the Security Council will withhold endorsement in cases where the AU takes the responsibility to address a grave humanitarian situation in a Member State. The fact that the right to intervention is not accorded to individual Member States but to the AU as a regional organisation, establishes a linkage with the provisions of Article 53 of the Charter, which provides for a role for regional organisations in matters relating to peace and security.

Conclusion

While its legal basis remains vague and uncertain, the concept of an international responsibility to protect populations at risk has several advantages over international law's old and tired warhorse, intervention. Firstly, it puts the focus on the heart of the problem: the suffering of human beings. Secondly, it enumerates clear and definable procedures and thresholds for intervention by the international community, limiting the risk of abuse. Thirdly, it acknowledges modern thinking on peace and security theory, namely that intervention to stabilise the situation in a state is only one the steps to achieve durable peace and security in a community, to be preceded by preventive action and followed by post-conflict construction.

This represents an important step forward in the search for a way out of the inherent conflict between the traditional foundations of the

international system and the new challenges facing the international community, which in the past often paralysed international action, resulting in failure to protect the vulnerable. The theoretical structure of an international responsibility to protect the vulnerable presents an escape route from the legal constraints inherent in the controversial (and much abused) concept of humanitarian intervention.

These attributes shape it into a suitable tool for use on the African continent, with its high share of especially intra-state conflicts. The challenge for the future will be for the AU and its member states to match the somewhat idealistic design of its new peace and security architecture with appropriate action and to subordinate specific political, economic and strategic interests to the continental good.

Notes

1. I Berlin, 'My Intellectual Path', *New York Review of Books*, No.8, 1998, p 60.
2. JE Rytter, 'Humanitarian Intervention Without the Security Council: From San Francisco to Kosovo and Beyond,' *Nordic Journal of International Law*, Vol.60, 2001, p 123.
3. F Harhoff, 'Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?', *Nordic Journal of International Law*, Vol.60, 2001, p 69.
4. A Cassese, 'Ex iniuria ius oritur: Are we moving towards international legitimisation of forcible humanitarian countermeasures in the world community?', *European Journal of International Law*, Vol.10, 1999, p 21; 'A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis,' *European Journal of International Law*, Vol.10, 1999, p 791; S Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford: Oxford University Press, 2001, p 228; R Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention,' *Virginia Journal of International Law*, Vol.41, 2001, p 936.
5. See P Hilpold, 'Humanitarian Intervention: Is there a need for a legal reappraisal?' *European Journal of International Law*, Vol.2, 2001, p 452; T Gazzini, 'NATO's Coercive Military Activities in the Yugoslav Crisis', *European Journal of International Law*, Vol.2, 2001, p 392.
6. Op cit, p.158.
7. See 'The Responsibility to Protect: Report of the International Commission on Intervention and State Responsibility', <<http://www.dfait-maeci.gc.ca/iciss-ciise/research-en.asp>> p 21 (20 September 2003).

8. G Evans, 'The Responsibility to Protect: Revisiting Humanitarian Intervention', *Foreign Affairs*, Vol. 81, Nov/Dec 2002, p 100.
9. Op cit, p 103.
10. Article 4(h) has subsequently been amended to include a further ground for intervention, namely "a serious threat to legitimate order to restore peace and stability in a Member State." This amendment has not yet entered into force.
11. See K Kindiki, 'The Normative and Institutional Framework of the African Union relating to the Protection of Human Rights and the Maintenance of Peace and Security,' *African Human Rights Law Journal*, Vol.3, No. 1, 2003, p 97 for an analysis of the relationship between the AU and the UN Security Council on the question of the authority to use force.