

MILITARY INTERVENTION AND THE INDETERMINACY OF THE RESPONSIBILITY TO PROTECT

Nothing in the UN Charter precludes a recognition that there are rights beyond borders. What the Charter does say is that 'armed force shall not be used, save in the common interest.' But what is that common interest? Who shall define it? Who shall defend it? Under whose authority?

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WHAT SHOULD MEMBER STATES OF THE SO-CALLED "INTERNATIONAL COMMUNITY" do when one of them does not assume its functions of protecting its own population, but instead abuses its power and uses all the means at its disposal to foment, foster or let perpetrate massive and systematic human rights violations? How shall they collectively react "in the common interest" to put an end to these atrocities?

While this violence inflicted on a state's population, generally with the complicity of those in charge of its protection, as well as of all the states who persist in their indifferent silence, is not strictly speaking new in human history, awareness that these extreme acts are not acceptable anymore and will no longer be so placidly contemplated by those witnessing them, is now commonly shared. What is also commonly shared, one could argue, is the conviction that when faced with this kind of action, the international community should be able to intervene as a last resort and use if necessary coercive force without the state's consent within which the force will be used, with the intention of protecting a population where its own government's action or inaction appears to be menacing it, where the wrongs suffered are most likely worse than what comes from the use of coercive force, and where the said population might plausibly wish to undergo such consequences. However, this view again begs an indispensable question: did the use of military force really open the door to justice?

The conditions, modalities, and merits of using force, especially military force, to protect innocent people when their security or even their very survival is thought to be at stake because of the action or inaction of their own government has always been controversial. As Annan hints in the previous quote, debates have constantly been fraught with difficulties when it comes to determining which principles, rules, and norms will guide our

¹ Kofi Annan, "Two concepts of Sovereignty," *The Economist*, (September 18, 1999).

actions as members of a political community. Defining these might even appear, as Hannah Arendt wrote, as "the foremost political issue" of all times.² Therefore, even though we might perceive these principles, rules, and norms, based on their overall utility, as some instrumental criteria of rational decision-making, we shall, on the contrary, find them extremely revealing of the manner in which the members of a given community assert their shared values, which represent what their respective rights and duties are as members of that community.

Within the international community, which is an imperfect association with limited purposes and mostly made up of states still keeping to all intents and purposes a monopoly on the legitimate use of physical violence, the general interdiction of the threat or use of force written in Article 2 § 4 of the United Nations (UN) Charter is usually considered as a peremptory rule of international law (*jus cogens*), accepted and recognized as such by the international community, and forbidding any derogation whatsoever. Two exceptions were nevertheless forecasted in the Charter and have been framing the legitimate use of force since 1945. On the one hand, the authorization to take any measures judged necessary "to maintain or restore international peace and security" that the UN Security Council can give in pursuance of Charter Articles 24, 39, and 42. On the other hand, "the inherent right of individual or collective self-defence if an armed attack occurs." Article 51 allows states to keep this right until the Security Council is able to take appropriate measures.³

Even though, during the Charter negotiations at the San Francisco Conference in 1945, various propositions were put on the table for the purpose of inserting an additional clause in case of any "clear violation of essential liberties or human rights," the resort to coercive measures motivated by the protection of threatened populations has not been accepted as a third exception to the general interdiction on the use of force. States were then too fearful of opening the door to abuse. Therefore, after some debating, the resulting Charter Article 2 § 7 insisted on the crucial rule of non-intervention "in matters which are essentially within the domestic jurisdiction of any state." Coupled with Article 2 § 4, the non-intervention rule was considered a fundamental corollary of the "sovereign equality" principle stated in Article 2 § 1 and, consequently, as an altogether essential element for the maintenance of international peace and security, which is presented in Article 1 § 1 as the "first purpose" of the UN.

Sixty years later, at the end of the World Summit held in September 2005, the UN General Assembly adopted an Outcome Document in which member states finally endorsed the concept of the Responsibility to Protect (R2P) a population suffering from serious harm (genocide, war crimes, ethnic cleansing, and crimes against humanity) when national authorities fail to protect it, whether because they are unwilling or because they are unable to offer them protection.⁴ The Outcome Document suggested that, under these circumstances, the presumption of non-intervention in domestic affairs should yield to that of an international responsibility to protect. The concept of R2P was first emphasized by Francis M. Deng in his work related to the fate of vulnerable groups like displaced populations and refugees⁵ and then developed in a key report

² Hannah Arendt, *The Promise of Politics*, ed. Jerome Kohn, (New York: Schocken, 2005), 147.

³ Note that there is a third, now out of date, exception "against any enemy state"—*i.e.* Germany, Italy, and Japan—authorizing the use of coercive measures without Security Council authorisation (Articles 53 § 1 and 107).

⁴ United Nations General Assembly, "2005 Summit Outcome", A/60/L.1 (September 20, 2005): § 138.

by the International Commission on Intervention and State Sovereignty (ICISS) in 2001.⁶ It was subsequently interpreted by the UN Secretary-General High-level Panel on Threats, Challenges and Change as a new "emerging norm" of "collective international responsibility to protect."⁷ The Secretary-General Kofi Annan later insisted, in his report on implementing the Millennium Declaration, that, to show their respect for fundamental human rights and people's individual dignity and worth, member states should stop paying "only lip service" and ought to accept their international responsibility of granting protection.⁸ The R2P concept has since been referred to in an important resolution by the Security Council, pertaining to the protection of civilians in situation of armed conflicts,⁹ and has often been mentioned in situations of humanitarian crisis, like in Darfur, Lebanon, Burma (now Myanmar) or Zimbabwe. Finally, in February 2008, the UN Secretary-General Ban Ki Moon announced the appointment of Edward C. Luck as Special Adviser, whose primary role would be "to develop conceptual clarity and consensus" regarding the evolving norm of the Responsibility to Protect.¹⁰

The seminal element of the R2P concept leads to revisit and re-characterize the principles, rules, and norms related to the independence and sovereignty of the state contained in Article 2 of the Charter. More specifically, the Report starts from the point of view of those needing protection with questions concerning the matters considered as "essentially within the domestic jurisdiction" of a state. As the former UN Secretary-General Boutros Boutros-Ghali wrote in *An Agenda for Peace*, back in 1992, "the time of absolute and exclusive sovereignty (...) has passed" and the state, whose primary *raison d'être* is to protect its population, should not be able to invoke the rule of non-intervention for wrongfully allowing itself to mock human rights.¹¹ Kofi Annan went further and said that while the Charter recognized and even defended the autonomy of political

⁵ Francis M. Deng, "Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced", *Leiden Journal of International Law*, 8: 2 (1995): 249-286; Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman, *Sovereignty as Responsibility. Conflict Management in Africa*, (Washington, D.C.: The Brookings Institution, 1996). See also Bruce W. Jentleson, *Coercive Prevention: Normative, Political, and Policy Dilemmas*, Peaceworks no. 35, (Washington, D.C.: United States Institute of Peace, Octobre 2000): 18-23.

⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Ottawa: International Development Research centre, 2001). Keep in mind that military interventions are one element of the social re-engineering process covert by the ICISS's Report. Other Responsibility includes a responsibility to prevent and a responsibility to rebuild.

⁷ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565 (December 2, 2004): §§ 202-203. One of the member of the ICISS was also a member of the High-level Panel: Gareth Evans.

⁸ Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005 (March 21, 2005): §§ 132, 135.

⁹ S/RES/1674 (April 18, 2006): § 4.

¹⁰ SG/A/1120 (February 21, 2008).

¹¹ Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, A/47/277 - S/24111 (June 17, 1992): § 17.

communities, and thus the sovereignty that they were historically able to establish, "it was never meant as a license for governments to trample on human rights and human dignity." Sovereignty, added Annan, "implies responsibility, not just power."¹² What remains, however, is a real dilemma: while all would readily agree "that both the defence of humanity and the defence of sovereignty are principles that must be supported," the reality is that we keep facing a seemingly intractable problem, due to the lack of further criteria that could point out "which principle should prevail when they are in conflict."¹³

Drawing on the laicized Just War lexicon, the concept of R2P wished to disentangle this Gordian Knot and move beyond the international community's failure to agree on the whole issue of humanitarian intervention; especially on "consistent, credible and enforceable standards to guide state and intergovernmental practice."¹⁴ To do this, the ICISS identified six relevant decision-making criteria: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects. Among those criteria, only the first one is really critical in the "decision-making equation." The second criteria, also crucial in that equation, is used to define the circumstances where the international community should consider exercising its responsibility to protect, once it has become clear that the national authorities of a state are not assuming their primary responsibility as they ought to. While they can still play an important role in the decision-making process, the remaining four criteria are more for the sake of prudence or precaution once a decision to intervene seems to be forthcoming.

Let's have a closer look at the critical criteria of right authority. What I would like to illustrate in this short assessment is how the argumentative structure of R2P regrettably remains vague. The ICISS considers, first and foremost, "that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes" and that it is this legal body that "should be making the hard decisions in the hard cases about overriding state sovereignty."¹⁵ Nevertheless, despite such firmness, the ICISS thinks it is necessary to resist the temptation of recognizing the Security Council as the sole entity with the legal competence to take those hard decisions, even though the commissioners add that its "authorization must in all cases be sought prior to any military intervention."¹⁶ For them, it is important to foresee resorting to other ways and following other avenues in case the Security Council "expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or (...) fails to deal with such a proposal within a reasonable time."¹⁷ In this context, the commissioners insist that the Security Council does not have an exclusive responsibility in matters of international peace and security. Charter Article 11 gives the General Assembly power to "discuss any questions" regarding the maintenance of international peace and security in case the Security Council is unable or unwilling—think

¹² Kofi Annan, "Intervention", Ditchley Foundation Lecture XXXV (June 26, 1998).

¹³ Kofi Annan, *We, The Peoples: The Role for the United Nations in the 21st Century*, A/54/2000 (April 3, 2000): 48.

¹⁴ ICISS, *The Responsibility to Protect*: § 2.2.

¹⁵ *Ibid.*: § 6.14.

¹⁶ *Ibid.*: § 6.15.

¹⁷ *Ibid.*: § 6.28.

of the veto—to fulfill its obligations. For instance, the ICISS mentions the possibility that the General Assembly may use the 1950 resolution entitled "Uniting for Peace."¹⁸ Confronted with the prospect of not getting the backing of a two-thirds vote, as it is required in the General Assembly, the ICISS suggests that regional or sub-regional organizations rally under the provisions of Chapter VIII.¹⁹

Oddly, after having given so much attention to development of the critical criteria of right authority, the ICISS commissioners finally concludes this discussion by questioning where the most important harm lies: "in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by?"²⁰ Somewhat unexpectedly, the ICISS commissioners' response did not discard the possibility that a state or an *ad hoc* coalition may unilaterally intervene to "meet the gravity and urgency of these situations."²¹ When all is said and done, how is it possible to not see this as a vicious circle? After all, and since there is still no other international body with the power to give this legitimate authorization, should it not be left up to the Security Council to decide if those conscience-shocking situations may require an intervention by the international community? Must we conclude that a Security Council's decision for non-intervention does not weigh the same as a decision to intervene?²²

If this conclusion is sound, then the price paid for reconciling the defence of state sovereignty with the defence of human rights might very well be prohibitive. This conclusion not only aims to deformalize the preemptory interdiction on the threat or use of force, but it also discloses a betrayal of the normative horizon of expectation. This horizon of expectation—that the R2P concept was hoping to widen and that depends on the R2P's capacity to be opposed to a state without being exposed to the objection of utopianism—reveals itself as being so flexible that it becomes nothing more than a mere function of politics. Therefore, while anyone should understand, from a pragmatic point of view, why the Security Council's authorization might not be a perfect option, the indeterminacy of the criteria of right authority nevertheless opens the prospect of becoming fundamentally vulnerable to being charged with apologism.²³

¹⁸ Ibid.: § 6.7.

¹⁹ Ibid.: § 6.5.

²⁰ Ibid.: § 6.37.

²¹ Ibid.: § 6.39.

²² This is what is implied by Jack Straw's comment months before the Irak "intervention:" "We are completely committed to the United Nations route, if that is successful. If, for example, we end up being vetoed (...) then of course we are in a different situation." See Julien Borger, "Straw Threat to Bypass UN over Attack on Irak," *The Guardian* (October 19, 2002), <http://www.guardian.co.uk/world/2002/oct/19/iraq.foreignpolicy>.

²³ See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge: Cambridge University Press, 2005), chap. 1.

The fundamental problem with the R2P concept is that the wished for reconciliation of state sovereignty and human rights is flimsy and fraught with numerous misunderstandings. The lack of coherence in this emerging norm for collective international protection—the problem besetting the right authority is only one example—veils something we could best describe as a strategy of "legitimacy through defiance" in which the international community, or those with enough power to speak in its name, "seek to legitimate violations of international norms, *not by disregarding* international law but rather *by virtue of the very fact that their actions violate* international law." Hence, while sacrificing the hope of an unadulterated reconciliation—which is impossible without subjecting the Security Council to a reform—that might have offered a new source of legitimacy, the R2P concept merely summons member states of the international community, or those with the power to do so, to react when confronted to such conscience-shocking situations.

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²⁴ See Nathaniel Berman, "Legitimacy Through Defiance: From Goa to Iraq," *Wisconsin International Law Journal*, 23: 1 (2005): 94.

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