Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 193

Doris König · Peter-Tobias Stoll
Volker Röben · Nele Matz-Lück (eds.)

International Law Today: New Challenges and the Need for Reform?

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Preface

Rüdiger Wolfrum celebrated his 65th birthday on 13 December 2006. On this special occasion, current and former members of the large circle of his PhD and post-doctorate students (Doktoranden und Habilitanden) organized a symposium on the subject of "International Law Today: New Challenges and the Need for Reform?" to honour him and his academic work as a teacher and researcher. The symposium took place at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg on 15 and 16 December 2006.

Since Rüdiger Wolfrum is a renowned scholar in many different fields of public national and international law, the subjects covered by the speakers and commentators reflect the wide variety of issues he worked on in his long and impressive academic career. They extend from a critical evaluation of the new responsibility to protect and the role of the UN Security Council in post-conflict management, thoughts on the proliferation of international tribunals with regard to the unity or fragmentation of international law, marine genetic resources in the deep sea and environmental protection in Antarctica to human rights issues relating to intellectual property rights and the protection of minorities. All the presentations focused on new trends in international law and thus followed the lead of Rüdiger Wolfrum who has always been at the forefront of innovative legal developments.

The symposium and the publication of its proceedings would not have been possible without the support and commitment of many whom I want to thank *in toto*. Special thanks go to *Tono Eitel*, *Thomas Mensah* and *Fred Morrison* who did not hesitate to come to Heidelberg a week before Christmas to chair the sessions of the symposium. In addition, a great deal of gratitude is owed to *Dr. Anja Seibert-Fohr* and to *Yvonne Klein* who shouldered the major part of organizing the symposium in Heidelberg, as well as to *Dr. Nele Matz-Lück* who took on the task of collecting and preparing the papers for timely publication. The linguistic quality of the contributions profited enormously from the proficiency of *Kate Elliott* who performed the native speaker check.

Hamburg, July 2007 Doris König

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Responsibility, Sovereignty and Cooperation – Reflections on the "Responsibility to Protect"

Tobias Stoll

I. Introduction

The international system and its legal structures are the subject of a broad discussion that probably dates back to the times of the fall of the Berlin wall. The turn of the millennium, the catastrophic terrorist attacks of September 11, 2001 and the attempts to reform the United Nations in 2005 have each furthered the debate. It takes place at political, diplomatic and academic level, and even includes concepts of a constitutionalisation. Due to its basic perspective, this discussion relates to a number of very fundamental concepts of international law. Among these are responsibility, sovereignty and cooperation.

Most observers agree that the 2005 UN reform attempt produced only some fairly limited results. The establishment of the Human Rights

Council and the Peacebuilding-Commission may be regarded as the most visible institutional outcome. In terms of concepts, the idea of a "responsibility to protect"[1] seems to be one of the few results. Although the set of arguments and observations which in total represent the concept of a "responsibility to protect" have not resulted in significant changes in existing or the explicit creation of new rules, the discussion is still relevant. It may importantly influence views on some fundamentals of the international legal order and have implications far beyond the issue of humanitarian intervention, which was originally the focus of the development of that concept.[2]

After a brief explanation of its origin and contents (II.), the concept of a responsibility to protect will be analysed in the light of three fundamental issues of international law, namely: responsibility (III.), sovereignty (IV.) and cooperation (V.). It will be submitted that the "responsibility to protect" in explicitly appealing to the notion of responsibility is dubious, whereas its implications for the concept of sovereignty are quite helpful. However, as will be shown, the "responsibility to protect" somehow fails adequately to take into account the dimension of cooperation.

II. "Responsibility to Protect" – The Career of a Concept

The notion of "responsibility to protect" was initially developed by an "International Commission for Intervention and State Sovereignty"

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[1] See P. Hilpold, "The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?", *Max Planck UNYB* 10 (2006), p. 35 et seq.; I. Winkelmann, "'Responsibility to Protect': Die Verantwortung der Internationalen Gemeinschaft zur Gewährung von Schutz", in: P.M. Dupuy/B. Fassbender/M.N. Shaw/K-P. Sommermann (eds.), *Völkerrecht als Wertordnung. Common Values in International Law – Essays in Honour of Christian Tomuschat*, 2006, p. 449 et seq.; A.M. Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq.; L. Feinstein/A.M. Slaughter, "A Duty to Prevent", *Foreign Affairs* 83 (2004), 136 et seq.; G. Molier, "Humanitarian Intervention and the Responsibility to Protect After 9/11", *NILR* 2006, 37 et seq.

[2] See below, text preceding footnote 4.

(ICISS) established by the Canadian Government.[3] The latter thereby responded to an initiative of the UN Secretary General, who had asked the international community to clarify the issue of humanitarian intervention. He stated:

> "… 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?"[4]

As is well known, the ICISS came back with the concept of "responsibility to protect". It basically envisages that

> "[s]tate sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself ..."[5]

and that

> "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."[6]

Furthermore, the Commission has voiced a responsibility to prevent,[7] to react[8] and to rebuild,[9] and has specifically attributed duties in this regard to states and the international community.

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[3] International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, Ottawa, 2001, www.iciss.ca.

[4] Report of the Secretary-General on the Work of the Organization, A/55/1 para. 37.

[5] ICISS report (footnote 3), at XI – "Principles" under A.

[6] *Ibid*. under B.

[7] According to the Commission report, Basic Principles, (3)(A) this includes "... to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk."

[8] The responsibility to react is defined as follows: "... to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.", *ibid*., (3)(B).

[9] C. According to the Commission, the "responsibility to rebuild" means: "... to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.", *ibid*., (3)(C).

At this stage, it has already become clear that the "responsibility to protect" is a two-tiered concept. It first reiterates that it is the most fundamental and genuine function of States to protect their citizens.[10] Secondly, in the sense of an "*international* responsibility to protect"[11] some sort of joint action is envisaged, which may include an international intervention. More or less explicitly, under specific circumstances, the ICISS envisaged the justification of intervention even in cases where there is no authorization by the United Nations Security Council.[12]

With some differences in wording and formulation, this responsibility to protect was endorsed by the so-called "High-level Panel on Threats, Challenges and Change" set up by the Secretary General later to develop concepts and ideas for the reform of the United Nations. The Panel stated:

> "We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[13]

As this statement may indicate, the Panel has importantly developed and altered the concept. It endorsed the concept by referring to an "emerging norm". However, it considerably diverged from the ICISS by emphasizing a "collective international responsibility" to be exercised by the Security Council.

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[10] See for details below, text accompanying footnote 41.

[11] Emphasis added.

[12] The ICISS states: "If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are: I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council." It goes on in emphasizing: "The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby."

[13] A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, para. 203. For a general analysis of the report see, Slaughter (footnote 1), *passim*.

Finally, the Secretary General himself, in his 2005 report "On larger freedom", – although in somewhat more cautious words – endorsed those views by stating:

> "I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."[14]

Finally, the Heads of States attending the High level meeting of the General Assembly in 2005 addressed the issue in their closing document, the so-called 2005 World Summit Outcome as follows:[15]

> "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."

The document goes on to state:

> "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 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 coop-

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[14] In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, A/59/2005, 21 March 2005, para. 135.

[15] 2005 World Summit Outcome, A/Res. 60/1, para. 138 et seq. The title of that section of the paper reads: "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

> eration with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. ... We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[16]

In its resolution 1674 of 28 April 2006, the Security Council endorsed this statement.[17]

Taking all these statements together the concept of a "responsibility to protect" in substance deals with issues of humanitarian intervention. It spells out a responsibility of States to be backed up by an "international" responsibility, which – according to the more recent documents – will be exercised through the Security Council. The concept takes a broader view, which touches upon the fundamentals of the international legal order in the same way as responsibility and sovereignty. "Responsibility to protect" has been qualified as an "emerging norm of international law" by the High-level Panel[18] and the Secretary General.[19] Thus, it has some legal status.[20]

III. Taking a Closer Look at Responsibilities

As the "responsibility to protect" expressly incorporates it, an analysis may start with the notion of "responsibility". Responsibility is a term

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16 *Ibid*., at para 139.

17 Preambular para. 4 of the resolution states: "Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity; ...".

18 See above, text preceding footnote 13.

19 Report of the Secretary General (footnote 14) at para. 135: "... recently the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an "emerging norm that there is a collective responsibility to protect" (see A/59/565, para. 203). While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. ..."

20 See Winkelmann (footnote 1), 459 et seq.