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# La responsabilité de protéger, dix ans après

# The Responsability to Protect, ten years on

Sous la direction
de Anne-Laure CHAUMETTE et Jean-Marc THOUVENIN

ACTES DU COLLOQUE
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CEDIN

25. Pour éviter que la R2P ne devienne un simple mirage ou chimère, il faudra mieux convaincre les Etats qui s'opposent, en insistant sur leur propre responsabilité (premier pilier), ainsi qu'en leur montrant la possibilité de devenir eux-mêmes des agents ou des garants de protection internationale (deuxième et troisième piliers)[68].

[68] A ce propos, enfin, il serait intéressant de considérer encore d'autres analyses, comme celle d'Alex J. Bellamy (« Humanitarian responsibilities and interventionist claims in international society », *Review of International Studies*, vol. 29, 2003, pp. 321-340) ou celle de Stevie Martin (« Sovereignty and the Responsibility to Protect: Mutually Exclusive or Codependent? », *Griffith Law Review*, vol. 20, n°1, 2011, pp. 153-187) qui reconnaissent l'interdépendance de ces deux notions sous une optique différente.

# WHAT NORMATIVITY FOR THE RESPONSIBILITY TO PROTECT?

ALAIN PELLET

*Professeur à l'Université Paris-Ouest, Nanterre-La Défense, Former Director of the CEDIN, Former Chairperson of the ILC*

A lot has been said, including during this fascinating conference and during that organized by the CEDIN within the framework of the *Société française pour le droit international* four years ago[1] and written on the Responsibility to protect and I wonder with some anxiety what remains to be said which is not already repeated again and again in the "small library" already filled up by the topic to put it in Edward Luck's words. And I am all the more embarrassed that I largely share what has already been said by previous speakers, in particular Anne-Laure Chaumette in her general presentation this morning.

Now, when I say that, all has been said on the topic, or nearly so, I must acknowledge that the responsibility to protect is a concept – a concept more than a norm (I'll come back to this in a few moments) – not very easy to capture; nor is it a topic allowing for a dispassionate approach: it arouses impassioned reactions from unqualified enthusiasm to total scepticism, from mere wishful thinking to cynical rejection – even though, following our debates, I had the impression that the negative stream is not really represented among us. Although not a "believer", I am neither a "contemptor" of the notion and I won't play the devil's advocate.

Ladies and gentlemen, let me take you back to 1954. We attend an interesting colloquium organized by a dynamic research centre in international law on a very innovative and stimulating concept: "The right of colonial peoples to self-determination". You know the context: Indochina is (successfully) fighting against its French colonial masters; Tunisia has just been recognized independence by the Government of Pierre Mendès-France and in Algeria some visionary terrorists use bombs against French first class citizens.

In the course of the Conference, some traditional positivist lawyers explain that, clearly, it is not a legal norm, hardly a political aspiration: State sovereignty is the α and ω of international law[2] and even for colonized people, this pseudo-right can have no concrete consequence, since Chapter XI of the UN Charter

[1] *La responsabilité de protéger*, Actes du Colloque de la SFDI (2007) de Nanterre, Paris, Pedone, 2008, 364 p.
[2] See fn. 9 below.

establish the legality of colonialism in international law. For their part, Anne Peters, enthusiastically supported by Luigi Condorelli, vehemently sustain that we must go further than a Report issued some years before, which had launched a new... idea? concept? principle?[3]. Without all sharing this enthusiasm, most participants agree, however, that something like this exists, if only because two provisions of the Charter use the expression "right of peoples to self-determination"[4]. For their part, some objectivists like Alain Pellet, wishing to avoid the label of "moralism" warn against any confusion between *lex lata* and *lex ferenda*.

Ladies and gentlemen, concerning the responsibility to protect, we are in 1954 – not in 1960, when the right of colonial peoples to self-determination was so forcefully proclaimed – and, by the same token, established – by resolution 1514 (XV) of the General Assembly. We have a concept; we have a report – or let me say an avalanche of reports (our time is one of excess more than of scarcity in this respect); but well, we certainly have at least one respectable and stimulating report[5]. A report which has then been toned down – not to say emasculated (although it was itself rather diplomatically drafted) – by a long series of further reports and various solemn declarations hesitating between sanctioning the notion or emptying it from any concrete consequence – or, maybe, sanctioning it in order to watering it down[6]. But the result of this all is that we have a concept – but a concept without a content or, at least, without a concrete and generally accepted content and, certainly, without a perceptible legal content or scope.

This said, I fully accept that like "in the house of the Father there are an infinity of mansions", there exists a multiplicity of definitions of the "normativity". As Prosper Weil so talentedly regretted, normativity is relative[7] – and this is particularly so in international law.

Now, one of the things I found especially inspiring in Anne-Laure Chaumette's Report to this Conference is her statement, which might not be tremendously original, but which was exposed with particular clarity, according to which the ... concept? principle? norm? (I prefer not to anticipate by naming it formally) of responsibility to protect is "dual:

- on the one hand, it imposes a duty on the State *vis-à-vis* its own population against dramatic evils (I deliberately use a non-legal terminology); and,

[3] One could think of Georges Scelle, « Quelques réflexions sur le droit des peuples à disposer d'eux-mêmes », *in Mélanges Spiropoulos*, pp. 385-392 – but it was only written in 1957...

[4] Article 1 (2) and article 55.

[5] Report of the International Commission on Intervention and State Sovereignty (ICISS), '*The Responsibility to Protect*', 2001, available at http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[6] *2005 World Summit Outcome*, A/60/L.1, 15 September 2005, paras. 138-140. See also the High-level Panel on Threats, Challenges and Change, *A More Secure World, Our Shared Responsibility*, 2 December 2004, A/59/565, and the Secretary General Report, *Implementing the Responsibility to Protect*, 12 January 2009, A/63/677.

[7] See Prosper Weil, « Vers une normativité relative en droit international », *RGDIP*, 1982, pp. 5-47 and « Towards Relative Normativity in International Law », *AJIL*, vol. 77, 1983, pp. 413-442.



- on the other hand, it also imposes another kind of duty, a second rank duty (or a safety net), not on the State, but on the international community as a whole to either substitute an unwilling State or to stop a non-complying State (non-complying with its first rank duty) to committing crimes against its own population.

Indeed both duties have quite different legal pedigrees. Without having any ambition to fully deal with the topic, nor even to say anything original, let me say some words successively about one and the other.

First, the duty of a State – or could it be an international organisation?[8] – to protect its own population.

I have but little doubt that it *is* a legal norm, whatever the definition you may give to the word. It *is* compulsory and self-sufficient: a State *must* protect its own population, and I accept in this respect Anne Peters' views as expressed in her well-known article published in 2009 in the *European Journal of International Law*[9]. The source of this obligation is custom. Indeed, the practice is uncertain and, more often than not, States harm and oppress their population instead of protecting them; but in that kind of circumstances, the practice cannot be limited to such a basic assessment: it is not because States commit genocide or crimes against humanity or let them be perpetrated that their prohibition can be put into question from a legal point of view – if only because such crimes are never claimed as lawful in themselves and they are condemned by the international community, not only of States, but also by the civil society, the NGOs and the public opinion – these condemnations too are part of the relevant practice, while at the same time they bear witness of the psychological element, the generalized *opinion juris*.

I am ready to concede that the precise substance of this first duty is subject to uncertainty. But I would think its core content is not subject to much discussion. The first consequences of the duty to protect incumbent on a State *vis-à-vis* its own population are negative: not to commit genocide and other fundamental breaches of human rights and not to use force against it except for legitimate purposes as defined by the law. Positively, any State owes a duty to its own population to follow policies meeting its basic needs. These are of course not obligations of result – but they certainly are legal obligation of means and of diligence.

Now, the main issue is, of course, and then? What, if a State does not comply with these legal obligations, which form the very heart of the duty to protect falling upon it towards its own population? The answer is not easy – but the answer on the "how?" or the "and then?" is never easy in international law: no international police, no ordinary court, no repressive penalties; therefore, in this matter as in most others in international law, the answer can only be

[8] I would suggest that the answer should probably be in the affirmative concerning the EU and, maybe, other organisations of "integration", which have "State-like" responsibilities.

[9] Anne Peters, « Humanity as the A and Ω of Sovereignty », *EJIL*, 2009, pp. 513-544, in particular pp. 519, 524-525 and 543.

disappointingly abstract and, apparently, a bit theoretical: the sanction of disrespect by a State for its duty to protect is the only ordinary one in international law: responsibility. As long as we accept that the duty bearing on a State to protect its population is a legal obligation, any breach of it, which can be attributed to the State, entails its international responsibility[10]. Quite often, this is the end of the matter: the State responsibility cannot be concretely entailed absent any competent forum to draw consequences from it. And, this might seem, all the more likely when the duty of the State to protect its *own* population is concerned, that the individuals or the groups forming that population have no standing to intervene at the international level – except, of course, in some parts of the World, before regional courts of human rights[11].

But, precisely, there is no ground for such a pessimistic approach in the case of the duty to protect. For at least two series of reasons.

In the first place, the obligations bearing upon the State in the framework of the duty to protect its own population are so essential that in most, if not all, cases, their violations would appear as serious breaches of obligations under peremptory norms of general international law within the meaning of Articles 40 and 41 of the ILC Articles on the Responsibility of States for internationally wrongful acts – with the special consequences attached to such violations. Moreover, this opens the way for an intervention of other States, which have standing to claim the implementation of these peremptory obligations. Not only, as provided for in Article 41 of the ILC 2001 Articles,

> "1. States shall cooperate to bring to an end through lawful means any serious breach [of that kind; and]
> 2. No State shall recognize as lawful a situation created by [such] a serious breach… , nor render aid or assistance in maintaining that situation";

but also, since "[t]he obligation breached is owed to the international community as a whole",

> "Any State … may claim from the responsible State:
> (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
> (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached",

that is, for the present purpose, the population of the non-protecting State.

Even more, it can be deduced from Article 54 of the ILC Articles that, in such circumstances, any State has a right to invoke the responsibility of the non-protecting State, "to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached"[12].

At this point, the two aspects of the dual notion of the responsibility to protect meet: the duty of the international community to substitute for, or to relay, the failing State makes up for the leeway and shortcomings of the duty of the State to protect its own population. But the duty incumbent on the international community is obviously less legally clear than that bearing upon the State. Contrary to what is often alleged, the international community and, more specifically, the international community of States[13], does not lack the means to act in this respect – only the political will is missing. And this missing will, morally or politically regrettable as it may be, is not legally reproachable.

As is well known, there has been, since the 1990s and the fall of the Wall[14], a clear (and fortunate) trend in enlarging the notion of threat to the peace embodied in Chapter VII of the UN Charter. Nowadays, it is established that a "humanitarian crisis"[15] or a "human tragedy"[16] or "human suffering"[17] or a "grave humanitarian situation"[18] may be qualified as a threat to the peace under Article 39. And it goes without saying that these expressions include the situations targeted under the concept of responsibility to protect – to protect the population precisely in case of humanitarian disaster or "human tragedy" or serious "humanitarian crisis".

Similarly, it can be recalled that the International Criminal Court has been given "jurisdiction over the most serious crimes of concern to the international community as a whole"[19]. And, in a way, the punishment of these crimes follows the same scheme as that of the responsibility to protect: "their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[20]. States have a primary "duty (…) to exercise [their] criminal jurisdiction over those responsible for international

[10] See Articles 1 and 2 of the ILC 2001 Articles on the Responsibility of States for internationally wrongful acts.

[11] Indeed, the violation of the duty to protect would not be *as such* an efficient cause of action before the European, the Inter-American or the African Courts of Human Rights; but they have jurisdiction for breaches of some of the main obligations composing the duty to protect.

[12] It must be noted however that Article 54 is drafted has a "without prejudice" provision: "This chapter does not prejudice the right of any State (…) to invoke the responsibility of another State, to take lawful measures (…)".

[13] This is not the place to discuss this controversial notion. My view is that the notion of "international community" is wider – but more imperceptible – than that of "international community of States" as recognized in the 1969 and 1986 Vienna Conventions on the law of treaties. The ILC Articles on the responsibility of the States and the international organisations of 2001 and 2011 use the more general expression "international community as a whole" (see e.g.: Articles 25, 33, 42 and 48 (2001) or Article 25, 33, 43 and 49 (2011)).

[14] However, this is not an absolute innovation. Thus, the Security Council adopted several resolutions concerning the situation in South Africa as a threat to the peace within the meaning of Chapter VII (see *e.g.* Resolutions 181 and 182 (1963), 191 (1964), 282 (1970), 311 (1972), 392 (1976), 417 and 418 (1977) et 473 (1980).

[15] See e.g. Resolution 929 (1994) (Somalia).

[16] See e.g. Resolution 794 (1992) (Somalia).

[17] See e.g. Resolution 746 (1992) (Somalia).

[18] See e.g. Resolution 864 (1993) (Angola) or "humanitarian situation", Resolution 1199 (1998) (Kosovo).

[19] Rome Statute of the ICC, 17 July 1998, Preamble, para. 9.

[20] *Ibid.*, para. 4.

crimes"[21], but "the International Criminal Court (...) shall be complementary to national criminal jurisdictions"[22] and can only exercise jurisdiction if "the State is unwilling or unable genuinely to carry out the investigation or prosecution"[23]. In a way, the ICC is part of the implementation mechanism of the responsibility to protect: it has jurisdiction to punish the individuals responsible for some of the worth breaches of the State's duty to protect and, as an element of implementation of the duty of the international community to protect, it appears as a safety net, entering into action in case of deficiency of the State.

However, while the State is under a legal obligation to act – both to protect its population and to punish the authors of crimes which could trigger the responsibility to protect –, this is not the case concerning the international community (of States):

- the ICC Prosecutor "*may* initiate investigations"[24], but, as shown by the (most debatable) Article 16 of the Rome Statute, this is not imperative[25];

- States *may* claim from the responsible State cessation of its wrongful behaviour when it breaches its duty to protect its own population and reparation in the interest of the injured State or of the beneficiaries of the obligation breached, and they might have the right to take lawful measures against that State to those aims[26]; but they are certainly not under a legal duty to do so[27]; and

- as indisputably, the Security Council *may* take compulsory measures under Chapter VII when it considers (but it has no legal obligation to do so) that an omission by a State to fulfil its duty to protect constitutes a threat to the international peace and security but it certainly does not have an obligation; nor have its permanent members a legal obligation not to use their right of veto in such a case.

This is not a cynical posture from my part and to be honest, I deeply regret this conclusion. But I deem it irresponsible, when you speak as a lawyer to "wishful think". And it is, I am afraid, irresponsible, to "make as if" oppressed peoples, or populations victims of a humanitarian disasters could invoke a legal right to be helped from outside: they have a claim – and this, by itself is a progress in that no serious lawyer could allege that using lawful means to exercise the international community's duty to protect would be an unlawful intervention in

[21] *Ibid.*, para. 6.
[22] *Ibid.*, para. 8. See also Article 1.
[23] *Ibid.*, Article 17 (1).
[24] See *ibid.*, Article 15 (1).
[25] Article 16 (Deferral of investigation or prosecution): "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."
[26] See Articles 48 and 54 of the 2001 ILC Articles quoted above.
[27] Although they are legally obliged to cooperate to bring to an end through lawful means any serious breach serious breaches of obligations under peremptory norms of general international law (Article 41 of the ILC Articles, quoted above).



the internal affairs of a State – but, at this stage of the evolution of the law they have no legal right.

And this takes me back to this idea of "duality" in the normativity of the principle: the international community's duty is "soft", it is possibility, a freedom – limited by the prohibition of the use of force absent an authorization of the Security Council; the State's duty to protect its population is a positive legal obligation – legal and complex since, if we were to dissect the various components of this complex duty, we would probably meet peremptory norms as well as "simply" binding rules and pure freedoms of actions; obligations of results and other simply of means or of behaviours; obligations bearing on the State itself, others on its various elements. But this is another and much longer story.

It remains that, for the time being, the population of the State is largely left in front of the Government and can rely only on its own strength. As was proclaimed by the French Declaration of the Rights of Man and Citizen of 1793: "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties"[28]. More or less successfully, more or less dramatically, the Tunisians, the Egyptians, the Yemenis or the Syrians, had to realize this. The "community's side" of the responsibility to protect was only fully resorted to in the case of Libya. Was it that better? I still think it was necessary; I accept it can be debated, especially so with the benefit of hindsight.

[28] English text in Frank Maloy Anderson (ed.), *The Constitutions and Other Select Documents Illustrative of the History of France 1789-1901*, Minneapolis, H. W. Wilson, 1904. Reprinted in Jack R. Censer and Lynn Hunt (eds.), *Liberty, Equality, Fraternity: Exploring the French Revolution*, American Social History Productions, 2001.