Towards global responsibility for human rights protection: A sketch of international legal developments*

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Recent decades have brought vast and rapid development in our understanding of human rights law as comprising positive obligations on states to prevent human rights violations, whether by their own agents or private actors. Generally, such state responsibility for human rights protection -under the various human rights treaty systems- extends to persons within the state’s territory or jurisdiction.

This short contribution will highlight developments elsewhere in international law that are in line with but go beyond these developments in human rights law itself. They indicate the responsibility of third states in the face of serious human rights violations, irrespective of where or at whose hand the violations occur. Various developments, taken together, suggest that at least as regards certain very egregious violations of the obligations to protect human rights, all states have an interest -and in certain circumstances an obligation- to act to prevent and to stop such violations wherever they arise. As such, these developments go significantly beyond the scope of human rights law, towards an emerging community responsibility that may be critical to the protection of human rights in the 21st century.

Before exploring recent developments, it is worthy of note that the principle that the protection of certain fundamental human rights is a concern of the international community as a whole is not new. The notion of such obligations being owed erga omnes - to the international community as a whole rather than to any particular state(s)- was established by the International Court of Justice in the Barcelona Traction case of 1970:

* This article was previously published in Interights Bulletin, 15,3, 2006.
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Various developments, taken together, suggest that at least as regards certain very egregious violations of the obligations to protect human rights, all states have an interest - and in certain circumstances an obligation - to act to prevent and to stop such violations wherever they arise.

The Court observed that obligations falling within this category include “the principles and rules concerning the basic rights of the human person... .”

Likewise, it is now well-established that certain human rights protections, for example freedom from torture, slavery and violations of most other core non-derogable human rights, as well as the basic rules of humanitarian law or the rules relating to the use of force, are peremptory norms of general international law (or jus cogens), which enjoy a special hierarchical status among norms and from which there can be no derogation or exception. The focus of this article is however on the consequences of breaches of norms enjoying this special status, and the responsibility that all states share by virtue of the nature of the wrong committed, irrespective of the fact that it arises outside their own jurisdiction and at the hand of other states.

ILC articles on state responsibility

The starting point for the analysis of developments in this field lies with the Articles on State Responsibility (“the ILC Articles”), adopted by the International Law Commission in 2001. The ILC Articles outline the lawful consequences of international wrongful acts for wrong-doing states, and for other states - both those directly affected and all other states. While the ILC Articles have been much discussed by international scholars, it may be that their full significance for human rights practitioners is only beginning to be appreciated.

The ILC Articles provide that where an international wrongful act occurs, a state affected by it may take measures to protect its interest, including measures that would otherwise be unlawful. They also provide that where “the obligation breached is owed to the international community as a whole,” states not directly affected may have interests that are triggered. At a minimum, they can ask for cessation of the wrongful conduct, for assurances and guarantees of non-repetition and for performance

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2 Ibid., at p. 32, para. 34, emphasis added. Subsequent ICJ cases have addressed issues such as self determination, the prevention of genocide and fundamental principles of IHL as giving rise to erga omnes obligations: see East Timor (Portugal v. Australia), ICJ Reports 1995, p. 90 at p. 102, para. 29; Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, ICJ Reports 1996, p. 595 at 616, para. 31; Legality of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, ICJ Reports 2004, p. 136, at pp. 199-200, paras 156-158; Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, para. 64.
3 ILC’s Commentaries to Articles on State Responsibility. Commentary to Article 40(3) describes peremptory norms as ‘rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and to their people and the most basic human values.’ It goes on to refer to the prohibitions of genocide, slavery, apartheid, racial discrimination, torture and cruel and inhuman treatment as examples of peremptory norms. See also Human Rights Committee, General Comment No. 29: Derogations during a state of emergency (Article 4) [2001], UN Doc. HRI/GEN/1/Rev6 (2003) at 186, para. 11.
4 Vienna Convention on the Law of Treaties 1969, Article 53: “For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See also Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226 at p. 257, para. 79.
6 See ILC’s Introductory Commentary to Part Three, Chapter II, para. 1, defining countermeasures.
7 ILC Articles, Article 48(1)(b).
of the obligation of reparation (in the interest of the injured state or the beneficiaries of the obligation).  

But the ILC Articles go further still. They make clear that if the internationally wrongful act amounts to a serious (“gross or systematic”) breach of obligations under peremptory norms states are not only entitled, but may be obliged, to react. The secondary obligations arising where there is a serious breach of core human rights norms include the obligation not to recognize (in law or otherwise) situations resulting from the breach, not to render aid or assist in maintaining any such situation, and to cooperate with other states to bring to an end any such breach. The Articles thus reflect negative duties of restraint (non-recognition and not aiding or assisting), as well as a legal requirement of more positive measures of cooperation to stop an on-going breach by the wrong-doing state. As the Commentary to the Articles notes:

Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches.

The predecessor: common article 1

It is important to note that while the idea that states may be obliged to respond in the face of violations by other states, for which they have no direct responsibility as such, might strike some as a radical proposition, it is in fact not a new concept in the field of international law. As far back as 1949, Article 1 common to the four Geneva Conventions provided that all states party to the Conventions have obligations to respect and to ensure respect for the obligations contained in the four Conventions.

As the ICRC Commentary notes, this means that states should “do everything in their power to ensure that it is respected universally.” In 1977 this positive obligation was reaffirmed without controversy by a broad representation of states, as a result of which the First Additional Protocol to the Geneva Conventions makes similar provision. The ICJ has found Common Article 1 to be a rule of general international law, applicable in international and non-international armed conflicts.

The secondary obligations arising where there is a serious breach of core human rights norms include the obligation not to recognize (in law or otherwise) situations resulting from the breach.

Whether or not party to a conflict, state parties to the Geneva Conventions are therefore obliged to take all reasonable and appropriate measures to ensure that other parties (to international and non-international armed conflicts) observe humanitarian law.

In this respect, Common Article 1 complements the ILC Articles, foreshadowing the obligatory nature of the responsibility in Article 41. Article 41 for its part may have contributed to the process currently underway of reinforcing and clarifying

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8 ILC Articles, Article 48(2)(a) and (b).
9 Article 40 provides that a breach of such a (peremptory) obligation is “serious” if it involves a gross or systematic failure by the responsible State to fulfill the obligation. Arguably, violations of certain rights may, because of their gravity, themselves amount to a “gross” breach, while others would require to be committed systematically to fall within this category.
10 ILC Articles, Articles 40 and 41. The ILC Articles also specify that states must not recognise or facilitate the situation that has given rise to the wrong.
11 Common Article 1 of the Geneva Conventions. See the ICRC Commentary on GC IV, p. 16.
12 Article 1(1) of AP I.
13 The Declaration provides: “We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to: [...] Ensure the effectiveness of international humanitarian law and take resolute action in accordance with the law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.”
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Debates on the dual nature of rights have persisted, given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

While not referring to the ILC Articles specifically, the case applies directly the principles of state responsibility set down in the Articles.

Other courts and tribunals have also taken on board similar principles. Even before the Articles were formally adopted, the International Criminal Tribunal for the former Yugoslavia recognized in the Furundzija case that “States are obliged not only to prohibit and punish torture, but also to forestall its occurrence.” More recently, in the seminal A & Others case before the UK House of Lords concerning the admissibility in UK courts of evidence obtained through torture or ill treatment, the court made extensive reference to the principles set out in the ILC Articles and in the Wall Advisory Opinion. The judgment concluded: “There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.”

Underlining the preventative purpose of the non-recognition principle, Lord Bingham concluded that “It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture.”

Jurisprudential developments: from the international court of justice to the house of lords

In 2001, Andrew Clapham noted that future ICJ judgements would be scrutinized to see how much they live they breath into the new state responsibility framework set out in the ILC Articles. Such vitalization of the ILC principles can be seen in their implicit endorsement by the ICJ in the Wall advisory opinion of 9 July 2004. The Court observed, in relation to the right to self-determination and the rules of IHL, that:

states’ shared responsibilities under common article 1 (Sassoli 2002). However, Article 41 clearly goes beyond Common Article 1 in embracing violations beyond IHL.

Developments since 2001

The ILC’s Commentary to Article 41(1) recognised in 2001 that the Article “may reflect the progressive development of international law” (para. 3). This provokes the question to what extent the principles enshrined in the Articles, and specifically in relation to the role of third states in respect of breaches, have been applied since then, contributing to the “ongoing process of consolidation of the international rules of State responsibility as reflected in the Articles.” (Crawford and Olleson 2005, 968).

A brief survey of judicial decisions and rules of State responsibility as reflected in the Articles.” (Crawford and Olleson 2005, 966-968). A brief survey of judicial decisions and rules of State responsibility as reflected in the Articles.

In 2002, the International Criminal Court adopted a similar rule. However, Article 41 provides some greater clarity as to what measures states may or must take - see below. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 9 July 2004.

Although the ICJ has not directly addressed the ILC Articles, it has acknowledged the role of third states in respect of breaches, have been applied since then, contributing to the “ongoing process of consolidation of the international rules of State responsibility as reflected in the Articles.” (Crawford and Olleson 2005, 966-968).

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The ethos of the ILC Articles may also be reflected in the approach adopted in 2004 by the Human Rights Committee in its General Comment 31 on the ICCPR. While it concerns the interpretation of treaty provisions rather than general international law, the Comment resonates the principle of “community interest” in human rights protection and the mutual responsibilities of states to ensure compliance by other states with their human rights obligations. It provides:

Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

Reports on the “responsibility to protect”

The principle of the responsibilities of third states in respect of serious violations has also been reiterated elsewhere in international practice through several influential reports from the UN and elsewhere on the “Responsibility to Protect.” This began with the International Commission on Intervention and State Sovereignty report on “The Responsibility to Protect” of 2001. The report helped reshape a debate on responding to humanitarian crises that until then had been bogged down in the issue of “humanitarian” military intervention and erroneously focused on the rights of states, rather than those of the ultimate beneficiaries of the humanitarian protection. Focusing on the corresponding duties and responsibilities incumbent on states, this report went further than the ILC Articles did, at least implicitly, in highlighting a responsibility not only to “react,” but also to “prevent,” and as necessary to “rebuild.”

This report was then followed by the 2004 report of the High-Level Panel on Threats, Challenges and Change established by the UN Secretary General, entitled ‘A More Secure World: Our Shared Responsibility’ which endorsed “the emerging norm that there is a collective international responsibility to protect. The report noted that:

There is a growing recognition that the issue is not the “right to intervene” of any State, but the “responsibility to protect” of every State when it comes to people suffering from avoidable catastrophe — mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.

In the same vein, the Secretary-General Report’s, “In Larger Freedom” of March 2005 called for a movement “towards embracing and acting on the ‘responsibility to protect’ potential or actual victims of massive atrocities,” a responsibility which lies with the international community and requires “diplomatic, humanitarian and other methods to help protect the human rights and well being of the civilian population.”

Finally, the culmination of this activity was the outcome document of the UN World Summit of September 2005, adopted by consensus, which acknowledged that

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 VII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

While these documents tend to focus on an arguably more limited range of activity than that covered by the ILC Articles – such as genocide, war crimes, crimes against humanity and ethnic cleansing – they are clear in endorsing, at the highest levels, the principle that third states have a duty to protect individuals where the state directly involved fails to do so. They are significant also in that they go further than at least a restrictive reading of ILC Articles (which focus the positive obligations...
to “stop” certain on-going violations) in setting down a broader duty of prevention before the violations arise, reaction when they do and rebuilding thereafter:

The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility has three integral and essential components: not just the responsibility to react to an actual or apprehended human catastrophe, but the responsibility to prevent it; and the responsibility to rebuild after the event.31

Measures to give effect to states’ responsibilities?

The question that most often arises in relation to these estimable principles is what they mean in practice: what precisely are all states obliged to do vis a vis offending states? Common Article 1 has been subject to criticism for the uncertain scope of its provision for many years (Sassoli 2002, 401). To a lesser extent, the ILC Articles that came 50 years later were similarly unspecific and begged the same question, with Article 41(1) on State responsibility not stipulating which measures states should take pursuant to their obligation to “cooperate to bring to an end” any serious breach of a peremptory norm.

Rather, the ILC Commentary to the Articles explains that “[b]ecause of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take…” The Commentary indicates only that they must be lawful and that the choice “will depend on the circumstances of the given situation.” While, as noted above, the UN reports provide more flesh to the concepts, arguably they too fail to indicate clearly precisely what is required of states in the face of serious violations by other states.

But lack of prescription as to means, in preference for a flexible approach which leaves it to the state to determine which measures will be most effective to meet its protective aim in any particular situation, should not be confused with lack of obligation to take appropriate measures. The ILC Commentary stresses that “What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches,” concluding that the first paragraph of Article 41 “seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response.”

In practice, states may exercise myriad forms of pressure on other States – political, diplomatic, economic and, as a last resort and very limited circumstances, military32- that do not involve breaches of international obligations.

Most straightforwardly are the obligations of restraint -not to aid or assist the violation. These have come into sharp focus in recent times in light of the debate on extraordinary rendition and the relationship between the use of a state’s airports or airspace for example and the duty of states not to facilitate egregious wrongs, whether by active support or turning a blind eye to the wrong doing and the effect of their own contribution to it. The duty not to recognise the fruits of the breach was reflected in both the Wall case before the ICJ and the “torture evidence” case before the UK House of Lords, highlighted above.

Other measures that states may take include withholding financial or military support, or political support in international institutions, refusing to receive officials of the wrong-doing state or to conclude treaties with that state. Positive measures to prevent and react may include exerting political pressure, for example through diplomatic representations or engaging international institutions, political or legal, considered to provoke an effective form of pressure on the relevant state. Judicial measures may also be invoked not only to provide reparation after the fact but to forestall the occurrence of such practices in the future, by holding to account states and those individuals responsible,

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29 2005 World Summit Outcome, GA Res. 60/1, 16 September 2005, UN doc. A/RES/60/1, adopted by “acclamation” [consensus] by the High-level meeting of the General Assembly.
30 2005 World Summit Outcome, ibid. The High-level Panel Report (above note 27) refers instead to “genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law…”
31 ICISS Report, para. 2.32.
32 Use of force must be within the legal framework set forth by the UN Charter; see infra.
and providing a forum for victim redress. In relation to IHL obligations specifically, refraining from providing weapons and logistical support, implementing legislation, encouraging universal jurisdiction and targeted sanctions have all been recognised as ways in which the common Article 1 duty to ensure respect for IHL can be given effect.

The ILC Articles and subsequent developments referred to above appear to envisage that measures taken in response will generally be “collective,” reflecting the collective nature of the international community’s interest and responsibility. As such, cooperative action is generally envisaged as through regional and international institutions: the ILC’s Commentary notes that “[C]ooperation could be organized in the framework of a competent international organization, in particular the United Nations”. But the ILC Articles refer also to “non-institutionalised cooperation.”

Moreover, while the preferred method of execution may be collective, and the language of “cooperation” is, arguably, inherently collective, this should not obscure the fact that states responsibilities are individual. In respect of the obligation to ensure respect for IHL, this is reflected explicitly in the language of Article 89 of Protocol I which provides that: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” The responsibility thus lies with each and every state to assess what measures it can appropriately and effectively take to prevent and/or to react to grave human rights violations.

More complex questions, well rehearsed elsewhere, relate to the extent to which military intervention may be one permissible measure to prevent or respond to humanitarian atrocities (Duffy 2005, 179; Chesterman 2001). Article 41 explicitly notes the need for obligatory measures under that article to be consistent with international law. There is a general prohibition on the use of force in international law, absent self-defence or Security Council authorization, and, while the issue is increasingly controversial, humanitarian intervention (other than pursuant to Security Council authorization) remains a doubtful basis for the legitimate use of force. This is reflected in the wording of the High-level Panel Report: “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...” However, provided it is authorized by the Security Council in accordance with Chapter VII of the UN Charter, collective military measures may also fall within the range of measures exercisable against wrong-doing states.

In practice, states may exercise myriad forms of pressure on other States - political, diplomatic, economic and, as a last resort and very limited circumstances, military - that do not involve breaches of international obligations.

Conclusion

In recent times, there has been no shortage of examples of serious breaches of peremptory norms in international practice. One need look no further than the United States to see widespread allegations of prolonged arbitrary detention and torture, in the notorious scandals relating to Guantanamo Bay and the Iraq prisoner abuse in Abu Ghraib and elsewhere. If a state engages in violations that offend the international community, the responsibility of all states is engaged, giving rise to numerous questions of current relevance.

Does the duty to respond to Guantanamo Bay, as a notorious example of prolonged arbitrary detention of recent times, not go beyond the protection of the states own nationals that characterized interventions by various states such as the UK?

See case of Jones v. Saudi Arabia currently before the House of Lords which addresses positive duty to provide redress for torture and immunities. The interveners brief by Interights and other NGOs available at www.interights.org.


High-level Panel Report (above note 27), para. 203 (emphasis added).
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or Australia? In the face of systematic torture, actual or threatened, does the duty to act not require forthright denunciation of such practices and all possible measures to hold the state to account? Does the duty to ensure that the occurrence of such practices in the future is forestalled include a commitment through practice by all states to hold those responsible to account and provide a forum for victim redress? Does it not require that states adopt a proactive and inquisitive approach to ensure that they are not facilitating or implicitly condoning the use of such practices, for example by reliance on evidence obtained through torture or the provision of facilities for aircraft participating in an act of enforced disappearance of persons or torture?

The import of the developments sketched out in this short piece is, in the author’s view, potentially revolutionary. Strengthened recognition of the principle that egregious human rights violations are, as violations of obligations owed erga omnes, matters of “community interest” is itself significant, reflecting the importance attributed by the international community to obligations of this type. But it is in focusing on the compliance regime, and the interest and obligations of third states individually and collectively, that they bolster the international legal order where it is at its most vulnerable. In a decentralized system, with the enforcement limitations intrinsic therein, the international legal system depends on other states responding to, and thus ultimately curtailing and preventing, violations which threaten its very foundations. The more these norms continue to be applied, and elucidated, through practice, the better for the international legal order and the global protection of human rights.

REFERENCES


