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## The Responsibility to Protect doctrine: between criticisms and inconsistencies

Fiammetta Borgia\*

This article aims to contribute to the current academic debate concerning the responsibility to protect (R2P) doctrine, by offering a critical perspective of the legal grounds and effectiveness of this doctrine. In the first part of this article, the emergence and evolution of the doctrine is examined, through the analysis of reports and documents written under the auspices of the United Nations. According to this early perspective, R2P was intended to act as an ‘obligation’ for states, as members of a new ‘human-centred’ international community. However, this ambitious vision was soon at odds with reality. The second part of this article is focused on a tentative deconstruction of R2P, by analysing the definition of ‘responsibility’ and the weaknesses of the doctrine as a whole. While the first and the second pillars do not pose particular concerns relating to their accordance with international law—even if their content does not add much in respect of the existent international instruments promoting or protecting human rights—the third pillar is very vague and unclear in terms of legitimate legal basis and effectiveness. Therefore, the third part of this article underlines the inconsistencies of the third pillar, by criticising its application within the context of the UN. The aim of this section is to determine whether or not the recent references to R2P doctrine contained in Security Council resolutions since 2006 can contribute to the consolidation of the R2P principle in practice. In concluding, a tentative approach to finding new legal grounds for R2P is presented. This restyling of an old-fashioned theory on intervention in case of *erga omnes* obligations is aimed at reinvigorating the doctrine in order to achieve the primary objective to reconcile universal legitimacy and effectiveness in defence of human rights.

**Keywords:** responsibility to protect; intervention; use of force; *erga omnes* obligations; human rights

### I. Introduction

This article aims to contribute to the current academic debate about the responsibility to protect (R2P) doctrine, by offering a critical view of the legal basis and application in practice of this doctrine. In 1999, the United Nations (UN) Secretary General Kofi Annan underscored the inability of the international community to reconcile universal legitimacy and effectiveness in defence of human rights.<sup>1</sup> In his view, the case of Kosovo revealed that the core challenge to the Security Council and to the UN as a whole in the future was to forge unity behind the principle that massive and systematic violations of human rights should not be allowed to stand.<sup>2</sup>

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<sup>1</sup>Kofi Annan, ‘Two Concepts of Sovereignty’, address to the Fifty-Fourth Session of the General Assembly, United Nations, The Question of Intervention: Statements of the Secretary General (UN Department of Public Information, 1999).

<sup>2</sup>*Ibid.*, 2.

From this starting point, a new doctrine on intervention has been shaped, through several UN General Assembly reports, in order to reconcile sovereignty and human rights.<sup>3</sup> However, this ambition is still far from being accomplished: the current vision of R2P, divided in three pillars (respect, remedy and react), has not brought effective results in the practice of either states or the UN.

In the first part of this article, the emergence and the evolution of the R2P doctrine is recalled, through the analysis of reports and documents written under the auspices of the UN. In this perspective, R2P should be considered an obligation for states, as members of a new ‘human-centred’ international community. However, this ambitious vision was soon at odds with reality: in the second part of this article, the evolving concept of R2P is deconstructed, by analysing the definition of ‘responsibility’ and the weaknesses of the doctrine. While the first and the second pillars do not pose particular concerns relating to their accordance with international law—even if their content does not add much in respect of existing international instruments promoting or protecting human rights—the third pillar is very unclear.

In the third part of this article, the inconsistencies of the third pillar are underlined, by criticising its application within the context of the UN. The aim of this section is to determine whether or not the recent references to R2P doctrine contained in Security Council resolutions since 2006 can contribute to the consolidation of the R2P principle in practice. The lack of an obligation to intervene, of guidelines to states and the inconsistencies in the procedures adopted by the Security Council does not, as we will see, ensure the effective realisation of the doctrine in practice.

Thus, the R2P doctrine, whatever its appeal, is not able to legitimise humanitarian intervention or to justify legally a military intervention by the international community when a state is unable to protect its population from gross violations of human rights. If one agrees that the value of this doctrine is to reflect and to support a change in the current international community, increasingly centred on the protection of human rights, the only way to push forward with the doctrine is to go back. A long-standing theory about the use of force in international relations has stated that when there is a violation of *erga omnes* obligations, and the UN is not able to act, states can reclaim the power to take the necessary responses *uti universi*, including those entailing the use of armed force.<sup>4</sup> This approach could be used to rebuild the R2P doctrine in order to find a more solid basis for military intervention in cases of gross violations of human rights not only under Chapter VII of the UN Charter but also as part of general international law, in the *erga omnes* obligation to refrain from gross violations of human rights. In this respect, military intervention could be permitted, under international law, also outside of the UN Charter, and could be used in cases where the Security Council is unable or unwilling to authorise intervention. It is clear that the effective realisation of this theoretical reconstruction will require an evolution in the practice of states and regional organisations, outside of the UN framework, supporting the existence of a ‘duty’ to intervene in the case of gross violations of human rights.

## II. The Emergence and Evolution of the Responsibility to Protect Doctrine

The R2P is, in many respects, an evolution of the concept of humanitarian intervention, introduced by the International Commission on Intervention and State Sovereignty (ICISS) in

<sup>3</sup>Mónica Serrano, ‘The Responsibility to Protect and its Critics: Explaining the Consensus’ (2011) 3 *Global Responsibility to Protect* 1, 2.

<sup>4</sup>Paolo Picone, ‘Valori fondamentali della Comunità internazionale e Nazioni Unite’ (1995) 50 *La Comunità internazionale* 439.

2001.<sup>5</sup> The assumption of the doctrine is the need for mutual support between states and a shared responsibility to protect populations from crimes of aggression and gross violations of human rights. This responsibility arose during the 1990s, together with a new notion of sovereignty, which has greatly influenced the rise of the R2P doctrine. According to this new theory of sovereignty, the international community, traditionally composed only of sovereign states, would be based on international relationships also with other legal entities. States are now interconnected with international organisations, which are subject to international law, as well as with non-state actors, non-governmental organisations, terrorist groups, individuals and multinational corporations. Therefore, international relationships are conditioned by a new balance of powers, which includes non-state actors, giving rise to a need to create new legal mechanisms for managing these new global circumstances and concerns.

This has produced a Copernican revolution in the international community, which is no longer based solely on the self-interests of sovereign states, but also on the interests of civil society as a whole. The increasing role of individuals in this field is mostly shown by the large number of international treaties and by the creation of international courts aimed at protecting human rights. Therefore, the sovereignty of states should be addressed not merely as the right to be undisturbed from without, but in relation to the ‘responsibility’ to perform the tasks expected of an effective government.<sup>6</sup> Accordingly, sovereignty should no longer be conceived of as a right, but as a responsibility towards the national community, which includes the obligation of the state to preserve life-sustaining standards for its citizens, as a necessary condition of sovereignty.<sup>7</sup> This view has been considered the legal basis for the evolution of the R2P doctrine,<sup>8</sup> and it has contributed to the current idea of ‘functional sovereignty’. A state should not be conceived as a legal person yielding political powers for the pursuit of its own interests; it rather constitutes one of the sub-units of the political organisation of mankind.<sup>9</sup>

The 2001 ICISS Report also connected this new theory of state sovereignty with the emergence and development of a ‘human security concept’, envisaged as the need to safeguard individual freedom against all forms of insecurity such as genocide, torture, war crimes and crimes against

<sup>5</sup>UN, International Commission on Intervention and State Sovereignty, The Responsibility to Protect (2001), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/57/303](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/57/303) (hereinafter ICISS Report) (accessed June 2015).

<sup>6</sup>Donald Rothchild, Francis Deng, William Zartman, Sadikiel Kimaro and Terrence Lyons, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, 1996) 33. The origins of the concept of responsibility to protect may be traced to some French and Belgian writings of the late 1980s. See, for example, Olivier Corten and Pierre Klein, *Droit d'ingérence ou obligation de réaction? Les possibilités d'action visant d'assurer le respect des droits de la personne face au principe de non-intervention* (Bruylant, 1992). In 1991, UN Secretary General Pérez de Cuéllar argued that sovereignty could not be a shield behind which human rights could be massively and systematically violated. He suggested that there was a ‘collective obligation of States to bring relief and redress in human rights emergencies’. He added that any international protective action had to be taken in accordance with the UN Charter and could not be unilateral. See United Nations, Secretary-General, Report to the General Assembly, UN Doc A/46/1, 6 September 1991, in Jutta Brunnée and Stephen Thope, ‘Norms, Institutions and UN Reform: The Responsibility to Protect’ (2005–06) 2 *Journal of International Law and International Relations* 121, note 4.

<sup>7</sup>UN General Assembly, UN Doc A/68/947-S/2014/449, 11 July 2014, xvii–iii.

<sup>8</sup>According to Hans-Georg Dederer, ‘Responsibility to Protect and Functional Sovereignty’ in Peter Hilpold (ed), *The Responsibility to Protect (R2P): A New Paradigm of International Law?* (Brill, 2015) 156, 156 (‘the linkage between R2P and State sovereignty has been correctly denoted one of the “primary normative makers” of R2P and its conceptual evolution’).

<sup>9</sup>E Cannizzaro, ‘Responsibility to Protect and the Competence of UN Organs’ in Hilpold (ed) (n 8) 207.

humanity.<sup>10</sup> In particular, each state would have the primary responsibility to guarantee (protect) the security of its population and, when or if it is unable or unwilling to fulfil this obligation, the international community as a whole could be called upon to intervene in protecting the population from gross violations of human rights, with any necessary instruments.

Following the 2001 Report, the R2P doctrine developed in a short period into three different pillars. The state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and the incitement to them; the international community has a responsibility to encourage and assist states in fulfilling this responsibility; and, finally, the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect peoples from these crimes. Finally, if a state is manifestly failing to protect its population, the international community must be prepared to take collective action to protect these people, in accordance with the UN Charter.

In other words, the R2P doctrine includes: (i) the 'responsibility to prevent' gross violations of human rights; (ii) the 'responsibility to react', when this type of crimes is perpetrated, through a gradual series of means going from persuasion to military intervention; and (iii) the 'responsibility to rebuild', ie responsibility for restoring the damage caused by the military action, ensuring a durable peace, and promoting the rule of law.

This structure has been progressively strengthened for more than a decade through a series of documents. The 2004 Report, 'A More Secure World: Our Shared Responsibility', enhanced the notion of human security, gathering together poverty, disease and environmental decay with international and civil conflicts, as well as terrorism and international criminal organisations.<sup>11</sup> The 2005 Report, 'In Larger Freedom: Towards Development, Security, and Human Rights for All', encouraged states to conceive of the R2P as a basis to legitimate a collective action against genocide, ethnic cleansing and crimes against humanity.

Furthermore, according to paragraph 138 of the 2005 World Summit Outcome (WSO),<sup>12</sup> each state has the responsibility to protect its population from these types of threat, and the international community has to accept this responsibility, and to comply with it, encouraging, and, if necessary, compelling, states to take on this responsibility. Paragraph 139 of WSO additionally calls for a responsibility of the international community, through the UN, to adopt diplomatic, humanitarian and other pacific measures, pursuant to Chapters VI and VIII of the UN Charter, in order to assist in protecting populations from the aforementioned crimes. In this context, according to the document, states should also be ready to undertake collective action promptly and firmly through the Security Council in accordance with the Charter. However, in cases of armed intervention, this should be done after a case-by-case analysis and in co-operation with the relevant regional organisations, when peaceful means have proven inadequate and national authorities have manifestly failed in protecting their population from genocide, war crimes, ethnic cleansing and crimes against humanity.

One year after the World Summit, the notion of R2P was recalled, though indirectly, by means of the adoption by the Security Council of Resolution 164/2006 concerning civil victims in armed conflicts.<sup>13</sup> The Resolution highlighted the importance of adopting measures for conflict prevention and resolution. In particular, paragraph 4, while recalling paragraphs 138 and 139 of the Final Document of the 2005 World Summit in relation to the responsibility to protect populations, explicitly introduced for the first time the notion of R2P in the legal framework of the UN.

<sup>10</sup>Pietro Gargiulo, 'Dall'intervento umanitario alla responsabilità di proteggere' (2007) 4 *La Comunità internazionale* 639.

<sup>11</sup>UN General Assembly, UN Doc A/59/565, 2 December 2004.

<sup>12</sup>UN General Assembly, UN Doc A/RES/60/1, 24 October 2005.

<sup>13</sup>UN Security Council, UN Doc S/RES/1674, 28 April 2006.

Even though the resolution did not add anything substantive to what already emerged during the 2005 World Summit, scholars have considered this Security Council resolution a significant statement in support of the consolidation of the R2P doctrine.

It has since been the General Assembly that has suggested strategies for the implementation of the principle, as well as instruments to strengthen the prevention of the crimes to which it relates. In 2009, the UN Secretary General's Report, 'Implementing the Responsibility to Protect', underscored that the worst tragedies afflicting humanity in the last century were not circumscribed to a particular region of the world.<sup>14</sup> In this report, the R2P doctrine is conceived of as an attempt to find a solution to those types of situations, and it was described as an ally of sovereignty. The 2010 Report of Secretary General Ban Ki-Moon, 'Early Warning, Assessment, and the Responsibility to Protect',<sup>15</sup> while recognising the efforts made by the UN in the field of information, assessment and early warning, called on UN bodies to increase the flow of information from the peripheral centres to headquarters. The management and the increase of the information flow is, according to the report, one of the key aspects to ensuring a timely intervention in the framework of R2P.

In 2012, the Secretary General presented his report on 'The Responsibility to Protect: Timely and Decisive Response' at the fourth annual informal, interactive, dialogue on the R2P in the General Assembly.<sup>16</sup> The report examined the range of tools available under the third (response) pillar, partners available for implementation and the close connection between prevention and response. In 2013, the General Assembly held its annual informal interactive dialogue based on the fifth report of the Secretary General, 'Responsibility to Protect: State Responsibility and Prevention'.<sup>17</sup> The report explored the causes and dynamics of atrocities and set out measures that states can take to prevent these crimes and build societies that are resilient to them. The report also highlighted some examples of initiatives that states are already taking. Finally, in September 2014, the General Assembly held a debate on the sixth report of the Secretary General, 'Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect'.<sup>18</sup> This last report identified the various actors, approaches and principles to guide efforts to assist states through encouragement, capacity building and protection assistance.

### III. R2P Content and Definition: Criticisms in Legal Theory

The R2P doctrine has been either enthusiastically sustained or strongly criticised by scholars.<sup>19</sup> It is clear that the simple fact that the concept of R2P is contained in several UN documents and

<sup>14</sup>UN General Assembly, UN Doc A/63/677, 12 January 2009.

<sup>15</sup>UN General Assembly, UN Doc A/64/864, 14 July 2010.

<sup>16</sup>UN General Assembly, UN Doc A/66/874-S/2012/578, 23 July 2012.

<sup>17</sup>UN General Assembly, UN Doc A/67/929-S/2013/399, 9 July 2013.

<sup>18</sup>UN General Assembly, UN Doc A/68/947-S/2014/449, 11 July 2014.

<sup>19</sup>See for an overview of the different scientific positions on R2P doctrine: Eckart Klein (ed), *The Duty to Protect and to Ensure Human Rights* (SPITZ, 2000); Emanuel Gross, 'Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to Protect its Citizens' (2001) 15 *Temple International and Comparative Law Journal* 195; Ramesh Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS' (2002) 33 (3) *Security Dialogue*, 323; Jeremy Leviitt, 'The Responsibility to Protect: A Beaver Without a Dam' (2003) 25(1) *Michigan Journal of International Law* 153; Ramesh Thakur, 'In Defence of the Responsibility to Protect' (2003) 7(3) *International Journal of Human Rights* 160; Daniel Warner, 'Responsibility to Protect and the Limits of Imagination' (2003) 7(3) *International Journal of Human Rights* 154; Mary Young, 'The Smuggling and Trafficking of Refugees and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crime?' (2003) 27 *Suffolk Transnational Law Review* 101; Gareth Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention' (2004) 98 *American Society of International Law, Proceedings of the Annual Meeting*



reports, as discussed in the previous section, does not establish the emergence of a new sound legal theory or the appearance of a binding norm of international law. Clearly, these reports and documents (eg the 2001 ICISS Report) do not have binding effect and they cannot establish by themselves the existence of any legally binding rule in relation to R2P. On the other hand, the non-existence of international treaties that explicitly refer to R2P excludes the emergence of any conventional obligations, directly reliant on the R2P doctrine.<sup>20</sup> Moreover, and most importantly, since the R2P doctrine is in conflict with some principles of customary international law—such as sovereign equality among states and non-intervention in their internal affairs—in order to support the legal nature of the R2P doctrine it is necessary to identify very clear evidence of the doctrine's practice and a general consensus among states as to its existence. The issue of the emergence of a customary international law on R2P has to be approached extremely carefully.

With this aim, it is of paramount relevance to establish whether or not R2P is a shared understanding within the international community, able to generate a sense of obligation or adherence in the practice of states. In other words, it is essential to demonstrate whether a customary international law, having as its content the R2P doctrine, is emerging or has emerged in international law. If not, the so-called norm should be considered only an enthusiastic hope, which can simply be evaded or ignored in the practice of states (as can any other soft law instrument).<sup>21</sup> In so doing,

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78; Alex Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) 19(2) *Ethics and International Affairs* 31; Thomas Weiss, *Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (Lanham, 2nd edn 2005); Paul Williams and Alex Bellamy, 'The Responsibility to Protect and the Crisis in Darfur' (2005) 36(1) *Security Dialogue* 27; Marie Joelle Zahar, 'Intervention, Prevention, and the "Responsibility to Protect": Considerations for Canadian Policy' (2005) 60(3) *International Journal* 723; Gelijn Molier, 'Humanitarian Intervention and the Responsibility to Protect after 9/11' (2006) 53 *Netherlands International Law Review* 37; Ramesh Thakur, *The United Nations, Peace and Security from Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006); Alicia Bannon, 'The Responsibility to Protect: The UN World Summit and the Question of Unilateralism' (2006) 115 *The Yale Law Journal* 1157; Rebecca Hamilton, 'The Responsibility to Protect from Document to Doctrine—But What of Implementation?' (2006) 19 *Harvard Human Rights Law Journal* 289; Peter Hilpold, 'The Duty to Protect and the Reform of the United Nations, a New Step in the Development of International Law?' (2006) 10 *Max Planck Yearbook of United Nations Law* 35; Laurence Boisson de Chazournes and Luigi Condorelli, 'De la "responsabilité de protéger", ou d'une nouvelle parure pour une notion déjà bien établie' (2006) 1 *Revue générale de droit international public* 11–18; Alex Bellamy, *Preventing Future Kosovo and Future Rwanda: The Responsibility to Protect after the 2005 World Summit* (Carnegie Council, 2006); Carsten Stahn, 'Responsibility to Protect: Politic Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008); Alex Bellamy, *Responsibility to Protect* (Polity, 2009); Cristina Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, 2010); James Pattinson, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010); Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011); Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, 2011); Daniel Fiott and Joachim Koops (eds), *The Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization* (Palgrave Macmillan, 2014); Roland Paris, 'Responsibility to Protect: The Debate Continues' (2015) 22(2) *International Peacekeeping* 143; and Hilpold (ed) (n 8).

<sup>20</sup>See Krista Nakavukaren Shefer and Thomas Cottier, 'Responsibility to Protect (R2P) Principle of Common Concern' in Hilpold (ed) (n 8) 123, 131 (arguing that the 'non-indifference' principle, contained in Art 4 of Constitutive Act of the African Union, adopted at Lomé in Togo on 11 July 2000 'is far from completion and it does indicate an expansion of the scope of the concept beyond the *de lege lata* boundaries').

<sup>21</sup>See also Ved P Nanda, 'From Paralysis in Rwanda to Bold Moves in Libya: Emergence of the "Responsibility to Protect" Norm under International Law—Is the International Community Ready for It?' (2011–12) 34(1) *Houston Journal of International Law* 39, para 326 ('In a nutshell, it is too early to tell how soon the

it is necessary to clarify what the exact content of the obligations should be, namely the *opinio juris*, and what practice of states and the international community as a whole is relevant (*diuturnitas*).

The starting point is defining the meaning of ‘responsibility’, by clearly outlining which responsibilities eventually fall upon which actors. With this aim, a distinction further needs to be drawn between the meaning of ‘responsibility’ in the context that states have a responsibility to protect their populations and the meaning of ‘responsibility’ when referring to the idea that the international community has responsibilities to encourage, assist and enforce this protection.

By analysing the UN documents addressing this topic, especially according to the 2005 UN WSO, 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.<sup>22</sup> Again, according to the 2005 Report, this responsibility is also directed to the ‘international community’, which can rightfully hold states to account by using appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter. It further provides for the taking of 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 co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations.<sup>23</sup>

Moreover, a distinction should be drawn between the responsibility of states and the responsibility of the international community: although the responsibility to protect their own citizens is generally recognised and accepted by states, the responsibility to react is conceived merely as a moral responsibility.<sup>24</sup> In particular, paragraph 139 of the 2005 UN Report, with regard to the responsibility of the international community, appears a rather curious mixture of political and legal considerations, which reflects the confusion about the meaning of the concept.<sup>25</sup> This confusion certainly does not help the strengthening of the *opinio juris* about the duties that should follow from the R2P doctrine for states and international community. However, this developing notion of responsibility has been partially improved by the 2009 Report, in which the pillar system has been more clearly defined in terms of: protection responsibilities of the states (pillar I), international assistance and capacity building (pillar II), and timely and decisive response (pillar III).<sup>26</sup>

This progress in the definition of the structure of the R2P doctrine has also allowed for a general acceptance of the customary international law nature of the first pillar. The 2009 Report states that the responsibility of the state to protect its populations—whether nationals or not—from genocide, war crimes, ethnic cleansing and crimes against humanity (and from incitement thereto) derives both from the nature of state sovereignty and from the pre-existing and continuing legal obligations of states. In so doing, the Report assumes that the R2P is not a relatively

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international community will operationalize and implement the responsibility to protect, which simply reflects the tension between the age-old tradition of sovereignty and the contemporary aspirations of human rights. It will take time for the idea to take root that sovereignty and responsibility to protect are indeed compatible. But there is no question that the collective action envisaged by R2P to prevent and halt atrocities is a preferable alternative to the much discredited unilateral intervention’).

<sup>22</sup>World Summit Outcome, UN Doc A/60/1, para 138.

<sup>23</sup>See Cannizzaro (n 8) 139.

<sup>24</sup>UN Doc A/63/677 (n 14) 9.

<sup>25</sup>Stahn (n 19) 102.

<sup>26</sup>According to the Report, if the three supporting pillars were of unequal length, the edifice of R2P could become unstable, leaning precariously in one direction or another. However, the only relevant step ahead in terms of definition and consequently on the legal nature of a pillar has been regarding the first pillar.



recent enunciation,<sup>27</sup> but a reinterpretation of old concepts from a contemporary perspective. This has been a step forward for the doctrine, even if the protection obligations for the states are once again not directly derived from the R2P doctrine, but rather from the practice of states compliant with other international agreements or principles that concern human rights protection.

Similarly, the ‘responsibility to prevent’ is contained in different instruments, such as political plans (relating to good governance, human rights and confidence building) economic policies (relating to poverty, inequality and economic opportunity), normative approaches (relating to the rule of law and accountability) and military matters (relating to disarmament, reintegration and sectorial reform), at the national and international level.<sup>28</sup> However, the inherent difficulty of translating a commitment to prevention into coherent policy, the impact of the place of prevention, eg in the war on terrorism, and the question of authority may raise doubts regarding the legal effects of the second pillar.

As for the ‘responsibility to react’, the existence of *opinio juris* with this content is highly debatable, even if one takes the view that such a rule would be desirable.<sup>29</sup> Moreover, the weak legal basis in the UN framework—as well as the lack of consistent practice by states and by the UN—all count against the purported emergence of an R2P obligation. While a few international scholars have simply asserted that there is a legal right to intervene, others in recent years have tried to find such a legal obligation in UN framework and practice. However, it is clear there is no such right on the basis of the kind of inconsistencies and double standards, which will be highlighted in the next section.

#### IV. The Controversial Legal Nature of the Third Pillar

According to the 2009 UN Report, Member States agreed to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organisations, as appropriate. This intervention would be permitted, under the doctrine of R2P, if peaceful measures prove to be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In addition, the report underlines how the General Assembly may exercise a range of related functions under Articles 10–14, as well as under the ‘Uniting for Peace’ process set out in its resolution 377. In particular, under the ‘Uniting for Peace’ procedure, according to the 2009 Report, the Assembly could address such issues when the Security Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members.<sup>30</sup> However, this framework presents several concerns in legal theory. First, its reference to Chapter VII of the UN Charter is very uncertain. Secondly, the envisaged idea of intervention authorised by the General Assembly and the involvement of regional organisations is very weak.

As for the third pillar of R2P and its relation to Chapter VII of the UN Charter, it must be demonstrated that military intervention—on the basis of the R2P doctrine—is lawful according to the Charter. Even if it is lawful, it must then be clarified who would be allowed to implement the military intervention, and how. Finally, it must be considered whether there is a mere ‘possibility’ or an ‘obligation’ to intervene. These different problems are directly linked.

<sup>27</sup>Stephen Marks and Nicholas Cooper, ‘The Responsibility to Protect: Watershed or Old Wine in a New Bottle?’ (2010) 2 *Jindal Global Law Review* 86, 105.

<sup>28</sup>Alex Bellamy, ‘Conflict Prevention and the Responsibility to Protect’ (2008) 15 *Global Governance* 135, 138.

<sup>29</sup>See Pattinson (n 19) 67.

<sup>30</sup>UN Doc A/63/677 (n 14) para 63.

According to the UN Charter, the threat and use of force in international relations is generally prohibited. In particular, Article 2(4) specifies that all Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. This is a general principle, incumbent on all states in the international community.

Only two exceptions are offered in this framework: self-defence under Article 51, and military measures taken by the Security Council in response to any threat or breach of the peace, or act of aggression, in order to maintain or restore international peace and international security under Article 42. As is well known, the practice of the Security Council has developed in deviation from the Charter, especially with reference to the creation and evolution of the system of authorisations to use force. This process has no express legal basis in the Charter. However, this practice is well established today and it involves the Secretary General of the UN, Member States of the organisation and regional organisations, under Article 53 of the Charter.

There are several theories aimed at justifying the use of force concerning the more traditional means of humanitarian intervention. According to a first approach, the legal basis of the operations implemented by states can be found in the existence of an unwritten rule, which modified Article 42 of the Charter and is confirmed by the general practice of states.<sup>31</sup> From a different perspective, Article 42 as such constitutes the legal basis of the military operations of states authorised by the Security Council, even in the absence of the requirements of Chapter VII, since the Council, according to Article 42, has the power also to authorise the use of force by states.<sup>32</sup> Others find the possibility to authorise these interventions in Article 24, by applying the theory of implied powers, which enables the Security Council to take measures not specified in the Charter, but which are necessary to carry out its primary responsibility for the maintenance of peace and security.<sup>33</sup> Finally, another view affirms that the development of general international law has led to the creation of *erga omnes* obligations. As a consequence, new powers have been conferred on the UN, beyond the conventional limits of the Charter, for the protection and implementation of *erga omnes* obligations,<sup>34</sup> and the decision-making centre has progressively moved outside of the Charter's original scope.<sup>35</sup>

As for the 'responsibility to intervene', based on Chapter VII, the legal basis for the doctrine should be found through an analogous, logical path. The Security Council can intervene, under Chapter VII of the UN Charter, only in relation to a threat to peace, a breach of the peace or an act of aggression, and where its action is aimed at maintaining or restoring international peace and security. Therefore, military intervention in the framework of the R2P doctrine should fulfil the conditions laid down by the Charter, briefly recalled, or otherwise should be conceived as an enlargement of the set of purposes assigned to the Security Council, under Chapter VII.<sup>36</sup>

Nevertheless, this effort to find a legitimisation of the R2P intervention is usually carried out within the framework of the UN security system, through a case-by-case analysis. This weak anchoring of R2P within the UN Charter and the uncertain practice, described hereinafter, does

<sup>31</sup>Benedetto Conforti, *The Law and the Practice of the United Nations* (Martinus Nijhoff, 2000) 204.

<sup>32</sup>Sergio Marchisio, *L'ONU. Il diritto delle Nazioni Unite* (Il Mulino, 2000) 25.

<sup>33</sup>Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 *European Journal of International Law* 436.

<sup>34</sup>See Picone (n 4) 447–48.

<sup>35</sup>Commonly, delegation by, or authorisation from, the Security Council to the states is done by way of a proposal from a Member State in order to bring the intervention under the control of the UN.

<sup>36</sup>However, an unexpected consequence may arise by using the theory of '*erga omnes* values and obligations'. This issue will be addressed in section VI of this article.

not give rise to the conclusion that this type of military intervention is now admitted under international law. Even assuming that R2P military intervention in the case of a gross violation of human rights could be considered to fall within the UN legal framework, the problem remains as to the emergence of a legal obligation to intervene. Indeed, without such an obligation there would be no difference between humanitarian intervention and R2P, in terms of the real impact of the doctrine, and there would be no need to develop further the R2P concept.<sup>37</sup>

Since 2005, states have been perfectly aware that the main problem relating to the application of R2P is the lack of an obligation to intervene, even in the case of a gross violation of human rights, for both the UN and states. More precisely, a considerable number of states were strongly against the notion of humanitarian intervention, implementing the R2P doctrine, and some expressly opposed it even in instances where intervention was authorised by the Security Council.<sup>38</sup> In any case, no state seems to accept unilateral humanitarian intervention, with the only possible (but still ambiguous) exception of the United States. In particular, states supporting R2P converged in limiting humanitarian intervention to very few situations, namely genocide, ethnic cleansing and crimes against humanity.

Indeed, even if states agree on the need to prevent and remedy these massive violations of human rights, when such states are called to intervene, they prefer to use remedies other than military intervention, such as measures of political pressure, economic sanctions, as well as the resort to national and international criminal courts. Admittedly, these measures may well prove inadequate, but they are the only ones that states actually support. As for military measures, states require guarantees of impartiality against abuse, given the seriousness of their consequences, or reserve their decisions on a case-by-case basis, clearly depending on the interest at stake in each instance.<sup>39</sup>

In recent years, the Security Council has often been involved in responding to cases of gross violations of human rights, and only recently has made a number of express references to the R2P doctrine. In particular, the Council invoked for the first time the principle of R2P in 2006, where it underscored that the government of Burundi had a primary responsibility to protect its population.<sup>40</sup> Afterwards, in the same year, the Council made an indirect reference to the doctrine in the case of Darfur, by recalling, among others, its previous resolutions 1325 (2000) on women, peace and security, 1502 (2003) on the protection of humanitarian and UN personnel, 1612 (2005) on children and armed conflict, and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms *inter alia* the provisions of paragraphs 138 and 139 of the 2005 UN WSO document. The Security Council took a relevant step forward with resolutions 1970 and 1973 on the situation in Libya. In the first of these resolutions, the Council referred to the R2P, taking note of the situation in Libya, referring the matter to the International Criminal Court, and imposing financial sanctions and the arms embargo; while, in the second, it approved a no-fly zone, called for an immediate ceasefire and imposed sanctions on the regime of Muammar Gaddafi.<sup>41</sup>

<sup>37</sup>See Brunnée and Thope (n 6) 121 ('In essence, all the eggs of responsibility to protect have been thrown into the Security Council basket, a basket that has proven to be full of holes in the past. This choice increases the pressure on the Security Council to meet the burden of the world's expectations for action in humanitarian crises. We believe that normative development is worth pursuing even in the absence of current institutional change. More robust norms may actually help institutional decision making').

<sup>38</sup>Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13(2) *Journal of Conflict and Security* 191, 201–02.

<sup>39</sup>See generally *ibid*, 210 et seq.

<sup>40</sup>UN Security Council, UN Doc S/RES/1653, 27 January 2006.

<sup>41</sup>Ved P Nanda, 'The Future under International Law of the Responsibility to Protect after Libya and Syria' (2013) 21 *Michigan State University International Law Review* 1.

Subsequently, with resolution 1975 of 2011 on the situation in Côte d'Ivoire, the Security Council, in response to the growing post-election violence, condemned the serious violations of human rights committed by supporters of political rivals Gbagbo and Ouattara, saying that the attacks that were taking place in Côte d'Ivoire against civilians could constitute crimes against humanity. By recalling the primary responsibility of each state to protect its civilian population, the Security Council asked for the transfer of power to Ouattara, and reiterated the mandate of the UN in Côte d'Ivoire with the use of every necessary means to protect life and property.

From a similar perspective, with resolution 1996 of 2011, the Security Council established the UN Mission in the Republic of South Sudan (UNMISS), and authorised it to use all necessary means to implement its mandate to increase security and development and provide assistance in building peace, stressing the importance of a comprehensive approach to its consolidation of peace. The Security Council recalled the principle of R2P in stressing the primary responsibility of the government of the Republic of South Sudan to protect its civilian population. The situation in Sudan was again addressed in 2014, when, in resolution 2170, the Security Council emphasised that those responsible for violations of international humanitarian law and violations and abuses of human rights must be held accountable and that the government of South Sudan bore the primary responsibility to protect civilians within its territory and subject to its jurisdiction, including from potential crimes against humanity and war crimes. More recently, the Security Council has made express reference to peacekeeping operations, by highlighting the important role that UN police components play, where mandated, in consultation with the host state and in collaboration with other actors, in supporting host states to uphold their primary responsibility to protect civilians as well as respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction.

However, while there is some progress in the practice of the Security Council to authorise actions under Chapter VII in response to gross violations of human rights, there has been no key shift from the Council's traditional practice: military intervention has always been linked to the concept of a 'threat to peace', and references to R2P doctrine have been somewhat vague and, in any case, complementary.<sup>42</sup> In other words, if R2P can contribute to justifying the intervention of the Security Council in situations of gross violations of human rights, it does not appear to create an obligation to intervene. Indeed, under Article 99 of the Charter there is no duty or obligation for the Secretary General to exercise his political authority in a particular way, but merely a discretionary mandate to undertake executive action. Similarly, Article 24, which confers the primary responsibility for the maintenance of international peace and security on the Security Council, cannot be interpreted as imposing an obligation upon the Council or its members to exercise that responsibility in predetermined ways.<sup>43</sup> This is true for any action of the Security Council, and, a fortiori, for military actions, such as those interventions 'required' by R2P, which cannot be easily justified under the UN Charter.

This exclusion of any obligation to act, coupled with the lack of guidelines in determining the urgency of a situation and the identification of appropriate measures to take in these cases, pose several problems for the effectiveness of the R2P doctrine.

<sup>42</sup>Dorota Gierczyk, 'The Responsibility to Protect: A Legal and Rights-Based Perspective' (2010) 2 *Global Responsibility to Protect* 250, 266.

<sup>43</sup>Anne Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 *Global Responsibility to Protect* 400.

## V. The Third Pillar and Procedural Inconsistencies

When the Security Council intervenes in international crises, it usually seems to proceed on a case-by-case basis, depending on the interests of its members and—particularly—of its five permanent members, providing authorisations in one case but not in another that may be just as serious.<sup>44</sup>

In order to avoid these inconsistencies in its practice, the 2001 ICISS Report on R2P suggested bypassing the Council in cases of inactivity or the exercise of the veto by the permanent members, by letting the General Assembly or regional organisations intervene. However, as there is no ‘obligation to intervene’, according to the R2P doctrine, there is no need to justify this lack of intervention.<sup>45</sup> The Security Council’s failure to fulfil its responsibility to protect does not entail any legal consequences. Moreover, no legal consequence would arise from arbitrary decision-making or exercise of the veto. Therefore, any expectation for the consistent implementation of the Security Council’s responsibility to protect can be considered only theoretical.<sup>46</sup> The right of veto is probably the main obstacle to effective international action in important situations of humanitarian crisis. Therefore, the 2001 Report suggested, for example, the need to consider the use of the veto by a permanent member of the Security Council, in case of R2P interventions, as a breach of the obligations of states to prevent genocide.

ICISS, in its 2001 Report, suggested drafting a ‘code of conduct’, directed at Security Council permanent members, relating to the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea was essentially that a permanent member, in matters where its vital national interests were not claimed to be involved, should not be able to use its veto to obstruct the passage of what would otherwise be a majority resolution.<sup>47</sup> However, this proposal was not followed in practice and, in any case, this code would have been non-binding.

The 2009 Report agreed on a new way to avoid the veto: the five permanent members, by bearing particular responsibilities, should refrain from using or threatening the use of the veto in situations where there was a failure of a state to fulfil its obligations regarding the R2P.<sup>48</sup> Another proposal was a voluntary agreement not to use the veto, at least in cases where the commission of the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity was unmistakable.

However, none of these proposals has been put into practice. There was no discussion of alternatives to Council action in any of the formal negotiations in New York and, had this been raised, it would have derailed any agreement on the responsibility to protect.<sup>49</sup> The reluctance of the Security Council’s permanent members to give up their right of veto, in any case, has demonstrated that there is little room for alternative solutions within the UN.<sup>50</sup>

<sup>44</sup>Gary Wilson, ‘Applying the Responsibility to Protect to the “Arab Spring”’ (2014) 35 *Liverpool Law Review* 157, 161.

<sup>45</sup>Hitoshi Nasu, ‘Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict’ (2009) 14(2) *Journal of Conflict and Security Law* 209, 219.

<sup>46</sup>Contra John Quigley, ‘The United Nations Security Council: Promethean Protector or Helpless Hostage?’ (2000) 35 *Texas International Law Journal* 129, 167–70.

<sup>47</sup>See ICISS Report (n 5) 51 (‘The expression “constructive abstention” has been used in this context in the past. It is unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution are concerned. But the adoption by the permanent members of a more formal, mutually agreed practice to govern these situations in the future would be a very healthy development’).

<sup>48</sup>See UN Secretary General, ‘Implementing the Responsibility to Protect’ (2009) para 61.

<sup>49</sup>Nicholas Wheeler, ‘A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit’ (2005–06) 2(1) *Journal of International Law and International Relations* 95.

<sup>50</sup>Aaron Hoffman, ‘A Conceptualization of Trust’ (2002) 8(3) *European Journal of International Relations* 375; Benno Torgler, ‘Trust in International Organizations: An Empirical Investigation Focusing on the United Nations’ (2008) 3(1) *Review of International Organizations* 65.



The possibility of intervention being authorised by the General Assembly has also been widely debated. Even though the Security Council has the key role and primary responsibility for the maintenance of international peace and security, Article 10 of the UN Charter recognises a general power of the UN General Assembly to debate and consider any matter within the UN's scope, and Article 11 establishes a fall-back responsibility of the General Assembly with regard specifically to the maintenance of international peace and security (albeit only to make recommendations, not binding decisions).<sup>51</sup> Thus, in the case of inactivity of the UN Security Council, the 2001 ICISS Report suggested two alternatives: an emergency meeting of the General Assembly in extraordinary session, as was done under the 'Uniting for Peace' resolution, or the involvement of regional organisations, to be approved in any case by the Security Council.<sup>52</sup> In the view of the 2001 Report, in the absence of Security Council endorsement and with the General Assembly's power only to make recommendations, a military intervention under R2P, which took place with the backing of a two-thirds vote in the General Assembly, would clearly have powerful moral and political support. However, practice does not confirm this view. As the recent case of the Ukraine crisis shows, the Security Council's inability or unwillingness to act has not led to an intervention by the General Assembly.

In light of all these considerations, at present it cannot be said that the practice of the Security Council, or of the UN as a whole, has evolved to accept the responsibility to protect as a discrete ground of competence authorising intervention in the field of international peace and security.<sup>53</sup> In other words, it is difficult to imagine how the Security Council or its individual members might be sanctioned for a failure to respond adequately to a humanitarian crisis or mass atrocities.<sup>54</sup>

Finally, in relation to the assumption according to which when the UN fails in its R2P, it must be said that any suggestion that this duty should be incumbent upon regional organisations is difficult to support.<sup>55</sup> To this end, the African Union (AU)—for example—has developed its own security architecture, which should ensure that the responsibility to protect is implemented at the regional level. In particular, according to Article 4(h) of the Constitutive Act of the AU, in claiming an exclusive right to resolve its own crises, the AU has arguably taken upon itself the responsibility to do so on behalf of the international community.

However, even from this perspective, the intervention should be included within the framework of the UN security system, which would authorise the military intervention. Furthermore, the effect of a failure by the AU to carry out effectively its responsibility to protect would be that the international community may challenge and even reject the organisation's claim to the exclusive right to determine and implement appropriate responses to crises on the African continent.<sup>56</sup>

<sup>51</sup>See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (advisory opinion) [1962] ICJ Reports, 151. The only requirement, meant to prevent a split between the UN's two major organs, is that the Security Council must not be discussing that issue at the same time (Art 12(1), UN Charter).

<sup>52</sup>The 'Uniting for Peace' Resolution of 1950 created an Emergency Special Session procedure that was used as the basis for operations in Korea that year and subsequently in Egypt in 1956 and the Congo in 1960.

<sup>53</sup>Hitoshi Nasu, 'The UN Security Council's Responsibility and the "Responsibility to Protect"' (2011) 15 *Max Planck Yearbook of United Nations Law* 377.

<sup>54</sup>Luke Glanville, 'On the Meaning of "Responsibility" in the "Responsibility to Protect"' (2011) 20(2) *Griffith Law Review* 482.

<sup>55</sup>José Alvarez, 'The Schizophrenias of R2P' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 281–83. See also Hitoshi Nasu, 'The Responsibility to React? Lessons from the Security Council's Response to the Southern Lebanon Crisis of 2006' (2007) 14(3) *International Peacekeeping* 339.

<sup>56</sup>See Glanville (n 54) 500.



## VI. The Responsibility to Protect Doctrine: Between Criticisms and Inconsistences

The emergence and evolution of the R2P doctrine have been greatly welcomed since 2001. However, it is nothing more than the evolution of the *droit d'ingérence* that appeared in the 1980s, and which was promoted by Kouchner, a representative of the non-governmental organisation Médecins sans Frontières, and French academics, such as Bettati. According to this theory, there was a moral duty to assist victims of gross violations of human rights, including where states were unable or unwilling to do so. This model later gave new ground to the doctrine of humanitarian intervention, and, after the Kosovo crisis, developed into the R2P doctrine.

Many scholars have concentrated their efforts on finding a legal basis for the R2P. Thus, since the R2P concept includes three pillars—respect, remedy and react—the legal basis of the first two ‘obligations’ was found in the evolution of human rights law, as a shared understanding within international society, able to generate a sense of obligation or adherence in the international community; while the third pillar was referred to the UN Charter and its security system, as the first Report in 2001 suggested.

In this article, after having clarified the concept of ‘responsibility’, the first and the second pillars of the doctrine have been conceived as a reinterpretation of human rights obligations, already existent in international law. In this perspective, the ‘responsibility to protect’ is conceived as a duty for states and the international community that is already binding, resulting from the human rights legal framework of international law, while the ‘responsibility to prevent’, beyond the concerns about its effectiveness, is perceived as a corollary of the first pillar, to which it is strictly linked.

Regarding the ‘responsibility to react’, the way in which it is promoted reflects the broader pathologies of the international community, concerning abuse of powers, structural inequalities, and unrepresentative norms and institutions.<sup>57</sup> This is particularly true in examining the practice of the Security Council, even in the case of Libya, where the R2P doctrine reached its breaking point. Until now, the Security Council has proceeded on a case-by-case basis, inevitably depending on the interests of its current members and particularly of its five permanent members. The lack of an obligation to intervene, and the inconsistencies in the procedure for implementing the R2P doctrine demonstrate the absolute lack of an emerging binding norm under the third pillar.

In conclusion, this doctrine does not have a strong legal basis under the UN framework and the practice of the organisation and of states does not suggest the emergence of a clear rule on R2P, different from obligations already existing in international law framework. In the case of the alleged ‘responsibility to react’, as has been shown in the above sections, there is no way to build such an obligation on the basis of 2001 ICISS Report and in the UN framework, as suggested by the R2P doctrine.

The R2P doctrine has not been able, on its own, to create any legal obligation. On one hand, it has only better described a process already existing in the international community (first and second pillars); on the other hand, it has tried to push forward new interests but has failed (third pillar). However, the doctrine has contributed by highlighting the increasing relevance of human rights protection in international law, especially in the case of gross violations of these rights. Besides the unenthusiastic reference to the R2P made by the UN Security Council, mentioned above, in the case of intervention in Libya, the current situation relating to Islamic State in Iraq and the Levant (ISIL) demonstrates all of the criticisms and inconsistencies of the R2P doctrine. Since August 2014, the United States and several allies have engaged in military

<sup>57</sup>Edward Newman, ‘R2P: Implications for World Order’ (2013) 5 *Global Responsibility to Protect* 235, 249.

intervention against ISIL, an extremist group that has brutally gained control of large swathes of Iraqi and Syrian territory. Despite an international consensus on ISIL's criminality, these actions have been taken without Security Council approval, and have put the United States and its allies on questionable legal ground. However, a general acquiescence of these states regarding unilateral interventions is gradually demonstrating that a breach of *erga omnes* obligations may allow a unilateral reaction by states, even outside of the control of the Security Council.<sup>58</sup>

Thus, a new perspective to find a sounder legal basis for the doctrine could be found by looking back in the past and outside the UN security framework, as has been the case for the first and second pillars. According to Picone's theory about the use of force in international relations, when there is a violation of *erga omnes* obligations and the UN is not able to act, states can reclaim the power to take the necessary responses *uti universi*, including those implying the use of armed force, also outside the system set out in the UN Charter.<sup>59</sup> In its dictum in the *Barcelona Traction* case,<sup>60</sup> the International Court of Justice proclaimed the concept of *erga omnes* obligations in international law, by enumerating four *erga omnes* obligations: the outlawing of acts of aggression; the outlawing of genocide; protection from slavery; and protection from racial discrimination. From this perspective, the violation of a general rule laying down an *erga omnes* obligation entails 'aggravated responsibility',<sup>61</sup> which may imply the use of force in collective action against this type of violation, as well as in individual action conducted outside of the UN framework. It is clear that this possibility would be allowed only in the case of inactivity by the Security Council and after the confirmation of gross violations of human rights. This approach would provide to find a legal foundation for a more effective 'responsibility to react' and, when supported by state practice, would help consolidate its legal nature.

<sup>58</sup>Paolo Picone, 'Unilateralismo e guerra contro l'ISIS' (2015) 1 *Rivista di diritto internazionale* 1, 15 ('l'intervento contro l'ISIS è stato fin dall'inizio condotto unilateralmente dagli Stati Uniti e dagli altri Stati della coalizione, in assenza di qualsiasi iniziativa idonea a "gestirlo" da parte del Consiglio di sicurezza dell'ONU; e continua attualmente a svolgersi nelle medesime condizioni. Non vi sono quindi dubbi sulla sua autonomia rispetto al sistema dell'ONU e sul carattere chiaramente "unilaterale" delle misure che lo realizzano in concreto').

<sup>59</sup>Paolo Picone, 'Interventi delle Nazioni Unite e obblighi erga omnes' in Paolo Picone (ed) *Interventi delle Nazioni Unite e diritto internazionale* (Cedam, 1995) 528, 536.

<sup>60</sup>*Case Concerning Barcelona Traction, Light, and Power Company, Ltd (New Application: 1962) (Belgium v Spain)* (second phase) [1970] ICJ Reports 3.

<sup>61</sup>Antonio Cassese, *International Law* (Oxford University Press, 1st edn 2001) 182.