Responsibility to Protect (R2P)

A New Paradigm of International Law?

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R2P and Humanitarian Intervention in a Historical Perspective

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1 Introduction

Being a relatively young concept R2P is by its very nature future-oriented. The basic events leading to the introduction and affirmation of R2P in the international legal order can be summarized as follows: while this term was first used by Francis M. Deng in 1995, in 2001 it was the subject of a thorough-going study by a Canadian government sponsored group of experts, the International Commission on Intervention and State Sovereignty (ICISS). Only four years later, this concept was officially accepted by the United Nations General Assembly (UNGA) at the World Summit. Thereby it made its way into the Outcome Document of 15 September 2005.[1] This was a success unexpected by most, and only afterwards did governments, human rights activists and academia become slowly aware of the enormous potential residing in this concept. First an array of states, which were either strongly attached to a traditional concept of sovereignty or had a bad human rights record (or both), opposed R2P notwithstanding the fact that it had been unanimously approved by the State Community in 2005. In the end, however, the forces operating in favour of R2P were stronger, and in 2011 the Security Council, a body which had initially taken a rather prudent stance towards R2P, referred to it in order to authorize the use of force against Libya.[2]

As this intervention turned out to be completely successful from a military point of view, political and academic interest in R2P grew further. A genuinely felt desire to unearth the enormous potential lying in R2P could be felt. In this context also, efforts were increased to clarify the historical dimension of R2P, and in particular to distinguish this concept from that of humanitarian intervention. Over the course of the years, these endeavours grew ever more sophisticated and an ever-growing academic community is developing research interests in this field.

1 See UNGA 2005 World Summit Outcome, A/RES/60/1 of 24 October 2005.

2 See SC Res. 1973 of 17 March 2011 as well as SC/10200, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions.

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Looking more closely at R2P it is not possible to deny the strong conceptual and historical relationship with humanitarian intervention, even if such denial is very common. As the concept of humanitarian intervention has widely fallen into disfavour and in general appears to be incompatible with UN law, to refer to the historical roots of R2P seemed to be hardly appropriate when this new approach was launched. At least this held true for the first few years. As R2P has, in the meantime, become a firmly established concept and attention has turned to its inherent potential, the time has come to look back to the more distant past. In fact, the ahistorical approach which sees in R2P a completely new and isolated development creates continuously a need for justification as to the ensuing limitations of sovereignty. If it is possible, on the other hand, to demonstrate that the roots of R2P can be traced far back into the history of international relations and state theory in an international legal order strongly based on long-lasting state practice, justifications will come to hand far more easily. What has been part of the international legal system since time immemorial will hardly be rejected for the time being, in particular if humanitarian goals are thereby pursued and any recourse to force is rendered compatible with UN law. Laying bare the far-reaching historical roots of R2P is associated furthermore with an ulterior advantage: even in the past specific justifications had to be found for limitations of sovereignty following from acts of humanitarian intervention and these lines of reasoning to a considerable extent are still of value today. At a closer look it becomes clear how many the similarities are between the broader circumstances of intervention today and in the past, in particular in the 19th century. This holds true both for possible justifications for intervention and with regard to its prospects for success and the acceptance of the intervention by the state community. If we continuously call to mind the heinous crimes of the past which today are classified as genocide, crimes against humanity and war crimes, the interventions carried out to stop those crimes, the interventions called for but never undertaken to confront them, and the various attempts to justify the necessary restrictions of sovereignty, an important contribution can be made to impede that such crimes should happen again.[3]

3 Of an exemplary character were the (ongoing) attempts by historians, political scientist and lawyers fully to shed light on the Holocaust, although much work has still to be done in this field. In contrast to this, other crimes, such as the genocide committed on the Armenians in 1915, have been, at least partly and in some quarters, ignored, denied or covered up. These omissions had most serious consequences as they created the impression that even the perpetrators of crimes of such a magnitude, unheard of before, could get away unscathed.

Thus it is known that Adolf Hitler on 22 August 1939 made the following cynical declaration before the High Generality of the Wehrmacht at the Obersalzberg: "Tell me: Who still

2 The Origins of R2P and Humanitarian Intervention – the "Just War" in Ancient History and in the Middle Ages

The concept of "humanitarian intervention" – in its present-day meaning – is a creation of the 19th century and can be found for the first time in writings of the period between 1840 and 1850.[4]

As will be shown, growing nationalism in the 19th century exacerbated group conflicts in the multiethnic European reality.[5] These conflicts became rampant in the Ottoman Empire where not only ethnic and religious contrasts were particularly strong but the government proved totally inept at devising appropriate conflict resolution mechanisms.

The challenge as such is, however, much older. Interventions that could be qualified as "humanitarian" according to modern terminology have been carried out since ancient times. On the other hand, it can be shown that the preparedness to launch military operations abroad for the protection of endangered populations depended on a series of factors that became increasingly stronger in the 19th century.

Of fundamental importance was the formation of a sensation of common belonging, and in this linguistic, cultural and ethnic elements, and in

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speaks of the annihilation of the Armenians?" This sentence is, however, revealing in an unintended way. In fact, it evidences the contrary. Notwithstanding all the attempts to deny, to cover up or to belittle the crimes committed 24 years earlier they were still very well known (otherwise the audience Hitler spoke to would not have approved his cynical judgements but would instead have been puzzled). Hitler in reality wanted to say something different: he gave expression to the hope that his criminal plans (directed primarily against the Jewish population) would remain without consequences for him and his followers whatever others would come to know or would say about those crimes.

See also P. Hilpold, Die Kurden zwischen dem Irak und der Türkei, in: Th. Giegerich/A. Proelß (eds.), Krisenherde im Fokus des Völkerrechts – Trouble Spots in the Focus of International Law, Duncker & Humblot: Berlin 2010, pp. 73–97 (77).

4 See D.J.B. Trim/B. Simms, Towards a history of humanitarian intervention, in: idem (eds.), Humanitarian Intervention – A History, CUP: Cambridge 2011, pp. 1–24 (3), referring to the Oxford English Dictionary, 2nd edition, entry: "humanitarian," A.3 B.2 a, "humanitarianism." As M. Swatek-Evenstein remembers, Henry Wheaton already in 1836 refers to the "interests of humanity" as a legal ground for intervention. See M. Swatek-Evenstein, Reconstituting Humanity as Responsibility?, in: J. Hoffmann/A. Nollkaemper (eds.), Repsonsiblity to Protect, 2012, p. 48 referring to H. Wheaton, Elements of International Law with a Sketch of the History of the Science, 1th edition 1836, p. 125.

5 On the success story of nationalism see B. Anderson, Imagined Communities – Reflections on the Origin and Spread of Nationalism, Verso: London 1996.

particular religious ties, play a dominant role. Only this feeling of a common affinity beyond political and geographic borders could lay the foundations for the creation of an international ordre public the violation of which would prompt intervention.

In the ancient world these elements were present only to a very limited extent. The same holds true for other factors that contribute, as will be shown, in a decisive way to prompt states to intervene:

- the formation of a human rights conscience, a phenomenon closely related to the individualization of society;
- the development of new communication technologies by which knowledge about massacres in distant regions could be transmitted over great distances and be rapidly processed at its destination;
- the development of new techniques and instruments of warfare that should render long-distance interventions more easily available.

In the ancient world these elements were all but absent:

- Human rights in the modern sense were not known. As even the most evolved societies, like the Roman and the Greek, were extremely unequal internally, permitting even slavery, they cared for discrimination and injustice abroad even less.
- Information about massacres in distant regions became public, if at all, only after a considerable delay. The reliability of this information was often unclear. and in any case it was available only to an elite. Under these circumstances, the formation of a mass movement capable of exerting pressure on the ruling classes was next to impossible.
- For most entities to carry out a military mission over long distances was not possible, on both logistical and financial terms. Only rapidly expanding powers had the necessary resources, but, if carried out, the immediate aims of military interventions were most often conquest and subjugation, and not help for the needy.

Nonetheless, the idea of humanitarian intervention was present in some elements also in the ancient world and throughout the middle ages. The terminology was different. It was the "just war" (bellum iustum) that ought to justify intervention beyond all (moral and religious) limits that most societies set for warfare. In ancient tribal societies religion was omnipresent, and it was tempting to overcome the aleatoric element of warfare by soothing the gods. This happened by sacrifices or by appealing to a higher ideal of justice which should

be implemented by a war.[6] Among the vast number of possible justifications for going to war that seemed possible on this basis there was also the case where a prince treated his people in a way that gravely offended public morals so as to incur the wrath of the gods.[7] According to Plato a war for "just cause" was permitted[8] and this position was taken up also by Roman philosophers. Wars, on the other hand, that were to be classified as unjust due to their cause or the method of warfare (if they were conducted with unnecessary cruelty or if prisoners or civilians were treated in a barbaric way) were criticized also within the Roman Empire and could lead to a request for punishment of those responsible for the war.[9]

The judgment whether a military campaign was just or unjust was often made ex post on the basis of its success: a defeat mirrored the gods' disapproval, while victory dispelled all doubts expressed before. In this, an interesting parallel can be found as to the way acts of humanitarian intervention were judged by the state community in the 20th century: this judgment regularly depended on the military result of the operation.

As the Roman Empire grew ever stronger at the end of the Republic, this entity became the major intervenor. While in the earlier times Rome's relations with other powers had similarities with modern international law relations, eventually when the Roman Empire became stronger and more dominant in the Mediterranean area, the legal nature of these relations[10]

6 In the ancient Persian empire military campaigns were justified as a fight against the lie (see in particular the justifications for the campaigns of Dareios I.). The lie was considered to be one of the worst sins of all. See M. Brosius, The Persians, Routledge: London 2006, pp. 32ss.

7 In the third Punic War which led to the total destruction of Carthage the Romans referred to the *perfidia punica* as well as the *crudelitas* of the Carthaginians because of their practice of human sacrifice. M. Trapp, Darstellung karthagischer Geschichte in der deutschen Geschichtswissenschaft und in Schulbüchern von der Mitte des 19. Jahrhunderts bis zum Ende des Nationalsozialismus – Untersuchungen zur Rezeptionsgeschichte, Dissertation Regensburg 2003, p. 14.

8 Plato, Politeia, chapter 3.

9 It is known that the Roman war against the Parthians sought by Crassus was broadly considered to be unjust. When the Roman commander left the city of Rome he was cursed by the people and the defeat in 53 B.C. was considered to be a judgment from above. See K.-H. Ziegler, Völkerrechtsgeschichte, C.H. Beck: Munich 1994, p. 59.

The conquest of Gaul by Julius Caesar was accompanied by acts of extreme cruelty with deliberate killings and mass mutilations of prisoners. As a consequence the Roman Senate was requested to remove Julius Caesar from office and to extradite him to the conquered province. Ibid.

10 Here parallels can be drawn with what happened in the aftermath of the Cold War. The resulting universal dominance by the US that at least temporarily seemed to set in on the academic level gave rise to the theory of the "end of history" (See F. Fukuyama, The End

changed radically and the justifications given for going to war became mere formal acts.[11]

When looking for the origins of the concept of "just war" reference is often made to the Roman politician, philosopher and writer Marcus Tullius Cicero (106 B.C.–43 A.D.) and, in particular, to his views in "De officiis" (I, 11, 34ss.) and in "De republica" (3, 23–35). Cicero developed both formal conditions (war had to be preceded by negotations, a priest had to give his assent, and a formal declaration of war was necessary) as well as others of a substantive legal nature (self-defence, assistance to others, reparation for injustice suffered), but the practical relevance of these conditions should not be overestimated. These were surely not legal norms in the proper sense that would have bound the Roman Empire internally or externally. More fittingly these rules should be regarded as philosophical considerations based on general principles of equity, strongly influenced by Greek philosophy and by observation of practice. Even a world power like the Roman Empire, which knew no equal and whose very nature was directed at expansion and conquest, had to try to appear, at least formally, as a rule-oriented actor, just to make its citizens believe that the rule of law applied not only internally but also for the Empire itself. To anchor the internal legal order in a broader, potentially all-encompassing system could considerably increase its effectiveness. Closely related with this was the attempt to please the gods.

These conditions could be interpreted differently.[12] They did not even come close to resembling an effective barrier against the Roman wars of expansion and conquest.[13]

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of History, 1992). In the political sphere the American government, led by President George W. Bush, conceived a new National Security Strategy that, according to some, provided a new basis for "just wars," even though at the same time existing international law was violated. See, for example, K.R. Himes, Intervention, Just War, and U.S. National Security, in: 65 Theological Studies 2004, pp. 141–157.

11 This holds particularly true for the so-called *ius fetiale* according to which a Roman priest determined a sum for compensation, payment of which by the opponent could pre-empt war. The origin of this "*ius repetere*" was, at it seems, a claim to return looted goods, and therefore a request for redress with regard to a wrong already suffered.

12 The conditions set out in "De re publica" are known to us only by a citation by Isidor of Sevilla ("Etymologiae," 18.1, "De bellis et ludis," written at the beginning of the 7th century A.D.): "nullum bellum iustum habetur, nisi denuntiatum, nisi inidictum, nisi de repetitis rebus." As to the appropriate translation of this formula there are divergent views in literature. In fact, depending on whether these conditions are formulated positively or negatively they could be interpreted as a justification for going to war or as a condemnation of war with some exceptions that had to be interpreted narrowly.

13 This is convincingly demonstrated by W.V. Harris, War and Imperialism in Rome: 327–370 BC, OUP: Oxford 1979. Harris points to the fact that as early as in 171 B.C. the ius fetiale was

A responsibility to protect was perceived primarily towards the Roman people. In a world seen as anarchic in which the only law was the law of the strongest, the borders between aggression and defence blurred. Furthermore, aggression and conquest promised peace: Conquered territories became participants in the Pax Romana.[14]

In the period of the Roman Empire's decline the need for such an argument began to vanish as the Empire was now involved in a permanent war of defence. According to a practically timeless moral principle wars of defence are clearly justified. On the other hand, the tribes storming the gates of the Empire saw no need whatsoever for a legal or a moral justification for their actions.

Nonetheless, even before the final demise of the Roman Empire in 476 A.D. the "bellum iustum" approach was consolidated and specified in many details by Christian dogmatism and ethics. It was Augustine of Hippo (354–430 A.D.) who devised the structure of such a new bellum iustum concept from the viewpoint of Christian theology. This new concept reflected developments that had taken place over a longer period. In the first period, the Christian religion was prevailingly pacifist[15] and, although not opposed to secular rule, tried not to become directly supportive of this rule.[16] The distance towards earthly power, however, lessened over the years, and in 380 AD Christianity became the state religion in the Roman Empire.[17] From now on it was confronted with the necessity to legitimate the defence of the ruling (Christian) power also by recourse to force.

These justifications, which at the same time had to respect the essential principles of the gospel and were furthermore combined with a historically unprecedented proselyte aim, created a mixtum compositum that was to become determinant for the European history of civilization, and it should be of enduring relevance for the jus ad bellum discussion up to the present day.

While Saint Augustine did not specify in a schematic way the conditions for a war to be just, the following conditions have been deduced from his various

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no longer verifiable (p. 167). The offer to negotiate became a mere formal act; usually the conditions for peace were absolutely unacceptable to the opposing party.

14 See in this sense also A.J. Bellamy, Just Wars – From Cicero to Iraq, Polity Press: Malden 2006, referring to R. Wilkin, Eternal Lawyer: A Legal Biography of Cicero, Macmillan: New York 1947, p. 65.

15 The best expression was given to this by Jesus Christ's Sermon on the Mount.

16 "Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfill them." (Matthew 5–7, 17, ESV).

17 This happened under Emperor Theodosius I, 380 AD (edict Conctus Populos).

writings, in particular from "The City of God" (De civitate dei) and Contra Faustum:[18]

- It was commanded by a legitimate authority (*auctoritas or legitima potestas*, just authority)
- a just cause was given (*iusta causa*, just cause)
- the presence of a right intention (*recta intention*, right intention)

As the concept of the i*usta causa* was defined very extensively, implying also the realization of Christian principles of fairness, a broad basis was created to justify not only wars of self-defence but also interventions accompanied by the intent to convert non-believers or directed at the removal of a despotic regime that behaved contrary to principles of Christian ethics.

The just war approach found an important case of application in the crusade whereby, however, its contradictory nature and its susceptibility to abuse also became evident: On the one hand, the *auctoritas* and the *legitima potestas* were, at least initially, without doubt given.[19] On the other hand, the *intentio*

18 See Book XXII, para. 74 and, in particular, para. 75: "A great deal depends on the causes for which men undertake wars, and on the authority they have for doing so; for the natural order which seeks the peace of mankind, ordains that the monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community. When war is undertaken in obedience to God, who would rebuke, or humble, or crush the pride of man, it must be allowed to be a righteous war; for even the wars which arise from human passion cannot harm the eternal well-being of God, nor even hurt His saints; for in the trial of their patience, and the chastening of their spirit, and in bearing fatherly correction, they are rather benefited than injured. No one can have any power against them but what is given him from above. For there is no power but of God, who either orders or permits. Since, therefore, a righteous man, serving it may be under an ungodly king, may do the duty belonging to his position in the State in fighting by the order of his sovereign, – for in some cases it is plainly the will of God that he should fight, and in others, where this is not so plain, it may be an unrighteous command on the part of the king, while the soldier is innocent, because his position makes obedience a duty, – how much more must the man be blameless who carries on war on the authority of God, of whom everyone who serves Him knows that He can never require what is wrong?"

See also J. Langan, The Elements of St. Augustine's Just War Theory, in: 12 Journal of Religious Ethics 1984, pp. 19–38.

19 In fact, in 1095, at Clermont, the highest authority of the Christian Church, Pope Urban II, had called for a crusade, and the persecution of Christians in the areas conquered by Arab-Islamic peoples was credibly and extensively proved.

was not uniform. It can hardly be contested that there was a clear will to protect the fellow believers and to permit them the free exercise of their belief so that it was even possible to speak of a causa iustissima. At the same time, however, often there was also a purpose of conquest and of economic enrichment by war gains.[20]

St. Thomas Aquinas (1225–1274) took up the criteria for defining a just war conceived by Saint Augustine and developed them further according to the principles developed and the insights achieved in the meantime in Christian theology. Also St. Thomas Aquinas requested *auctoritas* (*legitima potestas*), *iusta causa* and *recta intentio*. The demand for proportionality (*proportionalitas*) can also be deduced from his writings.[21]

The holders of *auctoritas* which, according to the multipolar power structures of the middle ages could be attributed to a great variety of rulers (generally called *principes*), were considered by Thomas Aquinas to be representatives of the common good. This common good was certainly broadly defined, but it found its limits where the mere personal interests of the *princeps* began. The *auctoritas* in question was therefore not of an original nature but derived from the *auctoritas divina* and was therefore functionally limited. In this way the sprawling phenomenon of feuding in the Middle Ages was outlawed.

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20 These nefarious intents became dominant on the occasion of the 4th crusade when Christians turned against their own fellow brethren when greed prompted Venetian and French crusaders to attack and loot Constantinople (1202–1204). The Byzantine Empire never fully recovered from this attack and crumbled finally in 1453.

21 "In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Romans 13:4): 'He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil'; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Psalm 81:4): 'Rescue the poor: and deliver the needy out of the hand of the sinner'; and for this reason Augustine says (Contra Faust. XXII, 75): 'The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.'" Sth-II-II, q. 40, a. 1, ad 4.

The defence of the common good also influenced the definition of just cause. Here again considerations of proportionality applied. Wars inevitably bring about immense human suffering and therefore a careful examination is required whether more lenient means may suffice effectively to combat internal and external injustice.

The requirement regarding the right intention should ensure that no base motives determine the will to go to war and that eventually peace be brought about. Thus, in the end, war should lead to enhanced peace. The close connection between mundane well-being and salvation, the prohibition on going to war out of egoistic motives and the definition of injustice against the population as a violation of rights of the (broader) community of fellow brethren as a whole (*republica fidelium*) implied that interventions beyond the borders of the prince's immediate authority were permissable. The Christian prince who raised his hand against his own people should be fully subject to earthly criminal justice; according to the psalm "Rescue the weak and the needy; deliver them from the hand of the wicked."[22]

Offences by non-Christian rulers should however be sanctioned only if they were directed against Christianity as a whole or against individual members of that community. No automatic obligation to intervene applied, however, as many balancing requirements were laid down. In particular, it had to be assessed whether the intervention being discussed was proportional, whether the accused was effectively culpable and whether the intervention was suitable to better the culprit. Saint Augustine had said the following in this regard:

> Those whom we have to punish with a kindly severity, it is necessary handle in many ways against their will. For when we are stripping a man of the lawlessness of sin, it is good for him to be vanquished, since nothing is more hopeless than the happiness of sinners, whence arises a guilty impunity, and evil will, like an internal enemy.[23]

In an age in which mundane existence was considered to be no more than a preparatory stage for the afterlife, the prince's protective function had to take into consideration not only well-being in the mortal world but at least to the

22 Ps 82,4. See G. Beestermöller, "Rettet den Armen und befreit den Dürftigen aus der Hand des Sünders" (Ps 82,4). Thomas von Aquin und die humanitäre Intervention, in: I.-J. Werkner/A. Liedhegener (eds.), Gerechter Krieg – gerechter Frieden, Religionen und friedensethische Legitimationen in aktuellen militärischen Konflikten, VS Verlag der Sozialwissenschaften: Wiesbaden 2009, pp. 43–67 (64).

23 Cited according to St. Thomas, Sth II-II, q. 40 a.1 ad 2.

same extend also that in the next world. The intensity of the protective function manifested itself in sort of concentric circles where the most pronounced form of responsibility was to be found within the area of the prince's immediate authority. There, any digression from the true belief had to be punished in the severest way, as can be demonstrated very clearly by the persecution of heretics. This responsibility, however, transcended the area of the prince's immediate authority when the external borders of Christian territories had to be defended or when individual Christians had to be defended according to the personality principle. This responsibility concerned *christianitas* and not *humanitas,* as only the former was available for salvation. Only much later, in the period of enlightenment, did the conditions materialize for a protective function that could be exercised for *humanitas* as a whole, even though the Christian religion laid important foundations also for this development.

There can be no doubt that the just war doctrine, both in its Augustinian and in its Thomasian form, was often disregarded by contemporary practice. This should not, however, be seen as proof of its irrelevance or faultiness,[24] as it was surely associated at least with civilizational progress. In a time where unrestrained use of force was ubiquitous leading, at least regionally, to widespread anarchy, any attempt to create a peace order based on ethical principles meant an important improvement.

A diametrically opposed philosophy was conceived, at least at first sight, by Niccolò Machiavelli (1469–1527):

> Those who make war have always and very naturally designed to enrich themselves and impoverish the enemy; neither is victory sought or conquest desirable, except to strengthen themselves and weaken the enemy. Hence it follows, that those who are impoverished by victory or debilitated by conquest, must either have gone beyond, or fallen short of, the end for which wars are made.[25]

This analysis may deliver a good picture of the mental attitude of many contemporaneous rulers, but nonetheless it stands in contrast to the fact that the community of Christian princes of that period by and large had accepted the

24 In this regard many similarities can be found with the question as to the effectiveness and bindingness of International Law. As has convincingly been shown, no argument for the alleged ineffectiveness of this legal order can be drawn from the fact that it is often violated. See M. Akehurst, A Modern Introduction to International Law, 1987, pp. 1ss.

25 See N. Machiavelli, Historie Fiorentine, 1525, Book VI, Chapter 1, http://www.gutenberg.org/files/2464/2464-h/2464-h.htm#link2H_4_0046.

legal, political, religious and moral rules that stood at the basis of the just war doctrine.

3 The Period between the Late Middle Ages and the Beginning of the Early Modern Age

As demonstrated, the concept of the "just war," in contrast to what is commonly perceived, has not been a creation of a war-prone mental attitude, but was rather the result of a sincere attempt to devise criteria which could regulate the use of force in a society permanently exposed to the threat of war. In this regard, since Augustine it has been necessary yo manage the difficult task of basing the just war doctrine on Christian ethics which were pacifist at their origins. This was easy to achieve as long as measures of self-defence or reparation for past wrongs were at issue. Much more problematic, however, were wars of religion. According to Augustinian or Thomasian criteria they could hardly be justified. In the real world abusive references to this concept were abundant. The forced baptism of Saxons by Charlemagne (772–804 AD) could be mentioned as an example.[26] This problem gained a wholly new dimension on the occasion of the colonization of America. Christopher Columbus had set his campaign of conquest under the flag of evangelization while at the same time not shirking from enslaving the indigenous people and killing them in large numbers. Spanish conquistadores continued this policy even more widely.[27] The evangelization of the Americas served as a pretext for land grab, the enslavement and destruction of whole populations, the start of the slave trade and the forcible transportation of thousands of slaves from Africa to America. The abusiveness of this argument and its ethical, moral and religious untenability were obvious also to commentators of that time. Dominican friar Bartolomé de las Casas (1484–1566) denounced the crimes committed by Spanish conquistadores publicly and squarely. He declared the war of conquest to be illegal and requested the restitution of the land to Native Americans without, however, being able to stop the deplorable events mentioned. The Spanish moral theologian and founder of Late Scholasticism,[28] Francisco de Vitoria (1483–1546), described these events lucidly within the frame of the just war discussion thereby giving a forceful and lasting impulse to this concept for

26 This abuse happened, however, more by the spirit of this concept than by its name.

27 See, for example, J.Ch. Chastreen, born in Blood and Fire: A Concise History of Latin America, Norton & Co: New York 2001.

28 Also known as Second Scholasticism.

further developments.[29] A broad concept of the common good and the responsibility to work resonates throughout his works. In the event of a war of aggression he gives the attacked an unlimited right to self-defence which can even give rise to a right to assistance in favour of the attacked. On the other hand the successful conqueror is also under an extensive responsibility to protect. Although de Vitoria defended the Church as the exclusive way to God and to salvation, and therefore unconditionally approved evangelization, at the same time he conceded to the natives fighting against the Spaniards that they lacked a sense of guilt and as a consequence de Vitoria, who also conducted criminal studies, was against any form of punishment of such subjects. Such an approach was revolutionary for that period, and it anticipates much of what would later characterize international law and human rights understanding and eventually lead to the concept of R2P.[30]

Finally, de Vitoria also dealt with a subject which today would be entitled "humanitarian intervention and regime change." Here, the pivotal question was whether intervention was permitted in order to oust from office an unjust, despotic ruler. For Francisco de Vitoria this was possible as a last resort. Only if security and peace were otherwise not attainable and great danger was in the offing could such measures be taken if a balancing of all possible positive and negative consequences for the common good was undertaken.[31]

It can therefore be said that since St. Augustine, due to changed circumstances the concept of the "just war" has been subject to profound modifications: while Augustine had developed his concept against the backdrop of a

29 This does not mean, however, that there has been no discontinuity in this development. Francisco de Vitoria's writings (which materially do not even stem from him, being notes taken by his students at his lectures) had, in fact, been forgotten for centuries and were re-discovered only in the 19th century. Since then, his views have gained enormously in importance and consideration as they anticipate much of what later would be discussed under the keyword of the universality of the international legal order. Also modern human rights doctrine regularly refers to Francisco de Vitoria, in particular in the development context.

30 See in this sense also Pope Benedict XVI in his speech before the UN GA of 18 June 2001. It would, however, be misleading to attribute the development of the modern human rights system directly to the Christian religion. The immediate pre-condition was rather enlightenment which may have received important impulses from Christianity but stood, at least initially, in clear contrast to it.

31 See F. de Vitoria, De Indis, 1532 edited in about 1917 by James Brown Scott, The Second Relectio of the Reverend Father, Brother Franciscus de Victoria, On the Indians, or on the Law of War made by the Spaniards on the Barbarians, para. 58.

highly developed civilization undergoing dissolution, de Vitoria had before him a nefarious war of conquest and religion by a nation declaring itself as Christian and pretending to pursue a holy mission of evangelization. While in a war of defence *the recta intention* is usually given, this was surely not the case in the situation the Spaniards were confronted with in the Americas where the *animus belligerendi* was totally on the part of the Spaniards. It is therefore no wonder that de Vitoria emphasized the element of *proportionalitas*, an aspect of great relevance also in the modern discussion about intervention. An intervention can always be only an ultima ratio; regime change may never be an aim on its own; and a war of conquest is not reconcilable with natural law and Christian philosophy.

Ruling out the permissibility of wars of religion constituted an important element of progress. It is interesting to note that more or less at the same time Martin Luther had adopted a similar position.[32]

This did not mean, however, an end to wars of religion in Europe. On the contrary, they blossomed out of the conflict between Catholics and Protestants, as in the eight French Wars of Religion (1562–1598) and the Thirty Years' War (1618–1648). The political power struggles behind these wars were all too evident. Religious and political aims were so closely intertwined that no party could claim to have a to prevail. While each party tried to assert such a right, already by their contradictory nature such claims appeared to be null and void.

It is therefore no coincidence that modern International Law developed out of this situation as a sort of "necessary law." The basis for this law was seen by Hugo Grotius (1589–1645) to be in a secularized natural law which could be relied upon independently of the confession chosen. In such a new international legal order new spaces opened up for intervention in favour of oppressed groups in other states.

4 Provisional Stock-Taking: The Relevance of the Religious Factor

The civilisations of the ancient world already recognized the moral reprehensibility of war and qualified this insight in religious terms. Peaceful interaction and the formation of civil rights were the pre-conditions for further economic progress leading to the internal pacification of society and also eventually

32 Of course, this position was not totally disinterested as Lutheran Protestants feared forceful repression and submission by the Catholics. The attempt to re-conquer the apostate territories was clearly a war of religion.

determining its external action. While justification for a just war was always easily at hand, the need to put it forward, to reason and to argue implied a considerable civilizational progress and prevented a total coarsening of society.

When Christianity became the state religion in the Roman Empire the just war concept obtained an intellectual foundation that would be decisive for the further development of that idea: a once highly antagonized religion characterized by pronounced pacifist elements had now become the moral and philosophical foundation of the state and had to provide the justification for the use of the protective power even by recourse to force. Furthermore Christianity was – unlike Judaism – a pronouncedly proselyte religion, and Islam went even further in this, underpinning this expansion militarily by means of the jihad. The adherents to the "book religions" (Judaism and Christianity) would at least be obliged to pay tribute to the Islamic communities.[33]

The wars against the Islamic communities have been qualified as just wars first of all because they implied the exercise of a responsibility to protect towards Christian territorities or the Christian population in the Arab-Ottoman territories. A second reason for qualifying them as just was found in the fact that these wars were directed at the re-acquisition of lost territories (Israel, the Holy Sepulchre, the Iberian Peninsula). In many cases reference to a religious motive was abusive, and this was particularly evident in the wars of conquest in the Americas, in the dynastic conflicts in Central Europe and in the efforts to rearrange the sovereign rights in the multipolar relationship between the emperor, the pope, the princes and the new nation states asserting themselves in Europe. It became ever clearer that religion could not be a justification for a war of attack, but the situation was different for wars of self-defence. To the extent that religion was taken as a pretext for massive discrimination, justification was created for intervention. Again, also in this case there was a considerable danger of abuse by interveners looking for a reason to go to war but the need for protection by endangered peoples often prevailed. When sovereign entities began to emerge, a phenomenon often (and somewhat simplifying) related to the year 1648 when the Thirty Years' War ended, the responsibility to protect was elevated to a new plane. This responsibility belonged to the relevant sovereign but it was often felt way beyond the boundaries of the territory over which he wielded his power.

For a long time, responsibility was primarily felt for the members of the personal community of believers, but the growing secularization of society let the

33 See G. Gornig, Der "gerechte Krieg," in: A. Herrmann-Pfandt (ed.), Moderne Religionsgeschichte im Gespräch, FS Christoph Elsas, EV-Verlag: Berlin 2011, pp. 470–490.

religious element vanish.[34] The final point in this development can be seen in the intervention by predominantly Christian NATO states in favour of the Muslim population of Kosovo which was threatened, persecuted and driven from its homes by Christian militias. Here, the community of peoples proclaimed by de Vitoria found a formidable expression in a responsibility to protect totally detached from religious boundaries and committed only to the protection of urgent humanitarian goals.

Contrary to what is generally assumed, interventions with the intent to remove a despotic regime (according to modern terminology "regime change") have been discussed for centuries.[35] As shown, Francisco de Vitoria referred to this element as a possible justification for the taking of land by the conquistadores. however coming to a result that widely ruled out its admissibility.

Reformation in Central Europe almost contemporaneously generated similar questions: could radical, religiously motivated discrimination against a population be considered a permissible justification for intervention with the aim of bringing about regime change? This question was dealt with in a Calvinist pamphlet, the so-called "Vindiciae contra tyrannos" (VCT),[36] published in 1579 in Basle. The "fourth question" of this pamphlet was "[w]hether neighbour princes may, or are bound by law to aid the subjects of other princes, persecuted for true religion, or oppressed by manifest tyranny."

The authors of this document came to following conclusion:

> …if a prince outrageously overpass the bounds of piety and justice, a neighbour prince may justly and religiously leave his own country, not to

34 According to Wilhelm Grewe the turning point was marked by the Conventions of Vienna of 1815 ("Déclaration des Puissances sur l'abolition de la traite des nègres," 8 February 1815) in which the formulas "toutes les puissances de la Chrétienté" and "toutes les nations civilises de la terre" can be found. See W. Grewe, Epochen der Völkerrechtsgeschichte, Nomos: Baden-Baden 1984, p. 335. According to Grewe starting with this date in all international treaties reference was no longer made to the "christianity" as the basic moral foundation for the consent. Ibid., p. 520. On the fight by Great Britain against the slave trade see J. MacMillan, Myths and Lessons of Liberal Intervention: the British Campaign for the Abolition of the Atlantic Salve Trade to Brazil, in: 4 GR2P 2012, pp. 98–124.

35 Even in ancient times philosophers and poets referred to the removal of despots, but this subject was not further elaborated upon as would have been necessary to connect it with that on the responsibility to protect.

36 Philippe Duplessis-Mornay and Hubert Languet are mentioned as authors of this anonymous document in literature. See D.J.B. Trim, "If a prince use tyrannie towards his people"; interventions on behalf of foreign population in early modern Europe, in: B. Simms/D.J.B. Trim, Humanitarian Intervention, 2011, pp. 29–66.

> invade and usurp another's, but to contain the other within the limits of justice and equity. And if he neglect or omit his duty herein, he shews himself a wicked and unworthy magistrate. If a prince tyrannize over the people, a neighbour prince ought to yield succour as freely and willingly to the people, as he would do to the prince his brother if the people mutinied against him: yea, he should so much the more readily succour the people, by how much there is more just cause of pity to see many afflicted, than one alone....[37]
>
> "...all histories testify that there have been neighbouring princes to oppose tyranny, and maintain the people in their right. The princes of these times by imitating so worthy examples, should' suppress the tyrants both of bodies and souls, and restrain the oppressors both of the commonwealth, and of the church of Christ: otherwise, they themselves may most deservedly be branded with that infamous title of tyrant.
>
> And to conclude this discourse in a word, piety commands that the law and church of God be maintained. Justice requires that tyrants and destroyers of the commonwealth be compelled to reason. Charity challenges the right of relieving and restoring the oppressed. Those who make no account of these things, do as much as in them lies to drive piety, justice, and charity out of this world, that they may never more be heard of."

This document clearly spells out a right and a duty to intervene in a case of outrageous oppression. Much of what would later become the responsibility to protect is anticipated here. The duty ("ought") to intervene is located somewhere between a moral obligation and a right proper. At the dawn of modern international law this definitional uncertainty was not really a problem. According to modern international legal theory the authors of the VCT seemed to argue for the existence of a customary right to intervene when they referred to such a practice (although this practice was not specified in detail) and an *opinio juris* (primarily based, however, on political and moral arguments).

The advent of Protestantism[38] unleashed an immediate Catholic counterreaction which, after the Council of Trent (1545–1563), finally led to the Counterreformation. The Counterreformation was defined as "forceful

37 An English translation of the VCT which was originally written in Latin can be found at http://http://www.constitution.org/vct/vindiciae.htm (last visited on 9 February 2014).

38 If one were to specify this date one could refer to Martin Luther fixing his Ninety-Five Theses to the door of All Saints' Church in Wittenberg on 31 October 1517.

repatriation of Protestants to the exercise of the Catholic confession"[39] and lasted until the 18th century. It found expression in extensive attacks on Protestant communities some of whom were driven from their homes and killed in large numbers. On the other hand, Catholics living in Protestant territories were also subject to persecution.[40] It was common for each side to present this confrontation as a fight for the brethren in faith abroad. It is difficult to say whether in this struggle the altruistic or the egoistic element prevailed. Neither a pure "realistic" (or "Machiavellian") perspective nor exaggerated idealism will deliver a true picture of this situation. Rather, it is necessary to take a context-related approach, and it has to be considered that the attitudes described can also intermingle. For example, Queen Elizabeth I of England intervened several times in favour of the threatened Huguenots in France as well as uprising Protestants in the Netherlands.[41] The motives for these interventions were mostly mixed. Genuine concern for the survival of Protestantism as a whole went along with sorrows by the English throne that had to fear an intervention by Catholic countries – in particular that they would send their armies and fleets from the territory of the Netherlands.[42] Conversely, the Catholic rulers were on the one hand interested in preserving their grip on economic and political power in Europe and beyond; on the other hand they were also driven by a true desire to preserve the unity of the Church and to aid their threatened fellow brethren (for example, both Philip I of Castile and Philip III of Spain tried to help Catholics in England and in Ireland; Oliver Cromwell intervened in favour of the Waldensians who were brutally persecuted by the Duke of Savoy).[43]

This historical survey therefore evidences interesting similarities with the present. Also currently going on is a controversial discussion on the exercise of the responsibility to protect, whereby one side emphasizes the egoistic motives allegedly behind R2P, while for the other altruistic inspiration is paramount. In

39 See Johann Stephan Pütter, Professor of State Law in Göttingen, in: "Litteratur des Teutschen Staatsrechts," 1776 ("gewaltsame Rückführung von Protestanten zur katholischen Religionsausübung").

40 In particular in England and in Ireland.

41 For these and the following examples see Trim, 2011, pp. 41ss.

42 Ibid.

43 Ibid., p. 53s. Trim analyses the divided nature of Oliver Cromwell who persecuted Catholics in Ireland in the most brutal way but tolerated religious minorities in England. To help Protestant Waldensians in Savoy who were faced with the danger of total annihilation he even considered sending the English fleet even if he could not expect any material or political advantage from such a mission. See Trim, 2011, p. 53ss.

reality, often a *mixtum compositum* of motivations can be noted. In many cases where governments decide to intervene some egoistic motives may also be presumed to play a part. Nonetheless, this should not lead to a cynical attitude rejecting interventions altogether. In fact, if a balancing of interests is undertaken, the weight of some egoistic afterthoughts is nothing compared to the relief provided in many cases of intervention. Furthermore, in Parliamentary democracies the costs for a politician to promote a decision for intervention should not be underestimated. The risks of failure are enormous, while it is often not easy to claim the rewards for successful intervention. Therefore, if in a democracy a politician sides with interveners the risks he takes are most probably higher than the rewards he may earn from such a decision.[44]

The conflicts between Protestants and Catholics in the 16th and 17th centuries confirm the findings already obtained with regard to the crusades in the High Middle Ages: Interventions in favour of subjects living within foreign communities presuppose a close relationship which was established, in the period before the advent of the nation state and the human rights idea, primarily by religious bonds. The common confession formed a trans-border community, a sense of reciprocal belonging and the first elements of an international public order – all elements that have also been of pivotal importance for the formation of the modern responsibility to protect. Until the first modern communication technologies were invented and put to use, religious communities could rely on communication systems that were superior to those used by states or other secular entities. Injustice suffered by members of a religious community rapidly became known across borders and continents. These were still very selective mechanisms, but the resulting quantitative dearth of

44 This was particularly the case with regard to the Kosovo intervention, carried out under the main leadership of the US. Although NATO states (and in particular the US) have often been accused of pursuing egoistic political and strategic interests by means of this intervention, it appears to be far more likely that Bill Clinton, Al Gore and Madeleine Albright were driven in their decision to intervene primarily by the intent to avoid the mistakes made in Bosnia (where the intervention happened far too late). See in this regard M. Albright in her memoires: "*The killings at Prekaz filled me with foreboding matched by determination. I believed we had to stop Milosevic immediately. In public, I laid down a marker*: '*We are not going to stand by and watch the Serbian authorities do in Kosovo what they can no longer get away with in Bosnia*'*…Earlier in the decade the international community had ignored the first signs of ethnic cleansing in the Balkans. We had to learn from that mistake.*"

See M. Albright/B. Woodward, Madame Secretary. A Memoir, Miramax Book, 2003, p. 381, cited according to S. Barthe/Ch-Ph. David, Kosovo 1999: Clinton, Coercive Diplomacy, and the Use of Analogies in Decision Making, in: The Whitehead Journal of Diplomacy and International Relations, 2007, pp. 1–17.

information had as a consequence an even stronger power of mobilization in those cases in which the relevant information effectively reached the European capitals.

The Enlightenment re-evaluated the importance of the religious factor. Future Darwinism, and in particular its ill-fated offspring, Social-Darwinism, led to counter-tendencies that resulted in a fatalistic, if not cynical, attitude towards the sufferings of people abroad.[45]

Nonetheless, the overarching idea of a responsibility to protect found a new revival in the 19th century, this time in a more humanistic and less religiously minted version. In the age of absolutism the philosophy of a responsibility to protect survived, as will be shown below, in a very special connotation within the Holy Roman Empire.

5 Absolute Sovereignty and the Responsibility to Protect – A Contradiction?

When in the 17th century sovereign states were established in growing numbers a fundamental change of perspective took place: While the Middle Ages and the Early Modern Age had been characterized by partly harmonizing and partly competing value systems in which a responsibility to protect could come to life in different fields and at various levels of a society, now the state claimed absolute and exclusive authority to determine in what case a specific claim for protection should be heeded. The personality principle, which had been of fundamental importance in the German legal tradition of the Middle Ages,[46] widely lost its relevance in legal practice in Central Europe, and this development found its reflection in the general attitude towards the idea of a responsibility to protect. The affirmation of the principle of territoriality was favoured by the outcome of the wars of religion waged immediately before then. In fact, the various peace settlements had favoured situations where the territorial powers of the princes corresponded to the boundaries of the confessions they pertained to. The Peace of Augsburg 1555, according to which the prince of the land could determine the religion of his subjects (*"cuius regio eius religio"*), made an early contribution to this development. The Peace of

45 N. Onuf, Humanitarian Intervention: The Early Years, Manuskript, 2000.

46 See H. Mitteis/H. Lieberich, Deutsche Rechtsgeschichte, C.H. Beck: Munich, 9th ed. 1992, p. 91 and H. Baltl/G. Kocher, Österreichische Rechtsgeschichte, Leykam: Graz 12th edition 2009, pp. 68ss.

Westphalia of 1648 confirmed this result,[47] but was at the same time also conducive to a certain degree of liberalization as it allowed members of other confessions also to practise their religion as long as this took place in private ("family prayers"). Furthermore, and in clear contrast to the Augsburg Peace, the option for a certain belief of the individual no longer depended on that of the prince who wielded authority over the relevant territory, as long as he followed the Catholic, Protestant or Calvinist confession. In fact, when a prince changed religions this no longer implied the obligation for his subjects to change their confession, too (or to emigrate). From now on, subjects of a different (recognized) belief retained their civil rights and, in particular, their right to stay. Formally, the Emperor wielded his responsibility to protect over all entities forming the Holy Roman Empire and their subjects, but this right was considerably weakened in favour of the victorious foreign powers (France and Sweden).[48]

Therefore, at the end of the Thirty Years' War the Holy Roman Empire was an entity of a unique legal character, from the perspective of both international law and state law. It is almost impossible to grasp its nature, as a whole or in its parts, by using modern legal categories. Often the Empire is compared to an association of states, and its individual components are considered as sovereign. However, this view does not match with historical reality.[49] In this network of political and legal relations, where France played a dominant role, it was expected that the Emperor and the princes of the various entities forming the "Reich" should contain each other. The "German Liberties" which France and Sweden were so eager to defend were in reality the liberty of German princes not to suffer too much interference from the Emperor.[50] The

47 The Peace of Augsburg was seen by all participants as only a provisional stage in an ongoing conflict about the role of the diverse confessions in the Holy Roman Empire and about the constitution of the Empire itself which needed redrafting. This compromise was incomplete also in the sense that it excluded the Calvinist confession. See D. Willoweit, Deutsche Verfassungsgeschichte, 1997, p. 126.

48 See R.G. Asch, The Thirty Years War – The Holy Roman Empire and Europe, 1618–1648, St. Martin's Press: Houndmills et al. 1997 and D. Willoweit, Deutsche Verfassungsgeschichte, C.H. Beck: Munich 3th edition 1997, pp. 138ss.

49 It is therefore wrong to say, as was often stated in international law literature of the past, that from 1648 the Imperial Estates (*"Reichsstände" "Status Imperii"*) were sovereign. The *"ius territoriale"* created by the Treaty of Westphalia was not to be compared to the sovereignty of a modern state. See convincingly M. Kotulla, Deutsche Verfassungsgeschichte, 2008, p. 108.

50 See B. Simons referring in this context to the affirmation by the Swedish Chancellor Axel Oxenstierna who had declared that the re-establishment of the "German liberties" had

Holy Roman Empire as an agglomeration of over 300 nearly-sovereign entities should, as a whole, no longer be an opponent France had to fear while on the confessional level the European Protestant North need no longer fear that a strictly catholic Habsburg emperor could jeopardize the survival of the Protestant confession or use the Holy Roman Empire as a bulwark against the North.

Therefore, in a multiconfessional and polycentric Empire complex balancing mechanisms had to be created that would guarantee a minimum of cohesion and cooperation between the various entities. In a certain sense this political model resembles what in modern days is called the consociational democracy.[51]

In view of the (intended) weakness of the Emperor this function was attributed to judicial organs, the Reichskammergericht and the Reichshofrat.[52] The Reichshofrat was the highest governmental, administrative and judicial authority and stood in direct competition to the Reichskammergericht, which was established as early as in 1495 and over which the Emperor had less influence.[53]

Unlike what is commonly believed the highest judiciary of the Holy Roman Empire exercised extensive constitutional control on the basis of which over 50 successful proceedings against unruly princes and counts of the Reich were carried out.[54] The reasons for these proceedings ranged from the indebtedness and bankruptcy of the entity in question to breach of the peace, treason

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been a decisive motive for intervention. These "German liberties" were, however, also an important instrument for the preservation of the European balance of power. See B. Simms, "A false principle in the Law of Nations": Burke, state sovereignty, [German] liberty, and intervention in the Age of Westphalia, in: B. Simms/D.J.B. Trim (eds.), Humanitarian Intervention – A History, CUP: Cambridge 2011, pp. 89–110 (92).

51 In this sense see also B. Simms, 2011, p. 92, who emphasizes that all religious questions – and at that time the majority of all political questions had at least a religious background – could not be taken by a majority but needed consensus. For essential reading on the consociational model see A. Lijphart, Democracy in Plural Societies: A Comparative Exploration, Yale University Press: New Haven 1977.

52 A certain control function was also exercised by the Reichstag (the Parliamentary Assembly).

53 See U. Eisenhart, Deutsche Rechtsgeschichte, C.H. Beck: Munich 1995, p. 132. There were periods in the 18th century in which the Reichskammergericht had 230–250 cases in its list while the Reichshofrat had to sit in judgment on 2000–3000 cases. Ibid., p. 137. Eisenhart points out that the reason for the comparatively greater popularity of the Reichshofrat among individuals seeking judicial reddress was to be found in the power of the Emperor who stood behind this latter Court and who could ensure more effective implementation of the judgments.

54 See in this regard the detailed examination by B. Marquardt, Zur reichsgerichtlichen Aberkennung der Herrschergewalt wegen Missbrauchs: Tyrannenprozesse vor dem

(alliance with the Emperor's enemies) and – most relevant for the subject treated here – the abuse of a ruler's powers (tyranny).[55] The cases reported by legal history research about princes removed from office[56] were usually characterized by the extreme cruelty of the princes against their peoples, leading to an outcry among their counterparts.

As was later often the case in the context of humanitarian interventions these objective motives for the removal of a prince were accompanied by less sincere motives hinting at a power struggle and at a fight for resources. Again, like later humanitarian interventions, those occurring in the Early Modern Age appear to have been prompted, at least in the great majority of cases, by an honest will to stop severe forms of abuse, discrimination and human suffering.

Interventions of this kind can be explained only by the peculiarities of the Empire's constitution. While the Empire's princes may have been near-sovereign, they were not fully sovereign. The Emperor had maintained a right of Final Appeal. In a certain sense, the "Reich" therefore resembled the modern international legal order: It may be the case that account is always taken of this legal order and it may also surely be true that even in cases of grave abuse intervention does not follow automatically. If such abuses occur, there is, however, a concrete probability that interventions will take place and the author of the abuses has to take this probability into account. Also the fact that interventions were carried out primarily against weaker members of the Empire bears similarities to empirical situations in modern international law.[57]

This situation was totally unique in Europe, a fact already recognized by writers of that time. Thus, the leading German public lawyer of the 18th century, Johann S. Pütter, wrote:

> The Constitution of the Empire knows…ways and means by which subjects can find protection against their territorial lord from a higher judge…and even in cases of outright abuse of the territorial sovereignty while in sovereign states there is no alternative to patience and obedience.[58]

Reichshofrat am Beispiel der südöstlichen schwäbischen Rechtskreise, in: A. Baumann et al. (eds.), Prozesspraxis im Alten Reich, Böhlau: Köln et al. 2005, pp. 53–83.

55 Ibid., p. 55, 77.

56 See also W. Troßbach, Fürstenabsetzungen im 18. Jahrhundert, in: 13 Zeitschrift für historische Forschung 1986, pp. 425–454.

57 With regard to humanitarian intervention see P. Hilpold, Humanitarian Intervention: Is there a Need for a Legal Reappraisal?, in: 12 EJIL 3/2001, pp. 437–467.

58 Translation by this author of "[Die Reichsverfassung] enhält […] Mittel und Wege, wie selbst Unterthanen gegen ihre Landesherrschaft bey einem höheren Richter Schutz

It can therefore be said that at the end of the Thirty Years' War the Holy Roman Empire was transformed into a framework in which the participating principalities, counties and cities were rather loosely lumped together. This association provided some external protection (in particular against France and the Ottomans), but there was also a responsibility to protect which applied internally. In particular, despotism that threatened the inner peace was repeatedly put on trial. On the whole, in the Holy Roman Empire the ousting of princes from office was less directed at the protection of threatened individuals than meant to protect the overall legal system and political order.[59] Neither was there any historical continuity between these measures and later cases of humanitarian interventions. This is already proven by the fact that the ousting of princes from office later fell into oblivion and its re-discovery can be attributed only to modern historical research.[60] This historically unique policy and practice are nonetheless of extreme value for the understanding of the mechanisms that come into play (both favourably and unfavourably) if grave human rights abuses are addressed in foreign jurisdictions. At first sight it may appear paradoxical that humanitarian interventions presupposed the sovereign state, as state sovereignty originally seemed to exclude any form of intervention. It soon became clear, however, that sovereignty as an exclusive right to dispose internally and externally, the state as a "Leibniz monad," is utopian. As soon as states form associations and accept limitations of their sovereignty, measures to restore order and to preserve the system have also to be provided for.[61] With the evolution of an increasingly more sophisticated moral-ethical conscience and a corresponding sense of solidarity,[62] the expectations of this system grew

finden können [...] wie so gar über Mißbrauch der Landeshoheit überhaupt geschehen kann, wo in unabhängigen Staaten nichts als Geduld und Gehorsam übrig bleibt." See J.S. Pütter, Historische Entwicklung der heutigen Staatsverfassung des Teutschen Reichs, Göttingen 1798/99 (originally. 1786), cited according to B. Marquardt, 2005, p. 53.

59 This was particularly evident when princes were removed from office because of mismanagement and profligacy.

60 See in particular the contribution by B. Simms, 2011, who broadly refers to Marquard and Troßbach.

61 See in this regard A. Rougier, La théorie de l'intervention d'humanité, in: 17 RGDIP 1910, pp. 468–526: "La cause de la civilisation et du progrès forme un bloc, et l'État ou l'individu qui rétrograde vers la barbarie compromet l'évolution du bloc tout entier. Pas plus que les sociétés particuliére, la Société des nations ne peut tolérer d'anarchiestes dans son sein, parce qu'il n'y a point de société sans justice et sans loi." Ibid., p. 471.

62 As to the principle of solidarity see P. Hilpold, Solidarität als Rechtsprinzip – völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen, in: 55 Jahrbuch des öffentlichen Rechts 2007, pp. 195–214; R. Wolfrum/Ch. Kojima (eds.), Solidarity: A Structural

and correspondingly also the need for mechanisms of self-correction and of intervention in the event of system failures. Although at the beginning of the development of modern nation states the possibility of and the sheer need for intervention were recognized only with regard to some extreme cases, the idea of a responsibility to protect was inherent in the new system of international law. State were on the way to becoming "the trustees of humanity."[63] This fact was clearly made evident in the writings of early international lawyers.

6 The Early International Law Doctrine and the Responsibility to Protect (or Humanitarian Intervention)

Compared to present international law doctrine that of early times could refer only to a very limited extent to positive norms. This opened up broad areas for ethical and moral arguments and writers could make extensive observations on legal policy. For a modern-day reader it is impressive to see the many references to ancient writings and to mythological events as if there could be straight continuity and comparability between these situations. This approach can, however, be justified by the fact that the prevailing school of thought of that time in international law was that of natural law, and it is interesting to see that this perspective led to results that seem surprisingly modern, anticipating also to a certain extent the concept of the responsibility to protect. For example, the "father of international law," Hugo Grotius wrote:

> "VIII. The question whether a war for the defence of subjects of another power is rightful is explained by a distinction.
>
> 1. This too is a matter of controversy, whether there may be just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands. Now it is certain that, from the time when political associations were formed, each of their rulers has sought to assert some particular right over his own subjects. As seen in the Children of Hercules, by Euripedes.

Principle of International Law, Solidarity: A Structural Principle of International Law, Springer: Heidelberg 2010 and P. Hilpold, Solidarität als Prinzip des Staatengemeinschaftsrechts, in: 51 AVR 2013, pp. 239–272.

63 See for this felicitous expression E. Benvenisti, Sovereigns as Truestees of Humanity: On the Accountability of States to Foreign Stakeholders, in: 107 AJIL 2013, pp. 295–333.

Just are we who within our city dwell,
And judgment we may render with full power.
Here too applies the following:
Sparta, which is thy lot, adorn;
We for Mycenae shall have care.

…

The purpose no doubt is, as Ambrose correctly explains, 'to protect men from provoking wars by usurping the care for things under the control of others.'

…

2. If, however, the wrong is obvious, in case some Busiris, Phalaris, or Thracian Diomede should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded. In conformity with this principle Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took up arms against the Persians, or threatened to do so, unless these should check their persecutions of the Christians on account of religion."[64]

Hugo Grotius very clearly states that as a matter of principle rulers are responsible for their own subjects, and care must be taken to avoid others interfering with internal affairs only in order to have a justification to go to war. In case, however, "the wrong is obvious," if a ruler inflicts treatment upon his subjects no one should be allowed to inflict, interference is permissible.

Hugo Grotius also adds some considerations with regard to criminal law: in the event of very serious injustice states are allowed not only to intervene in order to stop the injustice but also to bring the responsible ruler to justice. These considerations, however, reflected neither the development of international law of that time nor that of the centuries to come. Only the developments of the last two decades, concerning the creation of an international criminal justice with autonomous international tribunals, could be interpreted as an implementation of these Grotian thoughts. In the immediate aftermath (in terms of the history of ideas) the legality of such interventions was,

64 See H. Grotius, De Jure Belli Ac Pacis Libri Tres, 1646, Lib. II, Cap. XXV, § VIII, cited according to A. Pauer, Die humanitäre Intervention, Helbing & Lichtenhahn: Frankfurt a.M. u.a. 1985, p. 26, translation at http://www.lonang.com/exlibris/grotius/gro-225.htm (16 February 2014).

however, totally rejected, for example, by Christian Wolff.[65] Samuel Pufendorf and Emer de Vattel also denied, in principle, the existence of such a right, but were prepared to make an exception for the most extreme situations when the sheer survival of a group was at stake. This right to intervene was not a general one as propounded by Grotius, a right to wage war in the proper sense, but only a right to assist a revolting group weary of suffering continuous discrimination and eager to take its destiny into its own hands.

The differences in Grotius's theory of intervention on the one hand and Pufendorf's and Vattel's on the other are rather extensive:

1. Pufendorf and Vattel emphasize the absolutely exceptional character of any right of intervention. As a matter of principle subjects have to respect acts by the sovereign. According to Vattel, neither high taxes nor harsh treatment by the sovereign justify intervention, but just protests where appropriate, and in any case only after careful appreciation of the facts.[66]
2. Furthermore, intervention may only have a supporting character ("secourir" according to Vattel). The right to oppose repression which was considered to be of a primary character, to have its origin in natural law and to presuppose extreme forms of persecution, oppression and discrimination ("le prince, attaquant les lois fondamentales…") lay with the threatened people itself.[67] The people may not be roused to take the arms, even if it has previously raised complaints against the sovereign.[68]

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65 Ch. Wolff, Jus Gentium Methodo Scientifica Pertractatum, 1764, Cap. IV, § 257: "Nullus rector civitatis habet jus regimini alieno se immiscendi."Cited according to A. Pauer, 1985, p. 28.

66 So Vattel stated the following:

> "Il n'appartient donc à aucune puissance étrangère de prendre connaissance de l'administration de ce souverain, de s'ériger en juge de sa conduite & de l'obliger à y rien changer. S'il accable ses sujects d'impots, s'il les traite durement, c'est l'affaire de la nation; nul autre n'est appelé à le redresser à l'obliger de suivre des maximes plus équitables & plus sages. C'est la prudence de marquer les occasions ou l'on peut lui faire des representations officieuses & amicales."

See E. de Vattel, Droit des Gens, 1758, Liv. I, Ch. IV, § 55, cited according to A. Pauer, 1985, p. 29.

67 In this regard, Vattel wrote the following:

> "Mais si le prince, attaquant les lois fondamentales, donne à son peuple un légitime sujet de lui resister, si la tyrannie devenue insuportable soulève la nation, toute puissance étrangère est en droit de sécourir un peuple opprimé, qui lui demande son assistance." Ibid.

68 "C'est violer le droit des gens que d'inviter à la révolte des sujets, qui obéissent acutellement à leur souverain, quioiu'ils se plaignent de son gouvernement." Ibid.

3. In this way, abuses are ruled out, more efficient employment of scarce intervention resources is guaranteed and a contribution is given for an autonomous and responsible solution of conflicts.
4. Once a conflict has broken out, according to Vattel each external power can take the side of one or the other party, but at the same time care must be taken that the intervener is not himself the original cause of the outbreak of violence or its escalation.[69]

With the dwindling in importance of natural law over time efforts to justify intervention also became more arduous as the growing number of states assiduously defended their sovereignty. What had to be considered as a "just war" became more and more a question of subjective perspective, a development forcefully sustained already by Alberico Gentili (1552–1608). As a resuit, it was the sovereign who had to make the final assessment of whether a "iusta causa" for going to war had been given.[70] At the same time, however, humanitarian ideas also became stonger. Furthermore the perception grew that there were obligations binding the state community as a whole, both externally and internally, a vision much later epitomized by the concept of the "erga omnes"-obligations.[71]

In the 19th century, the divide between advocates and opponents of humanitarian intervention, a concept, as shown, created in that very period, became ever greater. In comparison to the past, however, the relevant discussion became more technical and more dogmatic. Even those adhering to a strictly

69 "Toutes les fois donc que les choses en viennent à une guerre civile, les puissances étrangère peuvent assister celui des deux parties, qui leur paroit en justice. Mais on ne doit point abuser de cette maxime, pour autoriser d'audieuses manoeuvres contre la tranquillité des états." Ibid.

70 It was in particular Protestant princes who applauded this new understanding of the concept of "just war" as it created a counterbalance to the pretension by the Catholic Emperor to decide solely and ultimately about justice and fairness. See M.E. O'Connell, Peace and War, in: B. Fassbender/A. Peters (eds.), The Oxford Handbook of the History of International Law, OUP: Oxford 2012, pp. 272–293 (276).

71 See in this sense Immanuel Kant in the tractatus on the Perpetual Peace, 1795: "Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace. One cannot flatter oneself into believing one can approach this peace except under the condition outlined here." (Third Definitive Article for a Perpetual Peace, last paragraph).

positivist viewpoint remained open to pragmatic considerations. The argument that general acceptance of the permissibility of humanitarian intervention would open the door to widespread abuses carried considerable weight.[72]

Finally, in the 19th century the human rights idea began to take hold even though on an international legal level these norms were to become affirmed only in the second half of the 20th century.[73]

7 Humanitarian Intervention in the 19th Century: The Formation of a New Concept

There seems to be no little need that the whole doctrine of non-interference with foreign nations should be reconsidered, if it can be said to have as yet been considered as a really moral question at all... To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect. But there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are... To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized

72 Friedrich von Liszt (Das Völkerrecht: Systematisch dargestellt, O. Haring: Berlin 1898, p. 38) wrote in this context:

> "On the other hand it is not possible to state that a right to interfere is given if a states asserts, maybe even providing proof, that such a measure is needed in order to protect the general interests of mankind or of culture....In fact, this would open the door to arbitrariness." (P. Hilpold, transl.).

Among those endorsing the legality of humanitarian intervention see also Fauchille, Stowell, Le Fur, Dupuis, Rolin-Jaequemyns, Martens/Bergbohm, Bluntschli, Oppenheim, Rivier and Stowell. With regard to the various positions sustained by these authors in detail see A. Pauer, 1985, p. 34ss.

73 See in this respect A. Rougier, 1910, p. 489: "A la doctrine négative de l'intervention d'humanité s'oppose un groupe de théories qui reconnaissent aux État le droit de mettre leur autorité au service de la justice et d'empècher ou de réprimer certains abus chez les États voisins. [...]Cette théorie affirme l'existence d'une règle d'une règle de droit générale s'imposant aux gouvernants comme aux governés, supérieure au droit national et internatonal qui n'en sont que de expressions particulières. Elle place sous la protection de cette règle les prérorgatives essentielles de l'individu, ce qu'on appelle les *droits de l'homme*."

> *nation and another, and between civilized nations and barbarians, is a grave error...*
>
> JOHN STUART MILL, A Few Word on Non-Intervention, 1859

7.1 *Greece's Fight for Independence 1821–1830*

As demonstrated, the roots of the concept of humanitarian intervention go far back to the past, to ancient times, and were closely connected with the idea of the "just war." Over the following centuries a flurry of related questions was repeatedly taken up and many aspects of this discussion have remained relevant to this day.

Something more was needed, however, to give this discussion an all-encompassing name, internal structure and conceptual autonomy. This additional norm-and concept-creating impulse came from the ongoing conflict between the Ottoman Empire and European states when the survival of the Christian minorities within the Ottoman Empire was at stake.

For a long time religious minorities within the Ottoman Empire had benefitted from a certain degree of tolerance, although they were certainly not treated equally, as was demonstrated by the higher tax burden they had to shoulder and their lesser legal position in the society.[74] The progressive decay of the Ottoman Empire ended this – relative – tolerance and led eventually to outright repression. The specific factors causing this dismal situation for religious minorities were varied, but certainly discontent over the continuing loss of territory, the need for scapegoats and the relative prosperity of at least some minority members, provoking envy and rapacity, stood out. On the other hand, more and more minorities made appeals for help to foreign countries, hoping for an end to the repression, and in some cases even for autonomy or outright independence.

Greece's fight for independence[75] between 1821 and 1830 was a precedent evidencing many elements that were characteristic also of later cases of humanitarian intervention. At the same time this case was also – to a considerable

74 "...the Ottoman political and administrative structure was based on a formal inequality between Muslisms and non-Muslims. Although one cannot point to a fully-fledged system of 'organized discrimination' in every sphere of life, non-Muslim inhabitants were tolerated as long as they lock public visibility." See C. Iordachi, The Ottoman Empire – Syncretic Nationalism and Citizenship in the Balkans, in: T. Baycroft/M. Hewitson (eds.), What is a Nation? – Europe 1789–1914, OUP: Oxford 2006, pp. 120–151 (129).

75 See in this regard J.-P. Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter, in: 4 California Western International law Journal 2/1974, pp. 203–270; A. Pauer, Die humanitäre Intervention, 1985, pp. 45 ff.; H. Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer

extent – an example of projection and self-imagination: the erudite classes in Europe and in particular in the intervening countries was convinced to contribute to a nation-building process with regard to a community that stood in a direct line of succession to ancient Greece while reality on the spot presented a quite different picture.[76]

Oppression and discrimination by the Ottoman rulers against Christian minorities is well-documented. Here, several elements interacted: the sparks of nationalism had reached the Peloponnese and the Aegean area while the weakness of the Ottoman Empire made the insurgents more daring, unleashing ever more desperate and ever crueller counter-reactions by a corrupt and backward regime. The fortunes of war changed several times, only to make repression ever harsher. Following the first skirmishes in 1821 the insurgents managed very rapidly to gain control over large parts of the Peloponnese and the Aegean islands. The Turks, however, reacted with unprecedented cruelty, in particular on the Island of Chios, where in 1823 large numbers of the population were either murdered or enslaved. An Egyptian army of 10,000 men under the command of Ali Pascha, the son of the Egyptian Sultan Ibrahim Pascha, was able to re-conquer within a short period of time large parts of the territories lost beforeNow, there was the terrifying prospect that the Christian Greeks in this area would suffer the same fate as the inhabitants of Chios, i.e. that they would be driven from their homes, enslaved, murdered. The events of Chios had led to an outcry all over Europe. Phihellenic movements were founded which acted, like NGOs are doing today, as pressure groups against European governments (in particular the French and the British), but also as fund raisers and as recruitment and gathering bases for volunteers to be sent to the conflict zone.

The European governments were caught by surprise by these events and drawn into a conflict in which they originally had not the least interest in participating, as this was contrary to their political interests.

Normen, Peter Lang: Frankfurt a.M. 1997, pp. 8 ff.; Ch. Hillgruber, Humanitäre Intervention, Großmachtpolitik und Völkerrecht, in: 40 Der Staat 2001, pp. 165–161; G.J. Bass, Freedom's Battle – The Origins of Humanitarian Intervention, Vintage Books: New York 2008; M. Swatek-Evenstein, Geschichte der "Humanitären Intervention," Nomos: Baden-Baden 2008, pp. 106ss.; J. Bew, 'From an umpire to a competitor': Castlereagh, Canning and the issue of international intervention in the wake of the Napoleonic Wars, in: B. Simms/D.J.B. Trim (eds.), Humanitarian Intervention – A History, CUP: Cambridge 2011, pp. 117–138.

76 The British Poet Lord Byron had to undergo this distressing experience when he hurried to Greece in order to help the insurgents, sacrificing his fortune and his health, only to be disillusioned, shortly before his death, by the fact that reality on the ground was far more complex than he had imagined. See G. Bass, 2008, pp. 47ss.

The "European Concert" may have been "intended to form a perpetual system of intervention among the European states."[77] The aim of these interventions was, however, not the promotion of revolutionary movements but quite the opposite: their suppression.[78]

This held true in particular for the Austrian politician and statesman prince Klemens von Metternich (1773–1859) who never made any attempt to conceal his disdain for the Greek insurrection, which he considered to be a revolt against the "legitimate" rulers. Beyond this categorical thinking in legitimist terms Austria's opposition to this insurgence was determined by fears that Russia could extend its sphere of influence if Turkey were further destabilized. Great Britain, on the other hand, followed a policy of strict non-intervention and was anxious not to lose political and economic influence through a change of power relations on the Balkans and in the Aegean. Russia's position was also determined by a complex mixture of factors. Undoubtedly, Russia pursued an expansionist policy, but at the same time it cannot be ignored that within the Russian population there was a deeply-rooted feeling of responsibility for the endangered members of the Orthodox Church in the Balkans. Furthermore, with the Peace of Kücük Kaynarca in 1774 which had terminated the Russian-Turkish war (1768–1774) Russia had assumed a protective role towards the people of Greek Orthodox belief in the Ottoman Empire.[79]

If therefore the European powers were drawn ever further into the conflict with the Ottoman Empire the reason can be found on the one hand in the attempt to exclude any change of the power balance in the Balkans in favour of other powers, and beyond that in the enormous pressure built up by European public opinion which had come into being in the 19th century.[80]

77 So H. Wheaton, Elements of International Law, II, i. § 5, p. 85s., cited according to N. Onuf, 2000, p. 9.

78 Ibid.

79 By the peace of Paris 1856, which ended the Crimean War (1853–1856) this protective role was, however, superseded by that of European Concert.

80 In order to explain this phenomenon, in particular as it manifested itself in strong support for the Greek cause, it has to be remembered that in the 19th century the Greek language and culture had an enormous importance for the self-esteem and the self-identification of the ruling elites in Europe. Greek language, history and culture were central elements in the curricula of European Grammar schools. Elements from ancient Greek culture were taken as a central building block in the nation-building process of European nation states. Greek style elements in official monuments or Government buildings built at the time in Europe give evidence to this day of this cultural orientation.

On the basis of the London Protocol of 9 April 1821 Russia and England had tried to mediate between the parties on the basis that Turkish sovereignty in the Peloponnese should not be put into question. In contrast to this, in December 1823 the Holy Alliance still condemned the Greek uprising. The massacre of Chios, the apparent willingness by Russia to get tougher on this issue and the rioting of the Turkish-Egyptian troops under Ali Pascha required, however, a re-defining of the European powers' position. Now the preferred option in several European capitals was autonomy for Greece, but the request for independence loomed large in the background. This second option was not totally rejected by most European powers provided other powers would not profit from such a development.

In a treaty concluded on 6 July 1827 France, Great Britain and Russia took notice of this new situation: the Ottoman Empire was offered a solution according to which Greece would obtain far-reaching autonomy while Turkish suzerainty over that territory would not be questioned.[81]

A secret additional protocol made clear that what was officially an attempt at mediation in reality was more an ultimatum: the Ottoman Porte had one month in which to accept the proposal. Afterwards sanctions would be taken "without participation in the hostilities between the conflicting parties" ("sans toute-fois prendre part aux hostilités entre les deux parties"). If these measures were also to prove ineffective even resort to military measures was announced, even though this threat was formulated in very contorted, diplomatic language. Again, this approach seems to be astoundingly modern. According to present-day terminology we are confronted here with an example of sanction-sequencing consisting first of a (robust) attempt at mediation and followed by economic sanctions or sanctions below the use of force, and finally forceful measures. When emphasis is set on the primary responsibility of the Ottoman Porte to restore peace while at the same time respecting justice and humanity a resemblance to R2P language appears.

81 In the manual of L. Oppenheim/H. Lauterpacht, International Law, vol. I, Peace, 8. ed., Longmans: London 1967 suzerainty is defined as follows:

> "Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a a term of Constitutional Law only. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. Modern suzerainty involves only a few rights of the suzerain State over the vassal State which can be called constitutional rights. The rights of the suzerain State over the vassal are principally international rights. Suzerainty is by no means sovereignty. It is a kind of internationally guardianship, since the vassal State is either absolutely or mainly represented internationally by the suzerain State." Ibid., p. 188s.

Developments on the ground, however, could not be fully controlled by the parties. After the Turks had rejected the mediation proposal a naval blockade was established by France and Great Britain. Unintended by the British Government, by accident and due to local misunderstandings, on 20 October 1827 the naval battle of Navarino took place in which the whole Turkish-Egyptian fleet was destroyed and 4,000 Turks died.

Shortly afterwards, the Russo-Turkish war (1828–1829) broke out. Here the Ottoman Empire suffered a definitive military defeat prompting the Ottoman Porte to accept Greece's independence by the treaty of Constantinople of February 1830.

With the nomination of Prince Otto of Bavaria as king of Greece a dynastic solution had been found with which the legitimist members of the Holy Alliance could live.

7.2 *The Intervention in Lebanon 1860/61*

The intervention in Greece which is often cited as first case of a modern humanitarian intervention would point the way for a series of interventions in the 19th century. The humanitarian element may have been only one element of several prompting the intervention, but the fact that this element was recognized as a possible cause for intervention was path-breaking for the further development of this concept.

The philosophy underlying the Greek intervention was further elaborated upon in the Lebanon intervention of 1860/1861. Now, the humanitarian element became even more prominent. In Lebanon Muslim Druze were opposed to Christian Maronites, and at the background stood a weak Ottoman Empire whose corrupt local governors were either totally inept or sympathized openly with the Muslim side. The reasons for the outbreak of this conflict were manifold. The Christian Maronites were in the typical position of a minority in the Ottoman Empire: while they had found recognition as a separate religious community they were far from being treated equally.[82] The progressive decay of the Ottoman Empire and the strengthening of economic relations with European countries from which in particular the Christian side profited prompted Christians to dare to rise up against their Muslim feudal lords, thereby provoking a harsh counter-attack by the Druze. The Druze, whose military power had been totally underestimated by the Maronites, not only won on the battlefield but in the aftermath went on to commit pogroms among the

82 Only by the Treaty of Paris of 30 March 1856 did Christians in Lebanon finally obtain a position equal to that of the Muslim population (Art. 9 of the Treaty). Due to the feudal structure of the society factual discrimination on the local level persisted, however.

Christian population. In June 1860 in Southern Lebanon and along the Lebanese coast thousands of Christians were killed and over 100,000 driven from their homes. Thousands took refuge in Damascus, but there they fell prey to a murderous mob which entered the city on 9 July 1860.

European Consulates became aware early on of the looming calamity and they accordingly informed their respective governments which urged the Sublime Porte to take preventive measures. No such measures were taken, however.

When news about the massacres, devastations and persecutions had reached European capitals, a wave of outrage swept through Europe. European governments had to react. France and Great Britain sent their navies to the Lebanese coast. The presence of these naval units sufficed to ensure that at least along the Lebanese coast the killings stopped. Agreement for the sending of French land troops was, however, found only by the Protocol of Paris, signed by the five European great powers (France, Great Britain, Austria, Prussia and Russia) as well as by the Ottoman Empire, after news about the Damascus killings had spread in Europe.[83]

Now the Sublime Porte became active and appeased the Lebanon even before the French troops landed. At least the most violent instigators and perpetrators were jailed and sentenced.[84] By the "Réglement Organique" the Lebanon obtained the status of an autonomous province within the Ottoman Empire ("Mutasarrifiyya") and a Christian governor.[85] A complex system of checks and balances was established that resembled the present-day model of a consociational democracy which would guarantee peaceful cohabitation on equal terms of the different ethnic groups.

In literature, the Lebanese intervention is often qualified as the first "genuine" humanitarian intervention in the modern sense. While all intervening powers pursued some individual interests by this intervention they were, compared to the overall humanitarian purpose of the intervention, of secondary importance.[86]

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83 See A. Pauer, 1985, p. 52 and G. Bass, 2008, p. 188.

84 56 men were sentenced as murderers and hanged. 11 soldiers were found guilty of participating in the massacres and executed. Death sentences were passed also on the military commanders in the cities where massacres were committed without the authorities intervening. See H. Endemann, 1997, p. 19, referring to a Report by Lord Dufferin to Sir H. Bulwer, the British Ambassador to the Sublime Porte 1860, cited according to Sohn/Buergenthal, International Protection of Human Rights, 1973, p. 161s.

85 See A. Pauer, 1985, p. 52.

86 Often reference is made in this context to the fact that France under Napoleon III wanted to extend its sphere of influence in the Near East and divert attention from its internal

Although it is true that the bloodshed was primarily stopped by the Turkish troops it cannot be ignored that the Sultan became active only after having been strongly urged to do so by the European powers and with the clear prospect that non-intervention could lead to heavy territorial losses.[87] At the same time, if we adopt a modern terminology, it may be remarked that by this intervention the Sultan had fulfilled his responsibility to protect.

If we analyse the intervention in Lebanon according to the criteria of the modern concept of R2P it becomes clear that there the preventive element, which is now given a pivotal role, was widely neglected. To this day prevention remains a factor the State Community has to work on, and it is generally held that far too few resources are invested in this area. On the other hand, there are still some fundamental problems with prevention that defy solution. In fact, prevention is rather resource-intensive, and on the political level it is very difficult to obtain such resources as long a conflict has not yet broken out openly. Furthermore, state sovereignty reveals itself as extremely intervention-resistant in such cases: there are widespread reservations within the State Community to approve interventions that have preventive purposes. Exactly because the home state bears the primary responsibility to find redress for human rights problems it is often difficult to state when the responsibility of the State Community for preventive measures takes the place of that of the home state.[88]

On the other hand it has to be emphasized that after the devastations and the egregious acts of violence that had been committed in Lebanon and in Syria the intervening countries (in particular France) and also the Ottoman Empire made enormous efforts to rebuild these territories. The model of power-sharing established on this occasion would afterwards constitute the basis for the constitutional order of the independent State of Lebanon (since 1943) and characterize the constitutional order of that state to this day.[89]

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problems. Furthermore, it is said that Great Britain, having sustained the Druze in the past, wanted to keep control of events by this intervention. Finally it is claimed that Russia was interested in a precedent for further interventions in favour of Christians within the Ottoman Empire.

87 Thus it appears that the role of Sultan in the overall effort to quell the bloodshed is portrayed too positively by M. Swatek-Evenstein (2008, pp. 132ss.).

88 As to the problem of prevention see A. Bellamy, Conflict Prevention and the Responsibility to Protect, in: 14 Global Governance 2008, pp. 135–156 and P. Hilpold, From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?, in: U. Fastenrath et al. (Hrsg.), From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma, OUP: Oxford 2011, pp. 462–476.

89 This does not mean, however, that the ethnic and religious groups of this territory would always live together in harmony. In 1958 in Lebanon a violent conflict erupted and

7.3 *The Balkan Wars (1875–1877)*[90]

In the three years between 1875 and 1877 the Balkans were a theatre of cruelties of unprecedented dimensions, leading to,military interventions which were – at least partly – motivated by humanitarian concerns. At the same time, too, diverse aspects of a responsibility to protect came to bear, although, of course, not by that name. Again, also in this case many political and geo-strategic interests were at play so that in the literature the question is often raised what were the "real" motives for these cases of intervention.

The relevant military measures were directed against the Ottoman Empire, a crumbling and corrupt state which was neither willing nor able to perform its obligations under the Treaty of Paris to treat all religions (and in particular the Christian one) equally with the State religion. As a consequence of the systematic violations of basic principles of humanity the call was repeatedly made to dissolve that Empire. This claim found support from broad parts of the population in several European countries, but not from their governments as they saw in the Ottoman Empire an important counter-weight against Russia. The Austro-Hungarian Empire and Great Britain had the greatest interest in the preservation of that state as a stabilizing factor: Austria saw it as a guarantee against the strengthening state of Serbia and Great Britain feared a Russian expansion into India and the conquest of Constantinople by the Czar – fears that were far from unrealistic in the second half of the 19th century. Also Prussia had interests in the preservation of the Ottoman Empire, and this interest grew so strong over the years that it ended up in a military alliance during the First World War.[91]

While Russia repeatedly demonstrated that it was nurturing expansionistic ambitions they were probably not as pronounced as many European governments supposed. At least Czar Alexander II (1818–1881)[92] and his long-serving

between 1975 and 1989 a civil war was waged which claimed nearly 100,000 victims. Since the middle of the 19th century there had been a steady flow of migration in particular by the Christian population from the Lebanon to the rest of the world (and primarily to the American continent). Therefore, nowadays more people of Lebanese descent lived abroad than in Lebanon.

90 See A. Pauer, 1985, pp. 60ss.; M. Swatek-Evenstein, 2008, pp. 144ss.; H. Endemann, 1997, pp. 24ss.; G. Bass, Freedom's Battle, 2008, pp. 239ss.; M. Schulz, The guarantees of humanity: the Concert of Europe and the origins of the Russo-Ottoman War of 1877, in: B. Simms/D.J.B. Trim, Humanitarian Intervention – A History, CUP: Cambridge 2011, pp. 184–204.

91 For André Mandelstam the Ottoman Empire was "dependent from Germany" during WW I. See A. Mandelstam, Le sort de l'empire ottoman, Lausanne/Paris 1917.

92 Alexander I was Czar of Russia between 1853 and 1881.

Foreign Minister Alexander Gortschakov (1798–1883)[93] for a long time had made every effort to avoid military conflicts in the Balkans. This policy was motivated by the attempt to modernize Russia and influenced by the conviction that it had insufficient military strength after its defeat in the Crimean war (1853–1856).

The conflicts started with an uprising by Christian peasants in Bosnia against their Ottoman lords.[94] This rebellion was crushed by the Sublime Porte with the utmost cruelty, and in this context extensive massacres were committed against civilians. Not much information from this conflict area reached the outside world so that there are differing indications about the number of victims.[95] The European powers intervened at the diplomatic level. More vigorous measures were opposed by Great Britain, and as a consequence the Sultan's military formations had a free hand. The British Prime Minister Benjamin Disraeli pursued a strict policy of non-intervention and prioritized strategic interests over humanitarian considerations.[96] Only public opinion could act, to certain extent, as a countervailing force. And, in fact, pressure coming from the public mounted continuously, reaching at the end a totally unprecedented level. One reason for this was the increasing distribution of newspapers in Great Britain that became affordable also for the lower middle class.[97] Furthermore, new technologies, in particular the telegraph, allowed the communication of news over great distances within a short period of time; telegraph cables now even reached regions that had in the past been considered inaccessible.[98]

The flame of protest soon spread from Bosnia to Bulgaria, where in 1876 large numbers of the population wanted to see an end to the oppression by the Ottoman lords and governors that had lasted for centuries.[99] Again the Sultan reacted with extreme brutality and he was aided by irregular troops formed by Turkish peasants who had settled there after the Crimean war. Unlike in the case of the Bosnian uprising the conflict in Bulgaria was extensively covered by journalists and detailed news of the massacres spread all over Europe, meeting particular interests in Great Britain and in the US.[100]

93 Gortschakov was the Russian Minister of Foreign Affairs between 1856 and 1882.

94 See A. Pauer, 1985, p. 60.

95 These numbers range between 15,000 and 60,000.

96 See the detailed account given by G. Bass, 2008, pp. 266ss.

97 Ibid., p. 256.

98 Ibid.

99 See in this regard also the pamphlet by W.E. Gladstone, Bulgarian horrors and the question of the east, J. Murray: London 1876.

100 A fundamental contribution was made in this context by the US journalist Januarius Aloysius MacGahan who was an eyewitness to the horrors in Bulgaria and cabled reports

Disraeli 's predecessor, Gladstone, saw in these events an opportunity to denounce the badly orientated British foreign policy, and he developed an extraordinary ambition in so doing. He entered the ranks of the so-called "atrocitarians" who relentlessly drew attention to the cruelties in the Balkans, the "Bulgarian Horrors."[101]

Disraeli could resist this pressure insofar as he could avoid the active military involvement of his country. In the end, however, he had to promise the Russia government to intervene as that government could no longer disregard the plea by an ever stronger pan-slavistic movement at home. After Serbia and Montenegro had unsuccessfully tried to stop the massacres and to shake off the Ottoman yoke, in 1877 Russia declared war on the Sublime Porte which ended with a clear Russian victory a year later. At the particular request of Great Britain, the harsh peace conditions imposed by the Treaty of San Stefano of 1878 were somewhat softened at the Berlin Congress of the same year. Serbia, Montenegro and Romania, however, remained independent and the Sublime Porte only formally maintained its sovereignty over Bulgaria. Of particular importance were the minority protection obligations the Ottoman Empire had to accept at the Berlin Congress which corresponded to equivalent protective rights for the other parties:

"1. La Sublime Porte s'engage à realiser, sans plus de retard, les ameliorations et les réformes qu'exigent les besoins locaux [...] [d]es Arméniens. [...] Elle donnera connaissance périodiquement des mesures prises à cet effet aux Puisances, qui en surveilleront l'application.

2. La Sublime Porte ayant exprimé la volonté de maintenir le principe de la liberté religieuse en y donnant l'extension la plus large, les Parties Contractantes prennent acte de cette declaration spontanée [...]."[102]

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to the outside world were of an authenticity and drama unseen before. MacGahan was called the "Liberator of Bulgaria," this qualification giving particular emphasis to the power of journalism. See A. Forbes/J.A. MacGahan et al., The War Correspondence of the "Daily News" 1877: With a connecting narrative forming a continuous history of the war between Russia and Turkey to the fall of kars, Tauchnitz: Leipzig 1877 and D. Walter, Januarius MacGahan: The Life and Campaigns of an American War Correspondent, Backinprint: 2006.

101 See G. Bass, 2008, pp. 260ss. On the controversy between Prime Minister Disraeli and the leader of the liberals, W.E. Gladstone, see also M. Rathbone, Gladstone, Disraeli and the Bulgarian Horrors, in: 50 History Review 2004, pp. 3ss.

102 See Parry, CTS, vol. 153 (1878), p. 171 (189), cited according to H. Endemann, 1985, p. 26.

7.4 *An Overall Assessment*

The Berlin Congress (provisionally) ended a process that had started with the Greek war of liberation and which saw a further progression in the Lebanon conflict. The Ottoman Empire had been a decaying, backward-looking power that violated repeatedly the most basic values of humanity. Ever more details of these crimes became known to a broad international public that had become highly sensitized to questions of this kind. The whole issue was also considered both by the governments that opposed interventions and by those that were in favour of such measures in broader political terms. In this context, the broader public, both as an anonymous mass and in the first forms of NGOs became ever more a factor in governments determining to intervene.

These processes were clearly influencing public opinion. There were many reasons why the interventions of the 19th century, considered overall,were clearly legitimized if not outright necessary from a humanitarian perspective: the abuses committed by the Ottomans were of an outrageous nature; culprits and victims could easily be identified; and information from the conflict regions was communicated mostly in a rather selective way, so that people took notice of it in an enhanced way.

Likewise as in the Middle Ages religious elements played an important role in the creation of specific bonds with people being discriminated against in foreign countries, giving rise to empathy and compassion finally prompting governments to intervene. Therefore, it can be said that elements of a *"respublica fidelium*," bridging religious divides within Christianity, were still present. At the same time, however, the feeling of a humanitarian responsibility, which was independent of religion, became ever stronger.[103] In the 20th century this aspect became dominant even though it was not the only decisive one.[104] The idea present already in the writings by Francisco de Vitoria

103 This development was succinctly expressed by the famous theory of humanitarian intervention developed by Antoine Rougier in 1910 (see A. Rougier, La Théorie de l'Intervention d'Humanité, in: 17 RGDIP 1910, pp. 486–526).

While this approach aims at the protection of the law of humanity, it is obvious that it was drafted against the backdrop of a history of interventions primarily motivated by the intention to stop atrocities committed due to religious hatred. See also M. Swatek-Evenstein, 2012, p. 52.

104 In general International Law this development was preceded by the passage from Republica Christiana to Jus Publicum Europaeum. See R. Lesaffer, The classical law of nations (1500–1800), in: A. Orakhelashvili (ed.), Research Handbook on the Theory and History of International Law, Edgar Elgar: Cheltenham 2011, pp. 408–440 (408ss.).

(1484–1566) and Immanuel Kant (1724–1804) that the definition of the "common good" should ignore religious divides and potentially include all people world-wide was taking shape.[105]

The interventions of the 19th century confirm various considerations that were formulated a century earlier by the Anglo-Irish politician and philosopher Edmund Burke (1729–1797). Although Burke's demand for intervention against revolutionary France[106] seems anachronistic and untenable from a modern point of view, this claim was based on fears that anarchy would destroy all civilizational achievements, fears not totally unjustified in the first years of the French revolution. For Burke the revolutionary ideas were harmful and disruptive and he saw them also as infectious for Great Britain due to its (geographic and cultural) "vicinity" to France. According to Burke "vicinity" not only generated a right to self-defence but should also be decisive for finding an answer to the question in which cases, in view of a world-wide misery, it would be appropriate to intervene. In the end, *"mental affinities and elective affections"* should be decisive.[107]

Important elements of this empathy generating vicinity are also transparency and publicity. And here the new technical achievements and inventions come in that made sure that this sense of vicinity developed a new dimension in the second half of the 19th century. Both the new means of communication and the new weight of the press made sure that the massacres of the Balkans were immediately present in the homes of the European middle class that identified itself to a considerable extent by reference to basic humanitarian and moral values.

What does one do, however, if all the injustices in a globalized world are known to everyone? If geographic distance or space limitations in traditional newspapers are no longer an issue and media cease to exercise a selective

105 See also Egide Arntz who stated that an intervention is legitimate if a government, while acting within the limits of its sovereignty, violates the rights of humanity, "soit par des measures contraires à l'intérèt des autres États, soit par des excès d'injustice et de cruaté qui blessent pronfément nos moeurs et notre civilitsation." See Gustave Rolin-Jaequemyns, "Note sur la théorie du droit d'intervention, à propos d'une lettre de M. le professeur Arntz" 8 Revue de droit international et de législation comparée 1876, p. 675.

106 Contained in Burke's most important writing: "Reflections on the Revolution in France," 1790.

107 "Men are rarely without sympathy in the sufferings of others, but in the immense and diversified mass of human misery, which may be pitied, but cannot be relieved, in the gross, the mind must make a choice." See. E. Burke, Letters on a Regicide Peace (Third Letter on a Regicide Peace, 1796) reprinted in: The Works of the Right Hon. Edmund Burke, Bd. II, Holdsworth and Ball: London 1834, p. 321.

function in the universe of news (however one-sided and biased this function may have been in the past), because computer and satellite technology no longer leaves any black holes on earth do we enter a new era? In this case, people may become anaesthetized and disaffected and they may be inclined to reorient their interest towards local events. While such a threat, at which Burke had acutely hinted, was not yet there at the end of the 18th century and was not an issue throughout the whole of the 19th century it was to become highly relevant in the second half of the 20th century.

In the 19th and in the first half of the 20th centuries, the lack of "vicinity" had disastrous consequences for several peoples, first of all for the Armenians. In the Ottoman Empire, they became the victims of ineffable cruelties and finally of a planned genocide without the State Community making any serious attempt to intervene. One of the main reasons for this dismal situation was to be found in the fact that the territory where the Armenians settled was extremely remote and hardly accessible to any form of external military intervention by means then available. A further consequence of this remoteness was that information from this region reached the Western European capitals only with great delay, if at all, so that empathy with the suffering Armenians arose far too late. Finally, the historic moment when the (second) genocide happened, the period of the First World War, was extremely unfavourable for outside intervention.

First systematic massacres with over 100,000 victims were committed by the Turks on the Armenians in the period between 1893 and 1897. The Ottoman Empire ignored its responsibility to protect towards the Armenians set out in Art. 61 of the Berlin Treaty of 15 July 1878.[108] Apart from mere formal protests the other treaty parties did not make use of their right to intervene also to be found in the same provision. The main reasons for this were the discord between the European great powers and the ever closer relationship of the

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See in this regard the detailed analysis by B. Simms, "A false principle in the Law of Nations": Burke, state sovereignty, [German] liberty, and intervention in the Age of Westphalia, in: B. Simms/D.J.B. Trim (eds.), 2001, pp. 89–110 (106) as well as by I. Hampsher-Montk, Edmund Burke's Changing Justification for Intervention, in: 48 The Historical Journal 2005, pp. 65–100 who refers to the community-creating "shared manners" of pre-revolutionary Europe.

108 "The Sublime Porte engages to carry out, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by Armenians, and to guarantee their security against the Circassians and Kurds. It will periodically render account of the steps taken to this effect to the powers, who will superintend their application."

Ottoman Empire with Germany.[109] Without support from Germany, a country whose economic, political and military influence was steadily growing in Europe and world-wide, intervention appeared to be no longer feasible. This circumstance exemplified a further characteristic of modern intervention law and policy of the 19th century and the beginning of the 20th century:

- The conviction that mass killings, "massacres" of civilians would, in principle, require intervention was widely held. Although the term "responsibility to protect" was used neither as a legal concept nor in a non-technical way, its content was de facto known and accepted.
- Many aspects of such a responsibility to protect had, however, remained unclear. On the governmental level the political reason of State prevailed.
- For this reason, States preferred to agree upon specific rights to intervene with regard to clearly defined situations both in territorial terms and on a subjective basis. A good example in kind is Art. 61 of the Berlin Treaty.
- Even if the factual situation clearly hinted at a right to intervene, the European great powers preferred a coordinated approach. Collective intervention should guarantee success in military terms and avoid any form of abuse.[110] With regard to the massacres in Armenia such an international consensus could not be found, however. Therefore, the Armenians were abandoned to their fate. Two decades later almost the whole Armenian population was driven from their homes and killed.

8 The US Intervention in Cuba and on the Philippines 1898

At the end of the 19th century the situation in the Spanish colonial Empire much resembled that of the Ottoman Empire: A crumbling dynasty that could no longer keep pace with modern States due to endemic corruption, mismanagement and hopeless backwardness tried to counter protests with extreme

109 See H. Endemann, 1997, p. 26.

110 See, for example, A. Rivier, Lehrbuch des Völkerrechts, Verlag von Ferdinand Enke: Stuttgart 1889, pp. 233ss.:

> "Where the rights of mankind are violated by a cruel, barbaric government through flagrant unlawfulness, persecution etc.…only a collective intervention by states which form the community of nations, can be justified. Because no individual State as such has the right to play the role of the representative of mankind. Only the community of States as such is authorized to act, to intervene. The community of States can authorize one States or a group of States to act."

brutality. After an uprising in Cuba in 1895 the Spanish general Wyler reacted with the construction of concentration camps where the rural population was gathered and abandoned to its fate.[111] The consequence was thousands of deaths and the total disruption of Cuba's economic order.

These events were documented in the US media in every detail and as a consequence a wave of outrage went through the American population, compelling the government under Arthur McKinley to act in 1898. McKinley justified the intervention in the following way:

> First. In the cause of humanity and to put an end to the barbarities, bloodshet, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or to mitigate. It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is our special duty, for it is right at our door.
>
> Second. We owe it to our citizens in Cuba to afford them the protection and indemnity, for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.
>
> Third. The right to intervene may be justified by the very serious injury to the commerce, trade, and business of our people, and by the wanton destruction of property and devastation of the island.
>
> Fourth, and which is of utmost importance. The present condition of affairs in Cuba is a constant menace to our peace, and entails upon this government an enormous expense. With such a conflict waged for years in an island so near with which our people have such trade and business

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Similar opinions can be found in the writings of Arntz and of von Fauchille. See A. Pauer, 1985, pp. 39ss.

The importance of a collective approach is emphasized also by P.H. Winfield, The Grounds of Intervention in International Law, in: 5 BYIL, 1924, pp. 149–162 (162): "The case in which [humanitarian] intervention is least likely to be abused is where the majority of leading civilized States exercise it collectively." Winfield highlights that there are no clear rules for a collective approach: "Whether, beyond this, there can be claimed any continuous practice in its favour, or what is approximately the limit of number of interveners, or how far their numerical inferiority is outweighed by the individual influence, or what, if any, other moral ground must be present – all this is unsettled."

See also M. Wood, The law on the Use of Force: Current Challenges, in: 11 Singapore Year Book of International Law 2007, pp. 1–14 (14): "…experience suggests that collective decision (whether for action or inaction) are usually better than unilateral ones."

111 See A. Pauer, 1985, p. 66.

> relations,…and other questions and entanglements thus arising, are a constant menace to our peace and compel us to keep on a semi-war footing with a nation with which we are at peace.[112]

Many commentators admit that the American government acted out of sincere motives. The humanitarian motives clearly prevailed.[113] It is impressive to see how many elements of the modern concept of R2P were cited in this situation: the US government exercised its humanitarian responsibility in a transborder situation; Spanish' sovereignty constituted no obstacle to its acting. At the same time this intervention gave expression to a responsibility to protect by the government against its own people. Most probably out of political considerations towards the US Senate, President McKinley had qualified this responsibility even as the primary reason for the intervention.

McKinley also referred to the geographical proximity of Cuba to US territory and to the close economic relations between those two areas. Again, this can be seen as a reference to Edmund Burke's "vicinity" as a decisive factor for intervention.[114]

The US intervention was extremely successful in military terms. For strategic reasons the operation was extended – without any specific territorial claims – to the Pacific, where larger parts of the Spanish navy patrolled other important remnants of its colonial empire. In the end, the US had obtained sovereignty not only over Cuba but also over the Philippines, Guam and Puerto Rico.[115] Exactly because the former Spanish colonial power had totally disregarded its responsibility to build up democratic structures and had instead installed a system exclusively directed at exploitation and the transfer of resources, now the US had to assume a completely new and unexpected responsibility. The territories in question could not simply be left to their own devices because otherwise chaos and further humanitarian distress would

112 Vgl. President McKinley to the Congress of the U.S. Special Message v. 11. April 1898, cited according to A. Pauer, 1985, p. 68.

113 It is also interesting to note that US President McKinley referred in this context to Armenia where an intervention would have been difficult to carry out for logistical motives (the US had only just started to build up a navy). The US was, however, willing to live up to its humanitarian responsibilities for events happening "in its backyard."

114 See n. 7.2 of this contribution.

115 For a different assessment of this intervention see Wilhelm Grewe (Völkerrechtsgeschichte, 1984): "The American advance to Cuba and the ensuing war against Spain (1898) were the beginning of a change of paradigm in American politics from isolationism to blatant imperialism…." Ibid., p. 515.

have ensued. In the aftermath, however, in the US economic and strategic interests arose. On this basis the following development took place:

- Guam and Puerto Rico were annexed by the US.
- Cuba became formally independent in 1902 but due to the "Platt Admentment" of 1901[116] the US maintained far-reaching rights of intervention in Cuba.
- The Philippines came under American administration. Originally, the US government had no such intention, but this measure turned out to be necessary in order for the US to fulfill its responsibility to rebuild (again using modern terminology). For the rest, any other option (be it to abandon the archipelago to chaos or to offer it as easy prey to the newly emerging colonial powers in the Pacific, Japan and Germany) would have been worse, first of all for the Philippines themselves.[117] On the other hand, this measure implied that the US had entered the ranks of the colonial powers. Only in 1946 did the Philippines become independent from the US. The relationship between the USA and Cuba remained problematic for most of the 20th century. The annexation of Puerto Rico led repeatedly to local political protest.
- On the whole, also in this case it can therefore be said that the American intervention happened primarily for clear humanitarian reasons, and from this perspective it seemed to be justified. Shortly after the military success, however, new problems and ambitions arose which shed a less positive light on the whole endeavour. Nonetheless, it would hardly seem fair to condemn the whole intervention for this reason because the alternative, i.e. not to intervene, would in all probability have resulted in a far worse outcome.

9 Humanitarian Intervention in the Aftermath: A Stock-Taking and a Look Ahead

Efforts to restrict the use of force and to hinder the outbreak of war constitute a permanent theme in the history of civilization. Even in ancient times the attempt was made to distinguish between permissible and non-permissible force and to identify situations that required the use of force at all. The modern catalogues of criteria on the basis of which the permissibility of an armed

116 Named according to its main sponsor, US Senator Orville Platt. The Platt Admentment remained in force until 1934.

117 See M. Sewell, Humanitarian intervention, democracy, and imperialism: the American war with Spain, 1898, and after, in: B. Simms/D.J.B. Trim, 2011, pp. 303–322.

intervention should be judged[118] in their substance date far back in history. Time and again it was pointed out that such catalogues are prone to abuse and that they might legitimize what they purported to prohibit.[119] The discussion about humanitarian intervention was characterized by this dilemma.

In the 20th century the potential reach, the limits and the internal contradictions of this concept came fully to bear. The nationalist ideology which already in the 19th century was fully formed and was responsible for gross violations of the principle of humanity was now cultivated. The wrongful interpretation of Darwinism as biological determinism, leading to social determinism and finally to racism, created the basis for widespread measures of annihilation that were unprecedented in the modern history of civilization.

Many crimes committed in the 20th century can be qualified as genocide or as genocide-like. Some were associated with the crime of colonialism, such as the killing of 65,000 to 85,000 Herero in German Southwest Africa between 1904 and 1908 by German troops[120] or the Italian colonial war in Libya (1911–1932) and in Abyssinia (1935–1941).[121] In other cases these crimes occurred in

118 One of the most recent catalogues of such criteria is to be found in the ICISS Report of 2001. According to this Report the following conditions are necessary for an intervention: "just cause, right intention, right authority, last resort, proportional means and reasonable prospects."

119 In various cases, however, this danger was presented in an exaggerated form, as for example by Carl Schmitt (criticizing by this way also the attempts to establish a monopoly for the use of force by the League of Nations: "That justice does not make part of the concept of war has been generally known since Grotius. The constructions that claim for just wars, usually are at the service of political aims. To ask from a politically united people to go to war only out of a just reason is either completely obvious when this means that war has to be waged only against a real enemy or it hides the political intent to attribute the decision about the jus belli to other subjects and to find norms of justice whose content is not determined by the State in the individual case but by some third parties who decide by this way who is the enemy." (P. Hilpold, transl.). See C. Schmitt, Der Begriff des Politischen, Duncker & Humblot: Munich/Leipzig 1932, pp. 37ss. Pertinent to this statement is also the following famous saying by Carl Schmitt: "Whoever invokes 'humanity' wants to cheat." Ibid., p. 27. The concept of "just war" was questioned, by the way, already by Richard Zouch (1590–1661) who is regarded by some as the "real father of International Law." For this reason, Richard Zouch was praised by Carl Schmitt in his "Nomos der Erde." See also G. Gozzi, Diritti e civiltà – Storia e filosofia del diritto internazionale, Mulino: Bologna 2010, p. 77.

120 A. Kämmerer/J. Föh, Das Völkerrecht als Instrument der Wiedergutmachung? Eine kritische Betrachtung am Beispiel des Herero-Aufstandes, in: 42 AVR 2004, pp. 294–328.

121 See in this regard A. Mattioli: Experimentierfeld der Gewalt. Der Abessinien-Krieg und seine internationale Bedeutung 1935–1941, Orell Füssli: Zürich 2005.

the context of armed conflicts such as the war of annihilation conducted by the Deutsche Wehrmacht during the Russian campaign starting in 1941, where even military aims were subordinated to the purpose of achievingh Hitler's genocidal ambitions. On the other hand, towards the end of WW II and in its immediate aftermath the German populations of Middle and Eastern Europe fell victim to widespread and systematic crimes that could be classified, according to modern terminology, as crimes against humanity.[122] Also to be mentioned are the crimes committed by the Japanese army during the Japanese war of expansion (in particular on the occasion of the occupation and annexation of Manchuria in 1931). As these crimes remained widely unpunished a highly problematic precedent was created for the decades to come.

The most outrageous crimes in the first half of the 20th century were surely the genocide against the Armenians (1915–1917 with further attacks until 1923) and the Holocaust against the Jews by Hitler's Germany aided by her allies.

The crimes against the Armenians are well-documented notwithstanding the geographic remoteness of the area where they settled, the war that was taking place at the same time and the intense efforts to cover up or to relativize these events as well as the "intent to destroy."[123] There can be no doubt that this genocide with up to 1,500,000 victims happened.[124] The same is true for the Holocaust, claiming 6,000,000 million victims between 1933 and 1945. In neither of these cases did the State Community intervene; the war against Nazi Germany cannot be qualified as a humanitarian intervention.[125] In both cases the full scale of the genocide became evident only after the concomitant war.

122 On the whole, up to 14 million Germans (according to some accounts 16 million) were driven from their homes and many of them fell victim to further crimes.

123 As is known, the "intent to destroy" is an important defining element of genocide. In many cases of massacres it was difficult to demonstrate that this element was present, and therefore it was assumed that no case of genocide was made out.

124 See in this regard B. Barth, Genozid, Beck: Munich 2006, pp. 61ss.: "On the basis of a broad array of documents the case of the Armenians in the Ottoman Empire can now be qualified as genocide." See also V. Dadrian, The History of the Armenian Genocide. Ethnic Conflicts from the Balkans to Anatolia to the Caucasus, Berghahn Books: Providence 1955; V. Avedian, State identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide, in: 23 EJIL 3/2012, pp. 797–820; U.Ü. Üngor, The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913–1950, OUP: Oxford 2011 as well as H. Kaiser, Genocide at the Twilight of the Ottoman Empire, in: D. Bloxham/A.D. Moses (eds.), The Oxford Handbook of Genocide Studies, OUP: Oxford 2012, pp. 365–385.

125 See in this sense also M. Swatek-Evenstein, 2008, p. 217.

As to the genocide against the Armenians not only those immediately responsible in Turkey but also the allied German Reich tried to cover up this fact. It may seem puzzling that the United States did not make serious efforts to shed light publicly on these events as it is known that the lot of the Armenian people was very close to the heart of the American people. Exactly for this reason, however, State Secretary Robert Lansing (1864–1928) wanted to avoid the American people being fully informed of the situation as he feared that as a consequence the US government would be compelled to intervene – an intervention not intended by American foreign policy.[126]

As shown above, the feeling of closeness and of "elective affection" ("vicinity" according Edmund Burke) was an important pre-condition to generate a sense of solidarity[127] and the preparedness to shoulder a responsibility to protect.

While first it was the government that, out of political and geo-strategic considerations, tried to impede the formation of a sense of solidarity with existentially-endangered people, at the end of WWI it was the US Congress that decided to take an isolationist position, thereby opposing any proposal for a responsibility to protect in the form of a mandate for the newly founded (and soon disbanded) State of Armenia.

Although the legal concept of genocide was created only in 1944[128] and agreement for specific norms prohibiting this crime was reached in 1948[129] there can be no doubt that this concept and the respective norms were introduced primarily as a consequence of the two events mentioned.[130]

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126 Gary Bass, 2008, pp. 315ss. demonstrates in detail that US Secretary of State Lansing was informed about specific details of the genocide against the Armenians. Lansing did not want to take measures going beyond an (indirect and discrete) diplomatic protest. He asked the German ambassador for an intervention by Germany at the Sublime Porte, stating that the "true facts, if publicly known, would shock the whole civilized word." Ibid., p. 332.

US President Woodrow Wilson was deeply shocked by the massacres in Turkey but he was not able to take a decision for an intervention which was strongly demanded by the former US President Theodore Roosevelt. Ibid.

127 As to the principle of solidarity in International Law see the literature indicated at the end of para. 6.

128 As is known, this term was created by Raphael Lemkin.

129 Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, UNTS 78, p. 277.

130 Thereby, of primary importance was surely the Holocaust, but also the genocide committed against the Armenians was highly relevant for the drafting of these rules. See the autobiographical writing by Raphael Lemkin (Totally Unofficial. The Flight. Unpublished

At the beginning of 20th century thinking in national categories, the emphasizing of absolute sovereignty, reached a new apex. The German lawyer Albert Zorn gave clear voice to this thinking when he wrote in 1903:

> …it ensues for the internal state law that each State is absolutely free to regulate its internal relations and bears responsibility to nobody than itself.[131]

The foundation of the United Nations can be seen as a reaction to the grave crimes mentioned. A new international order based on the prohibition of the use of force and respect for human rights whould make sure that crimes of the kind mentioned would never happen again.[132] In the case of a threat to international peace or a breach of the peace the State Community should be able react with forcible measures according Chapter 7 of the Charter.[133] In this

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autobiographic fragments, p. 18/19, New York Public Library, Rare Book Division: Raphael Lemkin Papers, Reel 2) who, after the genocide against the Armenians, had come to the conviction that international rules for the fight against genocide were necessary: "Sovereignty, I think, can never be misunderstood as a right to kill millions of innocent people." (Cited according to R. Hosfeld, Operation Nemesis – Die Türkei, Deutschland und der Völkermord an den Armeniern, Kiepenheuer & Witsch: Cologne 2005, p. 7). Thereby Lemkin had anticipated ideas that were groundbreaking for the introduction of the concept of R2P.

See also W. Schabas, Genocide in International Law, CUP: Cambridge 2000, p. 25.

131 See A. Zorn, Grundzüge des Völkerrechts, J.J. Weber: Leipzig 1903, pp. 49ss. (quote P. Hilpold transl.).

132 The crimes committed against the Armenians during and after WW I caused international outrage and led to an intensification of the efforts to create an international human rights protection system. Particular merits are to be attributed in this regard to André Mandelstam who was not only very outspoken as to the crimes that had been committed (for example in "Le sort de l'empire ottoman," Lausanne/Paris 1917) but who also made important contributions for the development of an international human rights system (so by the "Déclaration des droits internationaux des l'homme," adopted by the Institut de Droit International in 1929). See R. Huhle, Vom Minderheitenrecht zum Menschenrecht – André Mandelstam und die Entwicklung des menschenrechtlichen Völkerrechts, in: 70 Europa Ethnica 3–4/2013, pp. 3–16.

133 On the other hand, the system of the League of Nations had proved to be totally inadequate to react appropriately to human rights violations, although Art. 16 of the Covenant of the League of Nations contained provisions on sanctions. The only case where they were applied (against Italy following the aggression on Abyssinia 1935) was a complete failure. The respective economic sanctions – which were circumvented especially by Germany – were lifted as early as in 1936. On 16 December 1939 the Soviet Union was expelled from the League of Nations following its aggression on Finland. By that time, however, the League of Nations had anyway become all but irrelevant. See B. Baradon, Völkerbund, in: H.-J. Schlochauer, Wörterbuch des Völkerrechts, vol. 3, de Gruyter: Berlin 1962, pp. 597–611 (607). As to the role the League of Nations had played in the field of

system, no space should remain for unilateral measures, even if carried out by a collectivity of states. In the first years after the UN had come into being the conviction was that in cases with no trans-border consequences, for example when massacres were carried out only in one state and had no effects on other countries, there was a protective gap as the UN had no power to interfere. On the other hand, much depended on the approach one was to choose for the interpretation of human rights, and this approach changed considerably over the years.[134]

By the introduction of modern human rights obligations de facto a responsibility to protect was already given – both with regard to the home state towards its subjects and in relation to the State Community towards those people that otherwise had insufficient protection. It was obvious already from a dogmatic legal viewpoint that no state could oppose sovereignty against a plea for such protection.[135] It was, however, a rather long time until this fact found general recognition.[136]

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minority protection see P. de Azcarate, League of Nations and National Minorities: An Experiment, Carnegie Endowment: Washington DC 1945 and P. Hilpold, The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment, 17 Max Planck Yearbook of United Nations Law 2013, pp. 87–124; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305920.

As to a statement from the interwar period regarding humanitarian intervention see for example G. Diena, Diritto Internazionale, Editrice Dante: Milan 1930, p. 179:

"As a consequence of the independence of states…any sovereign has the right to regulate the legal condition of its subjects with absolute autonomy. If one were to attribute a general right to interfere to third states in internal matters of others the most serious abuses would be committed." (P. Hilpold, transl.).

134 For a good exposition of this process see M. Nowak, Der internationale Menschenrechtsschutz, in: A. Reinisch (ed.), Österreichisches Handbuch des Völkerrechts, 2013, pp. 313–386.

135 From the very beginning of the drafting process for the UN Charter it was clear that a reference by the Charter to human rights would have had consequences at the internal level of the parties. At least initially this led to considerable opposition to such a reference. See Vgl. L.M. Goodrich et al., Charter of the United Nations, Columbia University Press: New York/London, 3th edition 1969, p. 372. As a consequence, some first doctrinal statements about the relevant provisions were rather reserved in this regard. See in particular H. Kelsen, The Law of the United Nations, Stevens & Sons: London 1950, S. 19: "The language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects."

136 The Vienna Declaration and Programme of Actions of 25 June 1993 was very clear in this regard. Para. 4 of this document states the following: "[T]he promotion and protection of

Even more delicate was the question whether humanitarian interventions would still be permissible after the entry into force of the UN Charter. In this regard, a distinction is to be made between unilateral measures, i.e. intervention without authorization by the SC, and multilateral interventions which were taken on the basis of Chapter 7 of the UN Charter.

Unilateral measures are clearly prohibited, although in literature voices to the contrary can also be found.[137] Whether multilateral measures can be adopted as a reaction to gross violations of human rights has long been disputed. Only by the end of the Cold War in 1989 were the conditions created for finding a consensus for such interventions within the SC. This began with

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all human rights is a legitimate concern of the international community." As a consequence, the objection that human rights issues pertain to internal affairs is no longer permissible.

137 See in this context the dispute between Michael Reisman and Oscar Schachter in AJIL 1984. Professor Reisman was of the following opinion:

> "Article 2 (4), like so in the Charter and in contemporary international politics, rest on and must be interpreted in terms of this key postulate of political legitimacy in the 20th century....
>
> > Coercion should not be glorified, but it is naïve and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question in a decentralized system is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order."

See M. Reisman, Coercion and Self-Determination. Construing Charter Article 2(4), in: 78 AJIL 1984, pp. 642–645 (644ss.).

The rejoinder by Professor Oscar Schachter seems, however, more convincing:

> "In presenting this far-reaching thesis, Reisman regrettably does not adequately explicate the grounds on which it is based....from the very inception of the present Charter system, there has been general agreement that the rule against unilateral recourse to force (except in self-defense) is a fundamental tenet of international law. In recent years, it has been widely characterized as jus cogens. To argue that it must now be "reinterpreted" so as to subordinate its prohibition to the right of states to overthrow despotic governments by force is a radical departure from that principle."

See O. Schachter, The legality of pro-democratic invasion, in: 78 AJIL 1984, pp. 645–650, p. 648. See extensively on this discussion P. Hilpold, Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?, in: 54 ZÖR 1999, pp. 529–602 (576ss.). Also some German speaking authors (for example Karl Doehring or Matthias Herdegen) opined in favour of the permissibility of unilateral interventions.

"Operation Desert Storm" based on SC Res. 678 of 29 November 1990 authorizing an intervention to liberate Kuwait from the Iraqi invasion in 1991.

In 1991 no-fly zones for the protection of the Kurdish and Shiite populations of Iraq were authorized;[138] in 1992 a US-led intervention in Somalia was authorized;[139] and in 1994 forcible measures against the Haitian military government were approved.[140]

All these measures addressed grave humanitarian crises of an internal nature, but nonetheless doubts remained whether a real paradigm shift had taken place within the UN. In fact, the relevant SC Resolutions were somewhat ambiguous: they referred to a cross-border problem (which the ensuing refugee problem undoubtedly was) and they emphasized regularly the uniqueness of the situation (thereby ruling out the possibility that this measure could be seen as a precedent).[141]

Only when the UN General Assembly officially recognized the concept of R2P at the "World Summit" of 2005 did this situation change fundamentally: since then it can be assumed without doubt that gross violations of human rights justify the authorization of forcible measures by the Security Council.[142] Already out of this consideration he introduction of the R2P concept has been an important achievement in the development of international law.

Basic challenges that applied in the second half of the 20th century for humanitarian interventions are, however, still in place with regard to the concept of R2P, and this is a further reason why it may be useful to look back into history.

What Edmund Burke said already at the end of the 18th century still holds true: human misery and suffering are immense, and in the end men must make a decision where to act, where to intervene.[143]

The global capacity to intervene is still very limited. The high expectations nurtured towards the UN system in this regard have already been disappointed

138 SC Res. 688/1991 of 5 April 1991.

139 SC Res. 794 of 3 December 1992.

140 SC Res. 940 of 31 July 1994.

141 See extensively P. Hilpold, Sezession und humanitäre Intervention, 1999, pp. 590ss. Christian Tomuschat qualified these references as "auxiliary constructions." See Ch. Tomuschat, Die Zukunft der Vereinten Nationen, in: 47 Europa-Archiv, pp. 42–50.

142 See P. Hilpold, The duty to protect and the Reform of the United Nations – a new step in the development of International Law?, in: 10 Max Planck Yearbook of United Nations Law 2006, pp. 35–69.

143 See E. Burke, Letters on a Regicide Peace (Third Letter on a Regicide Peace, 1796) reprinted in: The Works of the Right Hon. Edmund Burke, Bd. II, Holdsworth and Ball: London 1834, p. 321. See in this regard note 106.

for lack of the necessary resources. The United Nations are not a sort of world police to be activated by the Security Council whenever such a necessity arises.[144]

If we consider furthermore on the one hand that the nations represented in the Security Council have their own interests they want to defend with all appropriate means and, on the other hand, that their decisions are influenced by the interests of other countries they are allied to, it is small wonder that there is a broadly felt deficit of intervention. Still up to this day this gap can be filled, to a certain extent, by unilateral interventions. While these interventions are certainly illegal, the intervenient may nonetheless hope that the State Community will adopt no sanctions. This was more or less the solution found as regards the Kosovo intervention of 1999.[145] There is no guarantee, however, that such a pragmatic solution may be achieved. This became particularly clear in relation to the intervention by Vietnam in Cambodia in 1978/1979.[146]

After the Khmer Rouge had seized power in April 1975 they established a regime of terror in the newly renamed "Democratic Republic of Kampuchea." This regime was historically probably unprecedented in its cruelty and bloodthirstiness. The reclusive Khmer ruling caste under Pol Pot was inspired by a bizarre philosophy of paleo-communism, and soon started to destroy that part of the population that it considered to be infected by the decadent ideas of western civilization. In the end, a pure people of peasants should constitute a new, "better" society. Within three years over two million people, out of a total Cambodian population of 7 million, were killed. Finally, the Khmer Rouge started, for reasons still not fully clarified, to attack Vietnamese villages close to the Cambodian borders,[147] and this prompted a Vietnamese counter-attack in

144 M. Koskenniemi, The Police in the Temple, Order, Justice and the UN: A Dialectical View, in: 6 EJIL 1995, pp. 325–348.

145 As to this subject see P. Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, in: 12 EJIL 3/2001, pp. 437–467 and Independent International Commission on Kosovo, Kosovo-Report, 2000. For a comprehensive look at the Kosovo problem see P. Hilpold, Das Kosovo-Problem – ein Testfall für das Völkerrecht, in: 68 ZaöRV 2008, pp. 779–801 as well as idem (ed.), Kosovo in International Law – The Kosovo Opinion of 22 July 2010, Brill: Leiden 2012.

146 See in this regard A. Pauer, 1985, pp. 165ss.; R. Falk, The complexities of humanitarian intervention: a new world order challenge, in: 17 MichJIntL 1996, pp. 491–513 and S. Quinn-Judge, Fraternal aid, self-defence, or self-interest? Vietnam's intervention in Cambodia, 1978–1989, in: B. Simms/D.J.B. Trim (eds), Humanitarian Intervention – A History, CUP: Cambridge 2011, pp. 343–362.

147 The most convincing explanation for this attack, that turned out to be suicidal for the Khmer regime was that this regime planned to establish an Empire comprising the whole Mekong delta, totally miscalculating by this the real power relations.

autumn 1978 under which the Khmer Rouge soon crumbled. Pol Pot and the Khmer Rouge hid in the forest near the Thai border. Most probably, the Vietnamese intervention saved the lives of millions of people. Although subsequently more and more crimes committed by the Khmer Rouge became known, these facts were widely ignored by the Western world and also by many third world countries, as the Cambodian problem was primarily looked at from an ideological perspective and from the viewpoint of the East–west conflict. The Vietnamese intervention was seen as an imperialistic war of expansion whereby the Soviet Union and one of its vassals wanted to extend their sphere of influence. For nearly a decade Vietnam was internationally ostracized, isolated and denounced as an aggressor and subjected to sanctions, while the Khmer Rouge continued to be supported by China and the West, and in particular by the US.

While it has to be admitted that Heng Samrin's regime (and afterwards under Hung Sen) established by Vietnam in Cambodia was far from being a democratic order based on the rule of law, and that the Vietnamese government was probably not immune to geo-strategic ambitions when it decided to intervene, it was nonetheless disillusioning to see the Western governments opposing an intervention indispensable to ending horrible bloodshed of enormous dimensions primarily for political and ideological reasons. On the whole this case shows that the State Community has learnt little from the humanitarian catastrophes of the past caused by despotic regimes. There is still the danger that extraordinary challenges of such a kind will remain without an adequate answer. If individual states intervene, always the presumption applies that this intervention is illegal and the intervening state may only hope that other states will not apply sanctions.

There is, of course, no guarantee that the intervention will be successful in military terms, and this holds true even for multilateral interventions authorized by the Security Council. In democracies, backlashes like the one suffered by the US in Somalia can undermine willingness to intervene for years.[148] With regard to unauthorized interventions this problem is even more pronounced.

148 The results of the "battle of Mogadishu" of 3 and 4 October 1993 during which 18 US American soldiers were killed abruptly ended the "intervention euphoria" with the American government that had started after the (successful) Kuwait campaign. Now the American government's attitude (and in general the American people') changed to the opposite. This may explain the US's extreme reluctance to intervene in the Bosnian conflict where genocide and genocide-like situations could unfold while the State Community remained inactive.

It was Friedrich Schiller who found fitting words for this situation:

> Then hadst thou courage and resolve; and now,
> Now that the dream is being realized,
> The purpose ripe, the issue ascertained,
> Dost thou begin to play the dastard now?
> Planned merely, 'tis a common felony;
> Accomplished, an immortal undertaking:
> And with success comes pardon hand in hand,
> For all event is God's arbitrament.[149]

Often, military interventions happen too late; often they not happen at all; and in any case they create additional victims and cause additional suffering. The first best solution should therefore always be to strengthen the international rule of law and to integrate a sophisticated system of human rights rules into national constitutional orders in order to make sure that respect for basic values becomes automatic. Correspondingly and appropriately the modern concept of R2P emphasizes the primary responsibility of the home state for ensuring respect for fundamental human rights. The cases of genocide and crimes against humanity treated here have evidenced that military intervention can always be only a measure of last resort with limited efficacy. The superiority of the R2P model results from its comprehensive nature. As it comprises both responsibilities to prevent and to rebuild the need for military intervention should become obsolete.

It can therefore be said that the measures of humanitarian intervention of the past were also expressions of a responsibility to protect, but modern R2P is a far more sophisticated concept that is, in contrast to humanitarian intervention, fully compatible with UN law. It is also suited to finding far greater acceptance in the State Community as it fits well with value-based modern international law which puts the individual at the centre of its attention.[150]

This new responsibility to protect receives additional support from the introduction of an individual criminal responsibility provided for by international criminal law. Even early in time in this whole development, when the

149 See F. Schiller, Wallenstein, Act I, Scene VII, 1799 (S.T. Coleridge transl.), http://www.gutenberg.org/files/6787/6787-h/6787-h.htm (4 March 2014). See in this regard also J. Isensee, Weltpolizei für Menschenrechte, in: 50 Juristenzeitung 9/1995, pp. 421–430 (427).

150 See Th. Meron, The humanization of international law, Martinus Nijhoff: Leiden/Boston 2006 and A. Peters, Jenseits der Menschenrechte – Die Rechtsstellung des Individuums im Völkerrecht, Mohr Siebeck: Tübingen 2014.

international law consequences of the Armenian genocide were debated, it was recognized that state responsibility can be made far more effective if complemented by individual responsibility, even though, at the end, in that specific case, only a very small number of the culprits were brought to justice and the discussion about the introduction of an international criminal tribunal for Armenia did not go beyond mere preparatory talks.[151] As to the Holocaust international criminal justice was effectively set in place, but its deterrent effects for the future remained doubtful. Not having been pre-announced it could not at least halt the Holocaust itself. But also for the future a deterrent effect did not necessarily flow from these proceedings as they were grounded on an ad hoc legal basis,[152] and in the aftermath of WW II it has long been unclear whether general international criminal justice would soon come to life.[153] On the other hand, it cannot be denied that the experiences of the Nuremberg and Tokyo Tribunals were of enormous value for the establishment of an international criminal justice when the time was ripe for its introduction.[154]

Taking stock, it can therefore be said that the modern concept of R2P certainly presents a milestone of epochal dimensions in international law, but it also cannot be denied that this approach builds on developments and experiences of the past.[155] It has been shown that a broader historical perspective

151 The "Commission of Responsibilities" established in 1919 and consisting of representatives from five Allied powers proposed i.a. the establishment of an International Criminal Tribunal for the prosecution of war criminals, but in a rapidly changing political situation after WW I these proposals were not heeded. According to Art. 230 of the Treaty of Sèvres 1920 the Turkish Government undertook to hand over to the Allied Powers those responsible for the massacres for prosecution by a Tribunal to designated by these powers. The Treaty of Sèvres was, however, never implemented.

152 The many war crimes committed during the Yugoslav conflict seem to suggest that the Nuremberg and Tokyo Tribunals were not seen as a precedent for possible application to the crimes unfolding on Yugoslav soil, as it seems the establishment of an International Criminal Tribunal for Yugoslavia was not anticipated by the perpetrators of these crimes.

153 This holds true even though the UN GA already by Res. 260 B (III) of 9 December 1948 had invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions," and requested the Commission, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

154 In this sense it can be argued that there was a direct line of development starting with the "Commission of Responsibilities" and leading via the post WW II tribunals to the modern International Criminal Justice.

155 According to international law doctrine, such a statement can be generalized. James Crawford emphasizes that pivotal concepts of present-day international law were

can provide important insights into the concept of R2P, and also give important hints as to its prospective development. Furthermore, contextualizing R2P can also contribute to its broader acceptance. As is known, if new, highly innovative and progressive concepts are presented in international law they usually arouse suspicion. Their creators are considered to be starry-eyed idealists and utopians devising concepts incapable of implementation. If it is possible to demonstrate that a seemingly new concept has historical precedents, even if they bear a different label, it becomes evident that such allegations are unjustified. The replacement of the concept of humanitarian intervention by that of R2P is, however, not only terminological cosmetics, as this approach which comprises both the responsibility to prevent and the responsibility to rebuild has a much broader reach and is suited to address the underlying problems in a comprehensive way. The terminological aspect is, of course, also not to be ignored as it often represents a decisive element for the acceptance of a new concept.[156]

It is an absolute necessity to keep constantly in mind the abysmal collapses in the civilizational process that happened in the 19th, but particularly in the 20th century if their repetition is to be ruled out, and to this end a historically informed R2P concept can be of immense value.[157]

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created at the turn of the 19th and 20th centuries. See J. Crawford, International Law as an Open System, Cameron May: London 2002, p. 17.

156 See M Koskenniemi, Miserable Comforters: International Relations as New Natural Law, in: 15 EurJIntlRelat 2009, pp. 395–422 (395): "When vocabularies change, things that previously could not be said, are now spoken by everyone…." See also P. Hilpold, Intervening in the Name of Humanity: R2P and the Power of Ideas, in: JCLS 2012.

157 In this context, the following observation by Rein Müllerson shall be cited:

> "A dangerous side of European reliance on its post-modern values in the wider world may be illustrated also by the disastrous standoff between the post-modern Dutch peacekeepers and pre-modern Mladic thugs at Srebrenica in 1995. This standoff ended with thousands Muslims men dead. However, it is not so much the young Dutch soldiers who are to be blamed for the Srebrenica bloodbath, but the softness and indecisiveness of Western, and especially European, societies and their leaders which contributed to the conditions leading to the disaster. Robert Cooper is right that 'in the coming period of peace in Europe, there will be a temptation to neglect our defences, both physical and psychological. This represents one of the great dangers for the post-modern state'."

See R. Müllerson, From E Unum Pluribus to E Pluribus Unum in the Journey from an African Village to a Global Village?, in: S. Yee/j.-Y. Morin (eds.), Multiculturalism and International Law, Brill/Martinus Nijhoff: Leiden/Boston 2009, pp. 33–58 (49) citing R. Cooper, The Post-Modern State and the World Order, Demos: London, 2nd ed. 2000, p. 39.

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