

FROM HUMANITARIAN INTERVENTION TO RESPONSIBILITY TO PROTECT: MAKING UTOPIA TRUE?

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I. Introduction

Regulating the use of force has always been a pivotal element of international law, both in practice and in theory.¹ Even in early times it was recognized that peace was the supreme goal mankind longed for,² a necessary pre-condition for progress in civilization.³

In the absence of an international law order in the modern sense, respect for peace should be obtained by attributing a divine character to it.⁴ Human nature is, however, ambiguous and capable of both enlightened aspirations and the most abhorrent deeds.⁵

Thus, from earliest history to the present days the temptation for human communities and societies to improve their lot through recourse to war has always been great. At the same time, it is also a human trait to feel *compassion* for people suffering injustice in other societies—compassion that can mount to anger and

¹ Bruno Simma has dedicated much energy to this question, both as an academic writer and as a practitioner and the respective contributions are outstanding. See, eg, A Verdross and B Simma, *Universelles Völkerrecht* (Duncker & Humblot, 1984); B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 Eur J Intl L 1, and his Separate Opinions in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 and in *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161. See also H Kipp, 'Zum Problem der gewaltsamen Intervention in der derzeitigen Entwicklungsphase des Völkerrechts' in H Conrad et al, *Gedächtnisschrift Hans Peters* (Springer, 1967).

² See H-J Schlochauer, *Die Idee des ewigen Friedens* (Ludwig Röhrscheid, 1953).

³ The term 'progress' is, of course, to be used cautiously. On the other hand, as I have pointed out in my review (published in (2009) 20 Eur J Intl L 1270) of R Miller and R Bratspies (eds), *Progress in International Law* (Martinus Nijhoff, 2008) the belief in progress is an innate characteristic of man (and in particular of international lawyers).

⁴ Recourse to war was therefore only possible if a just cause was given and '[r]eligion was the principal vehicle for determining the justness of [a] cause'. See DM Johnston, *The Historical Foundations of World Order* (Martinus Nijhoff, 2008) 279.

⁵ This phenomenon is expressed by St Augustine with the concept of the 'divided will'. See also Johnston, *The Historical Foundations of World Order* (n 4) 280.

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outrage and finally to the will to act. All these sentiments, the egoistic and the altruistic ones, can interact and in the end even the intervener himself might not be sure which sentiments were the prevailing ones. International practice and discussion is reflective of this ambivalent situation. Looking back over the last century it has become clear, however, that a broad consensus had emerged according to which peace preservation had to be made paramount, as any ‘just cause’ to break peace was prone to be abused. The United Nations (UN) order, created against the background of a man-made catastrophe of civilization, opened up a completely new chapter in international law and the new order seemed, at first sight, to be perfect. The use—and even the threat—of force was outlawed while the right to self-defence remained in place and a right to intervention by the organized State community was created according to Chapter VII of the UN Charter.

II. Humanitarian Intervention after 1945

As is known, the prohibition of the use of force according to Article 2(4) UN Charter worked quite well. The number of international wars diminished visibly. At the same time, however, armed internal conflicts augmented in number and intensity. The Security Council was severely blocked by the Cold War and it was not even clear whether it was authorized to intervene in such cases in the first place.

Given this legal framework and political reality, in the face of massive human rights violations third States were faced with the following dilemma: it was very likely that the State community would not intervene, but a unilateral intervention was tantamount to a violation of international law. The intervener could only hope that in view of the ever growing network of international human rights its international responsibility would be mitigated in view of the valuable goals pursued. This mitigation would, most probably, not go so far as to wipe out responsibility altogether as it was clear that the State community wanted to attribute primary importance to Article 2(4) UN Charter. The best the intervener could hope for was that other States would not take recourse to sanctions. The worst it had to fear was that the intervention would be classified as an aggression and an outright violation of Article 2(4). Therefore, there was small wonder that in most cases the intervener had little incentive to qualify its act as humanitarian intervention even though in reality it was. It seemed more appropriate to take recourse to other possible justifications for the use of force, in particular self-defence. In practice, this argument was very often used.

Of all the interventions after 1945 that could be qualified with the epithet ‘humanitarian’, those of the 1970s stand out: India’s backing of Bangladesh’s independence war against Pakistan in 1971, Vietnam’s intervention in Kampuchea in 1978 and 1979, and Tanzania’s intervention in Idi Amin’s rule of Uganda in 1979. It is hard to deny that in all three cases decisive relief was brought to oppressed people,

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in part faced with the outright threat of annihilation. In all three cases the official justification by the intervening governments was not, however, a purported right to humanitarian intervention but rather self-defence.⁶ This seems surprising since these interventions probably saved millions of lives. It bears evidence of the fact that none of these countries attributed much standing to the concept of humanitarian intervention in modern international law. All three cases were preceded by border conflicts and so it was not totally unrealistic for the respective governments to expect that the State community would take recourse to a balancing whereby the violation of Article 2(4) would be offset by the—albeit spurious—elements of self-defence combined with the paramount need to fight genocide-like events. It is interesting to note that in two cases, those of Bangladesh and Tanzania, this strategy actually worked, while Vietnam was faced in the immediate aftermath and for a long time to come with stern condemnation and harsh sanctions even though it is hard to imagine what would have happened had the blood-thirsty Khmer Rouge government under Pol Pot remained in power any longer. An explanation for this unequal treatment can only be found in power politics: while India and Tanzania had played a leading role in the Non-Aligned Movement and could count on some sympathies beyond this group, Vietnam had become a rival to China and could—for reasons associated with recent history—not expect to be treated kindly by Western States.

Ultimate success is an important aspect for the legal assessment of an act of humanitarian intervention⁷—both with regard to the specific intervention as in relation to the attitude towards this concept as such. The unexpectedly high number of United States (US) casualties after the intervention in Somalia in the first half of the 1990s put a break to intervention euphoria following the successful liberation of Kuwait by an US-led 34-nations alliance. The Somalia backlash was so massive that the West stood idly by when violence escalated in former Yugoslavia and Serbian President Milosevic could embark unhindered on a nationalistic war bordering on genocide.⁸ The tragic failure of the international community in Bosnia where the slaughtering of 8,000 men and boys in Srebrenica constituted the culmination of a murderous campaign conducted by Serb militias, shocked public opinion and when Milosevic tried to continue his campaign in Kosovo, a US-led NATO coalition launched air raids, after all negotiation attempts had failed. After 11 weeks the Serb troops were defeated. The consequences of this intervention constitute a

⁶ For an extensive examination of these cases and the respective justifications see A Pauer, *Die humanitäre Intervention* (Helbing & Lichtenhahn, 1985).

⁷ In this the principle of effectivity appears. See J Isensee, 'Weltpolizei für Menschenrechte—Zur Wiederkehr der humanitären Intervention' (1995) 50 *Juristenzeitung* 421 who characterizes this phenomenon very well with the saying: '... und wenn es glückt, so ist es auch verziehen' (427).

⁸ In its judgment of 27 February 2007 in the case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* <<http://www.icj-cij.org/docket/files/91/13685.pdf>> accessed 28 July 2010, para 297, the ICJ confirmed that in Srebrenica, in July 1995, genocide was committed on the Bosnian inhabitants.

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burden for the international community up to this day,⁹ but this intervention is generally qualified a success even though such a qualification requires prudence in view of the direct humanitarian and ecological consequences of the intervention¹⁰ and—even more—in view of the ensuing human rights violations and mass expulsions carried out by the immediate beneficiaries of the NATO operation, the Albanian majority on the territory against the Serb Kosovars.

Although the Kosovo case could have been an occasion for a rehabilitation of the concept of humanitarian intervention on the legal level—and in fact, such attempts have been carried out forcefully in academic literature¹¹—State practice was different.

When Yugoslavia brought action against eight NATO member States before the International Court of Justice (ICJ) because of the bombing raids, a window was opened to test the status of humanitarian intervention in international law.¹² Interestingly, only Belgium made explicit reference in her pleadings to this argument, maintaining that there was not only a right to intervene but a real duty.¹³ As is known, the ICJ was able to avoid commenting on this question due to procedural reasons.¹⁴

⁹ In this context, the request by the UN General Assembly for an advisory opinion of the ICJ on the secession of Kosovo has to be mentioned. See P Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 Chinese J Intl L 47.

¹⁰ See UNEP and UNCHS, 'The Kosovo Conflict: Consequences for the Environment and Human Settlement' (1999) and JE Austin and CE Bruch (eds), *The Environmental Consequences of War* (Cambridge University Press, 2000).

¹¹ See, eg, R Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 American J Intl L 828; J Delbrück, 'Effektivität des UN-Gewaltverbots' (1999) 74 Die Friedens-Warte 119; C Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (1999) 10 Finnish Ybk Intl L 141; K Ipsen, 'Der Kosovo-Einsatz—Illegal? Gerechtfertigt? Entschuldigbar?' in R Merkel (ed), *Der Kosovo-Krieg und das Völkerrecht* (Suhrkamp, 2000).

¹² *Case Concerning Legality of Use of Force (Yugoslavia v United States of America) (Serbia and Montenegro v Belgium) (Serbia and Montenegro v Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v Germany) (Serbia and Montenegro v Italy) (Serbia and Montenegro v Netherlands) (Serbia and Montenegro v Portugal) (Yugoslavia v Spain) (Serbia and Montenegro v United Kingdom)*.

¹³ 'LOTAN, le Royaume de Belgique en particulier, était tenu d'une véritable obligation d'intervenir pour prévenir une catastrophe humanitaire qui était en cours et qui avait été constatée par les résolutions du Conseil de sécurité pour sauvegarder quoi, mais pour sauvegarde des valeurs essentielles qui sont elles aussi érigées au rang de *ius cogens*. Est-ce que le droit à la vie, l'intégrité physique de la personne, l'interdiction des tortures, est-ce que ce ne sont pas des normes érigées au rang de *ius cogens*? ... Donc pour sauvegarder des valeurs fondamentales érigées en *ius cogens*, une catastrophe en cours constatée par l'organisation du Conseil de sécurité, l'OTAN intervient ... jamais l'OTAN n'a mis en question l'indépendance politique, l'intégrité de la République de Yougoslavie ...' See *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium)* (Request for the Indication of Provisional Measures: Verbatim Record) 1999 <<http://www.icj-cij.org/docket/files/105/4513.pdf>> accessed 28 July 2010, 15 et seq. See, for a detailed legal analysis of the NATO member States' attitude, A Prandler, 'The Concept of "Responsibility to Protect" as an Emerging Norm Versus "Humanitarian Intervention"' in I Buffard et al (eds), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Brill, 2008) 724.

¹⁴ As Serbia and Montenegro was not considered the successor of Yugoslavia, it had to apply for admission to the UN which occurred on 1 November 2000. This admission did not have retroactive

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If the Kosovo case constituted the culmination of the post-1945 attempts to revive the ideal of humanitarian intervention it marked at the same time its final demise.

More than those who denied the compatibility of this idea with UN law, it was the respective advocates who buried it. All those well-meaning and high-spirited writings that tried to reconcile military intervention in favour of people struggling for their survival with the prohibition to use force according to Article 2(4) UN Charter ended up in an unconvincing rhetoric. This is in particular true for the various approaches characterized by the development of catalogues of criteria that should specify when recourse to force is allowed because it is responding to a paramount humanitarian need and when it is prohibited because it is disruptive of the international peace order and abusive in its reference to humanitarian ends. It has been shown that these catalogues were of no real help. They shifted the interpretation problem to a myriad of criteria which provided no real clarity and resulted in different outcomes depending on to whom they applied.¹⁵

On a whole, this situation was more than disappointing. The discussion was reflective of a greater structural problem of international law as it became either apologetic towards human rights abuses or utopian when creating the false security that interveners would exercise nothing else than a right when coming to the rescue of threatened people, thereby also implying that this would happen more often in the future.¹⁶ Neither of these two doctrinal strands was really convincing.¹⁷

Bruno Simma was one of the first to note the fundamental theoretical and practical problems in international law that were created by the Kosovo crisis. He stated that ‘only a thin red line separates NATO’s action on Kosovo from international legality’.¹⁸ At the same time he also voiced the opinion, widely shared in politics, at least in Western States, that there are ‘hard cases’, such as the Kosovo conflict, ‘in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law’.¹⁹

There was the widespread conviction that the law as it stands was insufficient but this should not mean that we had to go from one extreme to the other, ie to legalize humanitarian intervention. The dangerous conflict between either

effect and therefore, on 29 April 1999 when the applicant filed the application it was not party to the ICJ Statute.

¹⁵ See, extensively, P Hilpold, ‘Humanitarian Intervention: Is There a Need for a Legal Reappraisal?’ (2001) 12 Eur J Intl L 437, 454 et seq.

¹⁶ Reference is made here to the title of a book (*From Apology to Utopia* by Martti Koskenniemi) that has become paradigmatic for the whole modern vision of international law.

¹⁷ See also F Francioni, ‘Balancing the Prohibition of Force with the Need to Protect Human Rights: a Methodological Approach’ in E Cannizzaro and P Palchetti (eds), *Customary International Law on the Use of Force* (Brill, 2005) 269 who distinguishes in this context between the ‘positivist-textualist’ approach and the ‘natural-law’ approach.

¹⁸ See Simma, ‘NATO, the UN and the Use of Force’ (n 1) 22.

¹⁹ *Ibid*, 22.

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safeguarding a traditional sovereignty concept (and thereby sacrificing the life of entire populations) or using military power to rescuing threatened people (and thereby abandoning the traditional, fairly successful UN peace model) had to be overcome.

It has become evident that a totally new approach was needed to provide relief to those who badly needed it. The great challenge was to find ways that would be effective and coherent with the UN Charter at the same time.

III. The Responsibility to Protect—the Development of a Concept

The preceding considerations have made clear that the dilemmas presented primarily revolve around the interpretation of the sovereignty concept, which dates back to the very origins of international law and which had not changed much when the UN was founded in 1945. To allow for acts of humanitarian intervention would have meant to undermine sovereignty and therefore the very existence of the UN's constitutive elements, the States.²⁰ The suggestion that there would be a direct trade-off between two principles of equivalent status, peace preservation and protection of human rights,²¹ sounds intriguing but it does not correspond to positive international law. The maintenance of peace in international relations is still the predominant goal of UN law,²² although the status of human rights is catching up rapidly.²³ When former UN Secretary-General Kofi Annan dared to hint in 1999 at a possible need to legalize humanitarian intervention he met with strong resistance.²⁴

²⁰ For the ICJ, the whole international law rests on the principle of sovereignty. See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14, para 263.

²¹ It is a very common proposition in literature to sustain that State sovereignty is directly founded on popular consent. Therefore, according to this approach, a State acting against its own people should lose its legitimacy and sovereignty could be set aside by any power intervening for humanitarian purposes. However, no such rule can be found in international law, be it treaty law or customary law. For a fascinating plea to the contrary see LC Buchheit, *Secession* (Yale University Press, 1978). This position was largely taken up especially in German international law literature. See K Doehring, 'Self-Determination' in B Simma (ed), *The Charter of the United Nations* (Oxford University Press, 2002) Vol 1 and D Murswiek, 'Souveränität und humanitäre Intervention' (1996) 35 *Der Staat* 31.

²² See P Gargiulo, 'Dall'intervento umanitario alla responsabilità di proteggere: Riflessioni sull'uso della forza e la tutela dei diritti umani' in *Studi in onore di Umberto Leanza* (Editoriale Scientifica, 2008) 234 citing the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14, para 268: 'In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect'.

²³ See the Vienna Declaration and Programme of Action, UN GA Res A/CONF.157/23 (12 July 1993) UN Doc A/CONF.157/23, Art 4: 'The promotion and protection of all human rights and fundamental freedoms must be considered a priority objective of the United Nations ...'.

²⁴ '[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights?', in

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In the face of this seemingly unsolvable conflict a new concept has come up, the ‘responsibility to protect’ (R2P). Its origins were very traditional and humble when it was developed by Francis M Deng and Roberta Cohen to conceptualize the problems of internally displaced people.²⁵ Soon, however, the enormous potential residing in it became evident.

The decisive contribution was given by a study commission instituted by the Canadian government, the International Commission on Intervention and State Sovereignty (ICISS), which presented in 2001 a report with exactly this title.²⁶ While in international politics and academic writings new ideas and concepts come up continuously²⁷ only to fade away soon after, R2P had a far-reaching impact and seems to be here to stay. When we ask ourselves why this is the case we have to consider some very specific traits of the strategy evolved by the ICISS: they play with established concepts whose legitimacy would never be questioned and at the same set them in a new context that should help to overcome traditional conflicts. Although the report itself states that it refers to the so-called ‘right of humanitarian intervention’ the terminology used is different. It chooses instead the traditional counter-concept, sovereignty, as the mainstay of the inquiry and re-interprets it in such a way that the conflict analyzed above blurs or even disappears. ‘Sovereignty’ is no longer interpreted in the traditional Westphalian sense as the ‘supreme authority within a territory’²⁸ but as a concept based on human security and also implying, as a consequence, responsibilities. ‘Responsibility’ is again a well-known concept of international law referring to the consequences a State has to face in the case of violations of international law. In the ICISS report, however, ‘responsibility’ means many things which, put together, form a unique new reality. It has been interpreted as ‘institutional’ responsibility (similar to the German *Zuständigkeit*, meaning power or authority)²⁹, as a concept operating in two directions (‘externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state’),³⁰ and also as emphasizing that agents of State can be held accountable for their actions.³¹

UN Secretary-General, *Millennium Report of the Secretary-General of the United Nations, We the Peoples: The Role of the United Nations in the 21st Century* (2000) UN Doc A/54/20, 48.

²⁵ See TG Weiss and DA Korn, *Internal Displacement: Conceptualization and its Consequences* (Routledge, 2006).

²⁶ See ICISS, *The Responsibility to Protect* (2001) <<http://www.iciss.ca/report-en.asp>> accessed 11 December 2009.

²⁷ In this context one can refer, inter alia, to the concept of the ‘two sovereignties’, individual sovereignty and State sovereignty, brought up by Kofi Annan. This concept seems intellectually challenging but nonetheless was not greeted warmly.

²⁸ See ‘Sovereignty’, in *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/sovereignty/>> accessed 17 February 2010.

²⁹ See T Stoll, ‘Responsibility, Sovereignty and Cooperation—Reflections on the ‘Responsibility to Protect’’, in D König et al (eds), *International Law Today: New Challenges and the Need for Reform?* (Springer, 2007) 8.

³⁰ See R Thakur and TG Weiss, ‘R2P: From Idea to Norm—and Action?’ (2009) 1 *Global Responsibility to Protect* 22, 26.

³¹ *Ibid.*, 27.

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All these affirmations seem, individually taken, coherent with traditional thinking but in their reciprocal interaction and in their indeterminacy as to their actual reach they are capable of engendering multitudes of hopes.

The respective responsibility is attributed primarily to the individual State and only exceptionally, if States fail to come up to this responsibility, does it become an ‘*international* responsibility’. In this latter case, this responsibility is attributed, within the UN, to the Security Council, but also an intervention by the General Assembly is considered as a possibility and here the report refers to the ‘Uniting for Peace’ procedure. Whether the report also considers unilateral interventions as legal remains unclear but in any case such interventions are seen as a possibility should the UN remain inactive.

According to the approach taken by the ICISS, R2P embraces three more specific responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.

In the following months and years a rare window of opportunity seemed to open up to implement this concept as intense talks took place to reform the UN system. UN Secretary-General Kofi Annan pressed hard to take use of this opportunity notwithstanding the fact that the 2003 invasion of Iraq by US-led Allied forces strengthened in many parts of the world suspicion and distrust of any attempt to legalize military interventions.

A ‘High-level Panel on Threats, Challenges and Change’ set up in 2003 by the UN Secretary-General endorsed this concept in its final report of December 2004:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.³²

The UN Secretary-General himself confirmed this position in his own report *In larger freedom* of March 2005 using, however, somewhat more diplomatic wording.

The great question was what would the heads of States say to these proposals when drafting (and deliberating upon) the final document of this reform endeavour. While the so-called Outcome Document of the 2005 World Summit was, in many senses, very disappointing, with regard to the concept of R2P the consen-

³² UN General Assembly, *A more secure world: our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change* (2 December 2004) UN Doc A/59/565, para 203. For an analysis of this report see P Hilpold, ‘Reforming the United Nations: New Proposals in a Long-lasting Endeavour’ (2005) 52 *Netherlands Intl L Rev* 389 and H Neuhold, ‘High-level Panel on Threats, Challenges and Change’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edn) <<http://www.mpepil.com>>.

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was achieved was a surprise to many. In fact, this concept was maintained and confirmed.

The relevant paragraphs 138 and 139 of the Outcome Document read as follows:

Each individual has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

IV. Responsibility to Protect: Only a New Label for an Outmoded Concept or an Important Step in the Development of International Law?

In a legal order like the international one that is in many ways still primitive³³ and that attributes so much importance to names, terms, and labels³⁴—both because of its intimate relationship with diplomacy as a consequence of the need to give some structure to what seems to be an utter confusion of languages, cultures, and legal structures—concepts surely also matter as such. They can gain a life independent from the facts they designate and decisively shape acceptance for the underlying rule. However, as is the case with most externalities, their effects are often short-lived. In the longer term, substance has to develop alongside the nominal claim, otherwise the acceptance of the term itself is eroded. If R2P is only a more

³³ See H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr, 1920) 258–9 and 266–7 and M Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press, 1968).

³⁴ This aspect became very prominent during the ‘Macedonian crisis’ in the early 1990s. See P Hilpold, ‘Die Makedonienfrage’ (1993) *Europa Ethnica* 113 and M Craven, ‘What’s in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood’ (1995) 16 *Australian Ybk Intl L* 199.

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fashionable term for ‘humanitarian intervention’ it is improbable that the State community will easily embrace what it has, in the substance, vehemently rejected in the past.³⁵ The ICISS has gone to great lengths to convey a different message. As stated above, the ‘responsibility to react’ was not designed as an autonomous instrument which would be fully congruent with R2P but rather as a—subsidiary—element of a broader strategy, where prevention would be given absolute priority and the destructive potential of intervention should be counterbalanced by an obligation to rebuild. Whether this strategy actually works depends on a series of conditions:

- First, it must be made sure that the responsibility to prevent and to rebuild are taken seriously and have not only been added to make an otherwise unacceptable instrument seem more attractive.
- Unilateral military intervention remains unacceptable to most States. The task of intervening must therefore be attributed to the UN itself and even in this context guarantees have to be introduced to ensure that intervention takes place only as an absolutely exceptional measure to respond to an extreme and overwhelming need.
- Finally, it must be ascertained whether the additional forms of responsibility really find broader approval and make intervention easier.

All three considerations raise serious doubts as to the probability that the responsibility to protect concept will find broad and unconditional approval by the State community in the near future.

As to the first condition it has to be remarked that only limited material substance has been given to the responsibility to prevent and the responsibility to rebuild in the ICISS report. Also with regard to the second condition there is a gap between substance and form. While it is true that the ICISS tried hard to restrict the recourse to force by the Security Council by introducing a series of criteria that have to be met (just cause, right intention, final resort, legitimate authority, proportional means, and reasonable prospect), it has been shown above that such conditional approaches are not new and that they are of no real help.

Finally, a closer scrutiny of the responsibilities to prevent and to rebuild must raise doubts as to their broad and unconditional acceptability. We are faced here again with an intrinsic pitfall of this whole approach: *prima facie*, to attribute such a responsibility to the international community must meet with a very broad consensus. When it comes to specifying the single instruments by which prevention and rebuilding activities should be carried out it becomes clear, however, that the

³⁵ See, in this context, CJ Burke, ‘Replacing the Responsibility to Protect: The Equitable Theory of Humanitarian Intervention’ (2009) 1 *Amsterdam Law Forum* 61, 63: ‘I fail to see how opting for an alternative nomenclature changes the issues at hand. Using different names cannot and will not affect the legitimacy, legality, or justifiability of the act in question.’

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range of such measures is enormous and that it may comprise initiatives that are associated with serious internal interferences.

In particular, with regard to the responsibility to prevent a three-tier dilemma has been identified:³⁶

- (1) There can be no doubt that to prevent human rights abuses is better than having to react to such abuses and to rebuild.³⁷ However, prevention is expensive and it is often difficult to raise funds to counter an abuse that has not yet materialized. A longer run-up usually increases the effectiveness of prevention—and amplifies the problem described before as the visibility of the danger further diminishes.
- (2) Prevention is an enormously broad concept, which may weaken the case for intervention as the relationship between cause and antidote is often highly speculative.³⁸
- (3) It is not clear which international level, the universal or the regional one, bears the primary responsibility for preventive measures. The regional level often seems to be the more effective one but a fragmented approach risks rendering the whole concept incoherent and dependent upon regional institutional capacities.

Similar problems have arisen with regard to the responsibility to rebuild. The UN has been accumulating experience in peacebuilding for decades.³⁹ As post-war societies are very vulnerable to relapse into conflict, peacebuilding is designed to put a break to the cycle of violence. Overall, the respective UN activities can be qualified as successful but also many deficits have been reported, such as a lack of coordination between these various initiatives and between the actors involved or the absence of a standing institution at the UN level that could collect relevant data and pass on information about past experience in the case of new challenges. Furthermore, the need was felt to have an institution that could be addressed directly by a government in need of support. The agreement on the institution of such

³⁶ See AJ Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14 *Global Governance* 135, 142.

³⁷ See also E Starnes, "'Speaking R2P" and the Prevention of Mass Atrocities' (2009) 1 *Global Responsibility to Protect* 70, and Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (1997).

³⁸ As Alex Bellamy points out, prevention is interpreted, according to some, as structural prevention that would require economic reform to stamp out inequality, measures to ensure good governance, human and minority rights, environmental protection, security sector reform and so on. See Bellamy, 'Conflict Prevention' (n 36) 144. On the distinction between 'operational prevention' (which should apply when the threat of a crisis is imminent) and 'structural prevention' see also the report by the Carnegie Commission (n 37).

³⁹ See SG Jones and J Dobbins, 'The UN's Record in Nation Building' (2005–06) 6 *Chicago J Intl L* 703, making reference to the missions in Congo (1960–64); Namibia (1989–90); El Salvador (1991–96); Cambodia (1991–93), Mozambique (1992–94); Eastern Slavonia (1995–98); Sierra Leone (1998–present) and East Timor (1999–present). To these, the peacebuilding activities in Kosovo (1999–present) can be added.

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a Peacebuilding Commission, an intergovernmental advisory body, was the second most important achievement at the World Summit 2005 and this achievement can be seen as closely related to the agreement on R2P. It was not possible, however, to attribute a preventive role to this body. It is generally recognized that peacebuilding is most effective as a preventive tool but no consensus could be found as many countries, in particular in the third world, feared undue interferences in internal policies.⁴⁰

V. Conclusions

It has been said that, after the World Summit, many governments have exhibited ‘buyer’s remorse’ with regard to R2P.⁴¹

In effect, there is light and shadow in the post-2005 development. It is true that with regard to Darfur the R2P concept was a disappointment.⁴² On the other hand, the UN is far from engaging in a turnaround from the road embarked on in 2005. In fact, the concept of R2P has already been confirmed by the UN—both as an important achievement of the past that should not be jeopardized and as a project for the future to be further developed and concretized.⁴³

The whole discussion about R2P within the UN is marked by two contrasting elements. On the one hand almost all States recognize that in future atrocities, mass killings, and outright genocides like those in Cambodia, Rwanda, and Srebrenica have to be countered at their very beginning or, even preferably, be fought in their very roots. At the same time, after the 2005 Outcome Document had been issued, awareness has grown as to the inherent potential of R2P. In a world community characterized by strong economic, political, and military disparities the fear of intervention is very marked. The North-South divide and the remnants of the old ideological contrasts between East and West also have some weight but it is interesting to note that their influence is no longer decisive. In Africa in particular, many societies are still marred by the Rwanda experience and therefore more open to intervention.⁴⁴ Even the US, in the Kosovo case an advocate for the admissibility

⁴⁰ See, extensively, S Weinlich, ‘Weder Feigenblatt noch Allheilmittel’ (2006) 54 *Vereinte Nationen* 2, 9.

⁴¹ See AJ Bellamy, ‘Realizing the Responsibility to Protect’ (2009) 10 *Intl Studies Perspectives* 111, 112.

⁴² See, eg, PD Williams and AJ Bellamy, ‘The Responsibility to Protect and the Crisis in Darfur’ (2005) 36 *Security Dialogue* 22, and CG Badescu and L Bergholm, ‘The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down’ (2009) 40 *Security Dialogue* 287.

⁴³ See para 4 of SC Res 1674 (2006) UN Doc S/Res/1674 on the protection of civilians in armed conflict where the Security Council reaffirmed the provisions of paras 138 and 139 of the Outcome Document 2005. See also the Report of the Secretary-General, *Implementing the responsibility to protect: Follow-up to the outcome of the Millennium Summit* (2009) UN Doc A/63/677.

⁴⁴ For an account of the relevant discussion within the UN see C Focarelli, ‘La dottrina della “responsabilità di proteggere” e l’intervento umanitario’ [2008] *Rivista di Diritto Internazionale* 317. At the same time, hopes set into the African Union whose constituent treaty lays down, in

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of unilateral interventions, now takes a more nuanced position. On the one hand the US wants to avoid multilateral intervention authorized by the Security Council becoming automatic and thereby draining further resources. On the other hand, attempts were made to extend the concept of self-defence to comprise pre-emptive measures.⁴⁵

For the time being the concept of R2P seems to be frozen in the formula found in 2005 and there are great hesitations to move further. Any step forward can therefore be only of a small, incremental nature.

While the High-level Panel on Threats, Challenges and Change referred to R2P as an ‘emerging norm’, any such qualification was avoided in the Outcome Document. This is not only a stylistic question. Reference to an ‘emerging norm’ evokes memories of a famous contribution by Thomas Franck of 1992 on the ‘emerging norm to democratic governance’,⁴⁶ a contribution that was path-breaking not only in academia but also had an enormous influence on the respective political discussion.⁴⁷ Such a development—and even the appearances thereof—should be avoided in this case. The Outcome Document stressed the need ‘to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law’.

What this diplomatic wording signifies in practice is not yet fully clear but the present UN Secretary-General Ban Ki-Moon, a firm supporter of the R2P doctrine, tries to implement it by keeping the discussion alive, by invitations to undertake further studies, and by the nomination of a Special Adviser for R2P.⁴⁸

Art 4(h), the right of the Union to intervene in a member State pursuant to a decision of the Assembly in the case of war crimes, genocide, and crimes against humanity, were deeply disappointed in the context of the Darfur crisis. With regard to humanitarian intervention in Africa see H Neuhold, ‘Human Rights and the Use of Force’ in S Breitenmoser et al (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (Nomos, 2007) 496.

⁴⁵ See, for a detailed analysis of the respective declarations, Focarelli, ‘La dottrina della “responsabilità di proteggere” e l’intervento umanitario’ (n 44).

⁴⁶ See TM Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American J Intl L* 46. On the further developments see D Thürer and M MacLaren, ‘In and Around the Ballot Box: Recent Developments in Democratic Governance and International Law put into Context’ in MG Kohen (ed), *Liber Amicorum Lucius Caflish* (Brill, 2006) as well as T Bruha and K Alsen, ‘Democracy and International Law: Reflections on Current Trends and Challenges’ in GH Gornig et al (eds), *Iustitia et Pax: Gedächtnisschrift für Dieter Blumenwitz* (Duncker & Humblot, 2008).

⁴⁷ Only a few years before, in the *Nicaragua* case, the ICJ, in 1986, had adopted a completely different position when it had stated that ‘adherence by a State to any particular doctrine does not constitute a violation of international law’. See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14, para 263.

⁴⁸ In February 2008 Prof Edward Luck was nominated as Special Adviser for R2P at the Assistant Secretary-General level.

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Secretary-General Ban Ki-Moon outlined his strategy—developed together with his special adviser—in his Report of 12 January 2009.⁴⁹

While for some R2P means everything to all, transforming it into a key for the solution of all problems, Ban Ki-Moon wants to keep its scope narrow: it should apply only to genocide, war crimes, ethnic cleansing, and crimes against humanity and not cover other calamities, such as HIV/AIDS, climate change, or natural disasters.⁵⁰

From some aspects Ban Ki-Moon's report also appears to be daring, in particular when the Secretary-General urges the veto powers 'to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect'.⁵¹

Here the Secretary-General clearly goes beyond the consensus reached at the World Summit 2005 where the veto powers rejected any such binding.

The report also specifically addresses the responsibility to prevent,⁵² although it remains rather vague in this regard, given the general scepticism of the States towards preventive measures. It stresses the need for more local capacity building activities that should protect a society from developments that afterwards could require intervention. It emphasizes at the same time the need for more field-research and identifies the concept of 'good governance' as a tool to keep societies functional and working. This is an important insight by which it is possible to make use of experiences accumulated in other fields of UN law (in particular by the World Bank group) and by other institutions.⁵³ It becomes more and more evident that the UN central institutions will succeed, politically and technically, in their attempt to give substance to R2P only if they cooperate closely with other institutions, with civil society, and with the single member States that spearhead this concept. As the examples of Australia and Canada demonstrate, single countries can give a decisive contribution—a contribution that in the end depends on the energy, the charisma, and the idealism of specific individuals.⁵⁴

⁴⁹ Report of the Secretary-General (n 43).

⁵⁰ *Ibid*, para 10(b).

⁵¹ *Ibid*, para 61.

⁵² *Ibid*, paras 43 et seq.

⁵³ See, in this context, the important contributions by the EU which tried to give more substance to the concept of 'good governance' in the field of development cooperation. See B Simma, J Aschenbrenner, and C Schulte, 'Human Rights Considerations in Development Cooperation Activities of the European Community', in P Alston et al (eds), *The European Union and Human Rights* (Oxford University Press, 1999) and P Hilpold, 'EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance' (2000) 7 *Eur Foreign Affairs Rev* 53.

⁵⁴ In this context personalities like Gareth Evans, Thomas G Weiss and Ramesh Thakur have to be mentioned.

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If one tries a global assessment of the R2P concept the perspective taken and the expectations associated with it are decisive for the outcome. Those approaches that attempted to use this terminology only to legalize unilateral humanitarian intervention by the back door were doomed to fail from the beginning as in an international society based on consent,⁵⁵ fundamental constitutional principles cannot be circumvented by mere conceptual engineering. Humanitarian intervention never regained life after 1945 and the respective hopes or fears engendered by the Kosovo intervention were unjustified. The recourse to a new terminology made it possible, however, to abandon a discussion that was quagmired in outmoded terms closely associated with a legal reality no longer in place. Even though the introduction of the R2P concept may have dissipated doubts that the Security Council can in fact authorize measures according to Chapter VII in cases of purely internal humanitarian crises, such measures will remain exceptional—both for capacity reasons as for the fact that the concrete will to intervene by single UN member States is a purely political decision depending on the presence of respective interests. As has been shown, R2P offers, however, much more than military intervention. It can give important insights into the ways in which effective human rights protection can be established and maintained. Therefore, there is no need to espouse this concept as such yet in order to be able to acknowledge that the surrounding discussion has surely strengthened awareness of human rights issues.

In their commitment to a better future based on the defence of human dignity, politicians, practitioners, and academics working in the field of human rights constitute a community beyond titles, tags, and labels. Human rights politicians need to undertake legal analysis and international human rights lawyers need to be inspired by a humanitarian agenda if they want to persist and to be successful. In this community Bruno Simma stands out for the contributions he has given and continues to give as both an eminent lawyer⁵⁶ and as a man with a deeply radical humanitarian spirit motivating and inspiring entire generations of students, academics, politicians, and practitioners.

⁵⁵ See B. Simma, 'Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung' in R. Bernhardt et al. (eds), *Die Bedeutung der Resolutionen der Generalversammlung der Vereinten Nationen* (Fünftes deutsch-polnisches Juristen-Kolloquium, Nomos, 1981) Vol 2, 58.

⁵⁶ For the latest example of his outstanding academic contributions see his 'General Course' at the Hague Academy of International Law on *The Impact of Human Rights on International Law* (2009).