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Intervening in the Name of Humanity: R2P and the Power of Ideas[1]

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Abstract

The introduction of the Responsibility to Protect (R2P) concept is an example for a very successful case of norm entrepreneurship in international law. Seemingly against all odds, a vague political slogan has gained, within a decade, nearly a worldwide support. After the success of NATO-led Libya intervention 'Unified Protector' the bulk of the critics with regard to this concept appear to have been muted. In this article, it will be examined what are the ingredients for success for such a norm creation initiative. It will be evidenced that, equally as was the case with regard to the crafting of the self-determination norm, political rhetoric can solidify to legal principle. With regard to R2P, at the beginning of the 21st century, time was very propitious for such a development as there was a widespread conviction that international law had to be 'humanized'.

1. Introduction

> 'When vocabularies change, things that previously could not be said, are now spoken by everyone . . .'[2]

Do ideas still matter in a realist, disillusioned international society? Are improvements possible and do we know them when we see them? The introduction of the concept of the responsibility to protect puts these questions to the test. These questions seem somewhat out of date in a time when the post-1989 euphoria has all but evaporated, in a world where the hopes for a true international

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1 This contribution builds on earlier studies of this author. See, for example, 'The Duty to Protect and the Reform of the United Nations - a New Step in the Development of International Law?' (2006) 10 *Max Planck Ybk UN L* 35–69; written together with AR Chowdhury and Md JH Bhuyian, 'Legal Status of Humanitarian Intervention' in Md J Bhuiyan and others (eds), *International Humanitarian Law - An Anthology* (LexNexis - Butterworth Wadhwa Nagpur 2009) 261–93; 'Die Schutzverantwortung im Recht der Vereinten Nationen' (2011) 21 *SZIER* 231–42; 'From Humanitarian Intervention to R2P: making Utopia true?' in U Fastenrath et al. (eds), *Essays in Honour of Bruno Simma* (OUP 2011) 462–76.

2 M Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *Eur J Intl Relations* 395–422, 395.

law of solidarity had to be forestalled, *sine die*, over wide areas[3] and where many patterns of international intercourse resemble very strongly what has been termed, in the past, the international law of coordination.[4] Nonetheless, two qualifications have to be introduced with regard to this first impression the present status of international relations conveys. First of all, we have to state what changes of international law we are looking for or, to put it otherwise, whether there is an actual direction in the development of international law. Are we able to state that international law is actually improving and that we are moving towards a certain direction, possibly towards a better society? Against which standards do we measure such advancements? While euphoric slogans such as 'progress in international law'[5] do no longer seem to be adequate for modern society, it can nonetheless be argued that improvements are possible and that they do actually happen. The degree at which core fundamental rights are strengthened and values such as peace preservation are enhanced provide direction in any evaluation of change. A second challenge refers to the actual events to be considered for the measurement of improvements. As it seems, all too often attention is too much concentrated on historic watersheds like the year 1989 while in reality change—and, of course, also improvements in the sense described above—happens on a continuous basis. It is incontestable that historic events such as the crumbling of the Iron Wall constitute great leaps forward for the development of international law but at the same time it has to be acknowledged that normative development is an ongoing process also in international law. The introduction of the concept of R2P and the further development of the respective discussion can be taken as a good example for how norm creation in international law takes place. At the same time, it constitutes an opportunity for a stock-taking on the present status of international law, in particular with regard to the question whether the process of humanization of this branch of law, so often proclaimed in literature,[6] has really brought about structural changes.

Finally, the power of concepts as such has to be examined. What if new concepts are introduced that suggest, as is the case with R2P, the achievement of a consensus that in reality is still far away? Initially, the reaction towards this approach has been very critical, both in practice as in academic writing. Subsequently, the overall attitude changed and now also in more conservative academic quarters a general preparedness to discuss this concept openly can be noticed. This is even more so the case after NATO-led intervention 'Unified

[3] See P Hilpold, 'Solidarität als Rechtsprinzip - völkerrechtliche, europarechtliche und staatsrechtliche Betrachtungen' (2007) 55 *Jahrbuch des öffentlichen Rechts* 195–214.

[4] See the famous monograph by W Friedmann, *The Changing Structure of International Law* (Columbia Press 1964).

[5] Reference is made here to the famous opus by M Hudson, *Progress in International Organization* (Stanford UP 1932). See also the book review by this author with regard to RA Miller and RM Bratspies, *Progress in International Law* (Martinus Nijhoff Publishers 2008) (published in: (2009) 20 *EJIL* 1270–75) a collective writing trying to restate Prof Hudson's monograph for modern international law.

[6] See T Meron, *The Humanization of International Law* (Martinus Nijhoff 2006).

Protector' in Libya turned out to be a success, at least in terms of ending mass-atrocities committed by a ruthless regime which was itself removed.[7] Seemingly against all odds, an initially rather vague provision is getting more and more substance. It has to be examined what are the ingredients for success for such a norm entrepreneurship.

2. Limiting the Recourse to Force as the Basic Pre-Condition and the very Essence of Civilization

Limiting and controlling the use of force has been one of the most pivotal challenges in the process of civilization—perhaps even the challenge per se, without which no civilization can happen. This challenge presents many faces, which has to be tackled on different levels. Even the most primordial society finds ways to regulate the use of force among its members as it is otherwise condemned to perish. The greater the community which shall be bound by this rules the more sophisticated the respective mechanisms have to become. The recourse to religious imperatives and the creation of feudal bonds have been attempts to transfer the personal control systems on ever broader levels. This control system could no longer work as soon as the unity between earthly and religious power, established by Charlemagne in 800 AD, disappeared. The schism within Christianity set finally the deadly blow to this medieval order. Generally it is held that it was the appearance of the territorial state that marked the beginning of modern international law, if not of international law as such.[8] The very *raison d'étre* of these states was peace preservation, a function which came to be interpreted as the result of a social contract to overcome the primordial status where, due to the brutishness of human nature, life of man would be, according to Thomas Hobbes, 'solitary, poor, nasty, brutish, and short'.[9] It can be argued that the primary role of newly created international law was to establish a similar peace order on the international level. While peace preservation worked remarkably well on the state level, on the international level, due to the lack of an institution wielding a power monopoly, periods of peace and war alternated. Looking back from 1945 to the 16th century it is nonetheless hard to describe this era of 'classical international law' as an era of absolute anarchy on the international level. In fact, from the outset quite effective mechanisms were in force at least to 'order anarchy',[10] so that peace was possible and states pursued peace out of their

[7] This intervention was based on UN SC Res 1973 (17 March 2011).

[8] See A Verdross and B Simma, *Universelles Völkerrecht* (Duncker & Humblot 1984) 25. For traces of international law going back to a more distant past see recently DM Johnston, *The Historical Foundations of World Order - The Tower and the Arena* (Martinus Nijhoff Publishers 2008).

[9] See T Hobbes, *Leviathan* (first published 1651). See also Jean Bodin whose definition of sovereignty as the 'absolute and perpetual power vested in a commonwealth' (in *Lex Six livres de la République*, 1576) should be leading the way for the following developments.

[10] This is to refer to R Müllerson, *Ordering Anarchy* (Martinus Nijhoff 2000).

immediate self-interest.[11] The considerations that inspired this 'pursuit for peace' were most variegated and they changed continuously over time. On a whole, however, they made sure that peace and war never stood at the same level and were never endowed with the same legitimacy. The former was considered the rule, the latter the exception which had to be avoided by all means. It was, first of all, the principle of reciprocity[12] and the fear of reprisals that restrained states from using force in their international relations. Furthermore, dynastic relationship among sovereigns in Europe operated, at least to a certain extent, as a deterrent to take recourse to force. Finally, it can neither be denied that there was something like a public conscience that set a barrier to violence on the international level. What was wrong domestically could not be right internationally. At least additional justifications were required. These justifications laid at the basis of the just war doctrine and they gave at the same time a political and a moral underpinning to humanitarian intervention.

3. Just War and Humanitarian Intervention

A war was always most easy to justify as just when self-defence was to be exercised. Even in present international law, the right to self-defence is often related to natural law[13] and therefore, in such cases, no further justification seems to be needed for the recourse to force. At a closer look, however, it becomes clear that self-defence as an exception to the rule prohibiting the recourse to force can operate only under strict conditions if the rule itself is not to be abandoned. In this context, the difficult discussion comes into play about how immediate the threat shall be in order to prompt the right to self-defence.[14] What is more, history shows that this justification is easily abused, one of the most egregious cases being the attack of Nazi Germany on Poland in 1939 with the excuse of self-defence. While the recourse to the self-defence argument

[11] In this sense, the rationale of an academic concept, developed much latter and termed 'Cost-Benefit-Analysis' of International Law operated already at that time. See H Neuhold, 'The Foreign-Policy "Cost-Benefit-Analysis" Revisited' (2000) 42 *GYIL* 84–124.

[12] See B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot 1972); B Simma, 'Reciprocity' (2008) *MPEPIL* online edition.

[13] See eg SC Neff, *War and the Law of Nations: a General History* (CUP 2005) 326.

[14] As it is known, with the so-called Bush doctrine (The National Security Standard of the United States of America, 2002, at http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/index.htm, last accessed 31 January 2012), this exception was interpreted in a dangerously broad manner, so as to go even beyond the Webster-formula in the 1837 Caroline incident thereby coming near to legitimate preventive wars. See eg MW Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton University Press 2008) and P Hilpold, 'Gewaltverbot und Selbstverteidigung - Zwei Eckpfeiler des Völkerrechts auf dem Prüfstand' (2006) 38 *Juristische Arbeitsblätter* 234–39.

creates at least to a certain extent an objective regime suitable to subsequent scrutiny, the other justifications recurred to for the legitimization of a just war appear, most often, totally vague.[15] Just causes have often been developed from an asserted tort suffered at the hands of another state. For a long time, the recourse to force was considered a legitimate instrument for the implementation of international law. This was in particular true in the field of debt recovery[16] and in the area of state responsibility when reparation was sought through reprisals. As each state could assert the violation of international obligations autonomously and unilaterally, justifications for going to war were easy to be found. In fact, these justifications in many senses overlapped and were reciprocally interchangeable. It took only a few argumentative steps to pass from self-defence to reprisals or to the need to implement international law by force.

In comparison to all these possible justifications for starting a war, the so-called humanitarian intervention constitutes a reality apart because this justification did not concern the reciprocal relations between states but internal situations, primarily grave violations of human rights, facts that shocked human conscience. It is interesting to note that a strong sensibility for facts of this kind developed long before concepts such as the erga omnes obligations or even human rights in a legal sense showed up.[17] Testimony of such internal abuses that aroused protest, opposition and intervention by other nations can be traced back to ancient times.

In a certain sense, these events could be characterized as acts of humanitarian intervention but one has to be careful to consider the special circumstances on which the respective analysis was built.

Thus, the existence of a right to intervene is confirmed by the father of international law, Hugo Grotius, who drew himself heavily on ancient documents.[18]

[15] See also A Nussbaum who demonstrates very well in his *Concise History of the Law of Nations* (Macmillan 1947, 1954, 1962) how often these just causes have been abused in history.

[16] See the Limitation of Employment of Force for Recovery of Contract Debts (signed 18 October 1907) (1907) 205 CTS 537 (Hague II).

[17] See, for example, P Fiore, *Nouveau Droit International Public* 521–22 (C Antoine tr, Durand, Paris 1885) cited by J-P Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter' 4 (1974) *Cal W Intl LJ* 203, 221):

> The violation of international law can also be a consequence of events occurring inside a State, and which results in the direct violation of international law. Let us assume, for instance, that a prince, in order to put down a revolution, violates all the generally recognized laws of war, has prisoners executed, authorises destruction, looting, arson, and encourages his supporters to commit those odious actions that it is the faction that [seized power] which engages in similar crimes. Inaction and indifference of other States would constitute an egocentric policy contrary to the rights of all; for whoever violates international law to the disadvantage of anybody, violates it not only to the detriment of the person directly affected, but as against all civilized States.

[18] See H Grotius, *De iure belli ac pacis libris tres* (1625, reprint Tübingen 1950) Book II, ch 25, § VIII, lit 2.

It was said that to Grotius the first authoritative statement of the principle of humanitarian intervention is to be attributed—'the principle that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins'.[19] On the other hand, it has to be considered, however, that Grotius was less preoccupied with the future destiny of an oppressed people as with the necessity to re-balance the natural order by punishing those who are responsible for having committed outrageous acts.[20] Emer de Vattel's (1714–67) position in this regard seems, in contrast, far closer to modern day views,[21] even though the relevant statement is more an assertion of a principle than the demonstration of the existence of a respective right:

> Mais si le prince, attaquant les lois fondamentales, donne à son peuple un légitime sujet de lui résister, si la tyrannie, devenue insupportable, soulève la Nation, toute puissance étrangère est en droit de secourir un peuple opprimé, qui lui demande son assistance.[22]

It is interesting to note that Vattel does less demonstrate the existence of a respective right than assert a principle. He furthermore makes its exercise dependent on a specific demand of assistance.

In the following, in particular in the 19th century, two countervailing trends characterized the discussion about humanitarian intervention.[23] At the one hand, the principle of sovereignty gained ever more strength and therefore suspicion towards the claim for a right to humanitarian intervention grew continuously, in particular in view of possible abuses. At the other hand, the sensibility for the plight of people in other countries became ever stronger. The basis was

[19] See in this sense H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *BYBIL* 27, 46. Some authors go even further back in time when looking for such testimony. See, for example, LB Sohn and T Buergenthal, *International Protection of Human Rights* (Bobbs-Merrill 1973) who at 138 cite WA Dunning, *Political Theories from Luther to Montesquieu* (1579). According to this source interference should be justified 'in behalf of neighboring peoples who are oppressed on account of adherence to the true religion or by any obvious tyranny'. ibid 55.

[20] See H Endemann, *Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen* (Peter Lang 1997) 36.

[21] As it is known, Vattel's close observation of state practice and his sophisticated balancing of natural law philosophy with positivist elements earned him much praise and his work, especially his main publication of 1758, *Droit des gens*, great reputation.

[22] Emer de Vattel, *Le Droit des Gens* (1758), Liv II, ch IV, 56, § 56.

[23] For an analysis of these trends see A Pauer, *Die humanitäre Intervention* (Helbing & Lichtenhahn 1985) 25 ss.
It has to be noticed that this discussion was mainly an academic one and that writers in international law had a quite different role than today. They were more detached from practice—with all the positive and the negative sides this implies. They could draw a 'great design' for an imaginary, ideal international law but at the same time one is inclined to state that their influence on practice was even less than it is today. A Bleckmann (*Die Funktionen der Lehre im Völkerrecht* (Heymann, Cologne 1981) 1) called this law 'Gelehrtenrecht'.

becoming laid for an ever more diffuse perception to belong to an international community. Intensified international exchanges and new technical means for communication gave decisive impetus to this development, whereby tolerance towards human rights abuses in other countries is diminishing continuously.[24] Of course, we were then even more far away from a principle of 'equal treatment' of all these situations than we are now. The means for intervention are always scarce and com*passion* is, as a sentiment, strongly determined by subjective elements. Therefore, both subjective and objective criteria will determine the preparedness to intervene. These are: the geographical distance, the sharing of common bonds with the offended people, for example with regard to culture, religion, history and language, the availability of sufficient means to make appear the success of intervention probable, sufficient internal support (or pressure) for such measures. It can be no surprise that under these conditions the Ottoman Empire of the 19th century and of the beginning 20th century was the target of Western intervention. The Western states had the military power to intervene, there was widespread ill-treatment and outright persecution of minorities in an Empire once rather tolerant towards cultural difference, the victims were most often Christians and the means of communication were already sufficiently evolved so that the relevant information could spread rather rapidly.

When, beginning with 1821, the Greek population on the Peloponnese tried to shake off the yoke of the Ottomans, massacres occurred. For the intellectual elite in Europe who felt to be part of an international community formed by common classical ideals of hellenic roots these events constituted a personal assault, a threat to their cultural basis. Especially in Great Britain enormous pressure was exercised on the government to intervene. While the actual decision to intervene depended strongly from political considerations in the interplay of the European powers citizens never before in history had such a decisive influence on the use of military force abroad. Further interventions against the Ottoman Empire, in particular in Lebanon (1860–61), Crete (1866–69) and on the Balkans (1875–78) followed. In the aftermath recourse to humanitarian intervention was taken also in the Western hemisphere. The basis of US intervention against Spain on Cuba and on the Philippines presented itself (or, respectively, was presented) in a similar way as that of previous acts of humanitarian intervention by European powers against the Ottoman Empire: a backward regime committed atrocities against freedom-seeking populations and the liberal-minded population of other countries in the region (in this case, the United States) was shocked by this appalling acts. It goes without saying that in all these cases the intervening neighbor had tangible political and economic interests in the case.

[24] See on this process also the interesting contribution by R Müllerson, 'From E Unum Pluribus to E Pluribus Unum in the Journey from an African Village to a Global Village?' in S Yee and J-Y Morin (eds), *Multiculturalism and International Law* (Martinus Nijhoff 2009) 33–58.

Summing up, the politics of humanitarian intervention developed during the 19th century presented a series of peculiarities that mirrored specific traits of that period's international law. We are confronted here with a paradox: why was so much energy dedicated to the search for a legitimate cause when recourse to force was not prohibited anyway? There are many explanations for this. While not being prohibited, going to war was at least politically a reprehensible act which was to be justified both internally and externally. In democracies it is particularly difficult to start a war.[25] At the same time, in such government systems constituencies can exert strong influence on their governments to act for the defence of democracy also abroad. Democratic values and core human rights are considered public goods which are to be protected beyond national borders. When acting for such humanitarian purposes, no matter if they are real or only pretextual, it is not advisable to declare war because this act, though legitimate according to 19th century law, places the acting government in a position which is politically and morally difficult to defend. At least prima facie the war declaring state bears the responsibility for this act.[26] Furthermore, going to war in the proper sense implies that hostilities continue until the enemy is totally defeated. In cases of humanitarian intervention the intervening state has most often no such interest. Waging war as an autonomous goal would again be hard to justify internally as it would usually run counter to broader political purposes[27] and harbor the risk of further military escalation the intervenor is usually interested to avoid.

All the preceding considerations reveal that the concept of humanitarian intervention is closely related to the broader concept of the use of force. As soon as war or, more generally, the recourse to force became restricted, humanitarian intervention was limited in parallel.

The steps by which this happened in the 20th century are well-known and it may suffice to recall the mainly procedural limitations for going to war introduced by the Charter of the League of Nations,[28] the prohibition of war by the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, the so-called Briand-Kellog Pact, the Stimson doctrine, introducing a very effectful principle according to which situations created by force would

[25] In this context, the well known dictum has to be mentioned according to which democracies do not go to war with each other. As it is known, this dictum can be traced back to Immanuel Kant. An empirical underpinning was given to this concept only starting with the 1960s, first by Dean Babst and afterwards by Rudolph J Rummel.

[26] This principle survives in the definition of aggression according to GA Res 334 (XXIX) of 14 December 1974. On the basis of art 2 of this document '[t]he first use of armed force by a State in contravention of the [UN] Charter shall constitute prima facie evidence of an act of aggression . . .'.

[27] This situation was clearly present in the case of the fight of Western powers against the Ottoman Empire which was seen by many countries as an important element in the European concert designed to bring peace and stability to Europe. Therefore, the Western countries were not interested in an all out war against this empire.

[28] See, in particular, art 12 of the Charter of the League of Nations.

not be recognized and, finally, Article 2 paragraph 4 of the UN Charter outlawing not only war but, more generally, the use of force in international relations insofar it was not authorized by the UN Charter itself.[29]

In this sense, the year 1945 can be considered a real watershed. The prohibition of the use of force in international relations has outlawed, at the same time, also the recourse to acts of humanitarian intervention. This holds true at least insofar as the respective measures are taken unilaterally, ie without UN authorization. Before passing to a more detailed analysis of humanitarian intervention under UN law, a few words shall be said about the period between 1933 and 1945 in which acts have been committed and statements been issued that are often cited to corroborate specific theoretical positions. It is true that in this period recourse to the concept of humanitarian intervention was taken in a very abusive way.[30] Care should, however, been taken that this demagogic rhetoric is not abused for other purposes. In fact, for all political observers it was all too evident that Nazi Germany was not interested in the lot of their co-nationals abroad but pursued other goals. Hitler's war of expansion had nothing to do with humanitarian intervention as it was commonly understood and therefore this institute was not affected by these criminal events. All too easily, in the aftermath this rhetoric was taken up to justify abuses and mass-expulsion, this time

[29] After the so-called 'enemy clause' has lost its importance, the remaining exceptions are, as it is known, the right to self-defence and measures under ch VII of the Charter. On the development of the prohibition of the use of force see P Hilpold, 'Gewaltverbot und Selbstverteidigung - Zwei Eckpfeiler des Völkerrechts auf dem Prüfstand' (2006) 38 *Juristische Arbeitsblätter* 234–39 and AAC Trindade, 'The Primacy of International Law over Force' in MG Kohen (ed), *Liber Amicorum Lucius Caflish* (Brill 2007) 59.

[30] See, for example, the letter of the German Government to the British Government of 3 September 1939 which contains a humanitarian explanation for the war against Poland:

> Die Deutsche Regierung hat, ergriffen von dem Leid der von Polen gequälten und unmenschlich behandelten deutschen Bevölkerung . . . fünf Monate lang geduldig zugesehen . . .'.

See Akten zur Deutschen Auswärtigen Politik, Series D, vol VII, doc no 565, cited by M Swatek-Evenstein, *Geschichte der 'Humanitären Intervention'* (Nomos 2008) 216. The same author cites also a letter by Adolf Hitler to the British Premier of 23 September 1938 in which the intervention against Cescoslovakia is justified:

> Alle Versuche der Unterdrückten, ihr Los zu ändern, scheiterten an dem brutalen Vernichtungswillen der Tschechen. . . . Ich habe nun in meiner Reichtagsrede vom 22. Februar erklärt, dass das Deutsche Reich von sich aus nunmehr einer weiteren Unterdrückung dieser Deutschen ein Ende bereiten wird. . . . Denn wenn früher das Verhalten in der Tschechischen Regierung brutal war, dann kann man es in den letzten Wochen und Tagen nur mehr als wahnsinnig bezeichnen. Die Opfer dieses Wahnsinns aber sind unzählige Deutsche. . . . Dieser Zustand ist . . . unerträglich und wird von mir jetzt beseitigt.

against the minorities in Central and Eastern Europe related to the defeated nations in World War II.[31]

If this period can be seen as relevant for qualifying the role of humanitarian intervention in actual international law practice until 1945 then it should be stated that this time was characterized not by too much intervention but by an appalling lack of willingness to intervene, as the genocide against the Jews in Europe demonstrates. Even though the extent of the criminal acts in Germany and in German controlled areas might not have been known to the Allies in all details sufficient elements were known—at a rather early time—that should have prompted an immediate intervention.[32]

The fact that such an intervention did not happen—as no intervention took place to stop the extermination of the Armenian people in the Ottoman Empire in 1915—demonstrates that even in a situation where the recourse to force was not yet outlawed humanitarian intervention was not more than a possibility, depending very much from further political considerations, if not from an outright strategic calculus to achieve additional advantages. A radical change of philosophy was needed.

4. Humanitarian Intervention after 1945

In 1945, the long-lasting attempts to outlaw the recourse to force reached their apex when a totally new institutional setting, the UN, was created which should not only prohibit the use of force in international relations but provide also for the exercise of such force in cases when it deemed to be necessary to re-establish peace. At first sight, this seemed to constitute the perfect counter-model to the one in force before. It should guarantee peace where before (at least until the Briand–Kellog Pact) war was a legitimate instrument of international politics. That a new era had begun cannot be denied but it can neither be ignored that the new system was not as perfect as it appeared on paper. The veto power of the permanent members of the Security Council according to Article 27

[31] It is also very common to attribute to the minorities in Central and Eastern Europe persecuted and expulsed at the end and in the immediate aftermath of the Second World War at least some co-responsibility for their destiny. They were, so goes a very common argument, disloyal to their new masters, for example by presenting petitions to the League of Nations. These arguments are very problematic, both from a legal as a historic point of view. In fact, the acts of discrimination against these groups were widespread and are well-documented. Furthermore, to make protection (interpreted that time as not much more than non-discrimination) depended from a degree of loyalty even exceeding that of other citizens cannot be justified. See P Hilpold, 'Commentary on Article 2 of the European Framework Convention for the Protection of National Minorities' in M Weller (ed), *The Rights of Minorities* (OUP 2005) 97–105; P Hilpold, 'Minderheitenschutz im Völkerbundsystem', in C Pan and B Sybille Pfeil (eds), *Zur Entstehung des modernen Minderheitenschutzes in Europa* (Springer 2006) 156–89.

[32] See Mark Swatek-Eventstein (n 30) ss 214.

paragraph 3 of the Charter and the failure to conclude the special agreements foreseen in Article 43 of the Charter had as a result that neither in legal terms nor in practical ones there was any guarantee for peace enforcement even if an actual, broadly recognized need was given. Furthermore, even assuming that peace enforcement actually worked, the UN provided for such measures only in the international relations while it seemed to be prevented from intervening in internal affairs due to Article 2 paragraph 7 of the Charter. It has to be recalled that at least in the first years it was not fully clear what would be the real contribution by the UN to the development of human rights—whether a substantial corpus of human rights provisions could be created or whether the contribution by the UN would mainly consist in the elaboration of political principles.[33] Did the Member States undertake legal obligations in the matter of human rights by becoming parties to the Charter?[34] While some early authors answered this question in the negative,[35] others affirmed the existence of such legal obligations and state practice was eventually on their side.[36] Finally, the Charter system seemed to implicitly accept imperfection and inaction. In fact, it was obviously unacceptable to state that the UN member states would regain their power to act unilaterally once the Security Council demonstrated to be unable to deliberate[37] as a limited functioning of the collective security mechanism was foreseeable already at the time of the drafting of the UN Charter.[38]

It may be true that the period after 1945 was far more peaceful than any previous period in the history of international law, at least when reference is made to international conflicts in the northern hemisphere. It would, however, be naive to attribute this success exclusively to the prohibition to use force set out in Article 2 paragraph 4 of the Charter. Without doubt, this pivotal norm in

[33] See MO Hudson, 'Integrity of International Instruments' (1948) 42 *AJIL* 105–08, for whom 'the Charter is limited to setting out a program of action for the Organization of the United Nations to pursue, in which the Members are pledged to co-operate'. See also H Kelsen (*The Law of the United Nations*, 1950, ss 29) who was of the opinion that 'the Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter'. The text of the UN charter speaks actually only of 'promotion' of human rights and not of 'protection'. See M Nowak, *Einführung in das internationale Menschenrechtssystem* (NWV 2002) s 39.

[34] This was the question examined by Egon Schwelb in the *American Journal of International Law* in 1972 (see 'The International Court of Justice and Human Rights Clauses of the Charter' (1972) 66 *AJIL* 337, 338).

[35] See the author mentioned in the previous footnote.

[36] See, for example, O Schachter, 'The Charter and the Constitution: The Human Rights Provisions in American Law' (1951) 4 *Vand L Rev* 646–53.

[37] This was the position held, ia, by J Stone, *Aggression and World Order* (Stevens 1958) 96; T Franck, 'Who Killed Article 2(4)?' (1970) 64 *AJIL* 809; M Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *AJIL* 642.

[38] See, in this sense, also I Brownlie, 'Thoughts on Kind-Hearted Gunmen' in RB Lillich (ed), *Humanitarian Intervention and the United Nations* (University Press of Virginia 1973) 139, 145 and P Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 *EJIL* 437–67, 453.

UN law set a powerful signal and going to war has become even less acceptable than it was before.[39] On the other hand, it cannot be overlooked that a decisive contribution for the guarantee of stability came from the balance of power between East and West, accompanied by nuclear deterrence. This stability spread partly also to the Third World where international wars became rarer, too while the ideological divide led to proxy wars and spurred internal unrest.

Internal conflict and internal abuses became in general the primary challenge for the UN system. As evidenced, the UN order was, at least initially, blind in this field and the attempts to develop a specific competence in this area, a necessity deeply felt by the growing community of human rights activists, occurred in fits and starts, the greatest obstacle constituting the fact that states stuck to a very traditional and conservative sovereignty model.[40]

For humanitarian interventions in the UN system, there was simply no space left and no legal basis given even though grave human rights abuses continued to be a reality. The State Community offered several answers to this challenge that might not have been useful in each case and in the immediate but nonetheless improved the overall framework. First of all, work on international human rights instruments continued relentlessly. Although during the height of the Cold War progress was achieved only on a slow pace, it cannot be denied that such progress actually took place. A decisive step was surely made at the 2nd World Conference on Human Rights in Vienna 1993 when in the final document it was explicitly stated that 'the promotion and protection of all human rights is a legitimate concern of the international community'.[41]

A second answer consisted in the strategic use of human rights in the Cold War. Pinpointing actual or alleged human rights abuses became a powerful argumentative instrument in the struggle between the main ideological systems and, as a consequence, at least some improvements ensued. Finally, in extreme cases, it was not to be ruled out totally that humanitarian interventions in the classical form could occur. Such interventions took place, however, under specific circumstances and with possible consequences the intervenor had to be aware of. In fact, the unilateral use of force for humanitarian purposes continues to be prohibited by UN law and the violation of this rule must lead to state

[39] This is also a central reason why the declaration of war, once a legitimate and very common unilateral act, has fallen in disuse after 1945. See House of Lords, Select Committee on the Constitution, 15th Report of Session 2005–06, *Waging War: Parliament's Role and Responsibility* (HMSO, London 2006).

[40] This sovereignty model resembled very much the one conceived 400 years before which could be defined as the 'supreme authority within a territory' (see 'Sovereignty' in Standford Encyclopedia of Philosophy, available at <http://plato.standford.edu/entries/sovereignty> accessed 21 December 2009). In the meantime, however, the basic conditions under which states act and interact have profoundly changed. For SD Krasner (*Sovereignty: Organized Hypocrisy* (Princeton University Press 1999)) sovereignty also in legal history has always been a concept subject to many limitations.

[41] See art 4 of the Vienna Declaration and Programme of Action, A/CONF. 157/23 v 12 July 1993.

responsibility and requires reparation.[42] As acts of humanitarian intervention entail the violation of peremptory norms the provisions in chapter III of the draft articles on state responsibility regarding 'serious breaches of obligations under peremptory norms of general international law' apply. According to Article 41 of this document '[s]tates shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40'. Furthermore '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'.

A state violating Article 2 paragraph 4 of the Charter risks becoming an international pariah. No assistance is to be provided to him. The injuring state is obliged to provide restitution and/or compensation.[43] This will entail in most cases withdrawal without delay of the intervening troops, restitution of all persons and property seized and compensation for all losses incurred by the state subject to intervention. Concomitantly, criminal responsibility of the perpetrators of acts falling under the jurisdiction of the ICC is not to be ruled out. After the so-called Kampala consensus of 11 June 2010 by which the first Review Conference of the International Criminal Court (ICC) both defined the crime of aggression and specified the conditions under which the ICC could exercise jurisdiction on such crimes, those who have ordered an intervention could face further sanctions.[44]

Although it is true that these provisions are, in part, of rather recent date and, also in part, yet not even applicable, insofar as they regard state responsibility they are so-called 'secondary norms' applicable to a material law situation in force since 1945.[45] While the instruments to implement these norms may not have been so sophisticated in the past as they are now the concept of state responsibility did not change in substance. This implied that all intervenors had to take into account international isolation and harsh repression. At the same time, however, also grave human rights abuses generate international responsibility though the contours of this responsibility are not so clear and this branch has undergone far-reaching developments in the last decades. The establishment of the so-called Charter-based systems of human rights protection (procedure 1267 of 1967 and procedure 1503 of 1970) has borne evidence of the fact that serious human rights abuses provoke international responsibility also in default of more specific obligations and explicit commitments even though the consequences are visible mainly on the diplomatic level. The ever-growing corpus of treaty-based obligations can be seen as proof of the fact that human

[42] See art 34 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts 2001.

[43] See the arts 35 and 36 of the ILC Draft articles.

[44] See Resolution RC/Res 6. As it is known, the applicability of this provision is subject to a further decision to be taken by states parties after 1 January 2017. Generally, the probability that such a decision will actually be taken is considered to be highly likely.

[45] See, extensively, the collections of essays edited by M Ragazzi, *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005).

rights obligations find broad recognition. With regard to humanitarian interventions particular attention has to be paid to the Genocide Convention[46] which gives testimony to the international will to counter human rights abuses as far as possible.[47] States may even become responsible for human rights abuses committed outside their territory if they have effective[48] or overall[49] control over a territory[50] over individuals committing such crimes.

This being the legal framework each state planning measures of humanitarian intervention after 1945 could hope that 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 paragraph 4 of the Charter. The best the intervenor could hope for was that other states would not take recourse to sanctions. The worst it had to fear was that the intervention was classified an aggression and an outright violation of Article 2 paragraph 4. Therefore, there was small wonder that in most cases the intervenor 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 ruled Uganda in 1979. It is hard to deny that in all three cases decisive relief was brought to oppressed people, 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.[51] This seems surprising since these interventions saved probably 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

[46] Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78, UNTS, 277. The number of ratifications to this convention is high (141 as of 8 December 2009), though less than with other international human rights instruments.

[47] The problem with this convention was, however, that little was done to give effect to it. See G Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006–07) 24 *Wisconsin Intl LJ* 704–22, 705.

[48] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14.

[49] *Prosecutor v Dusko Tadic* (Judgment), ICTY-94-1-A (AC) (15 July 1999); *Prosecutor v Predrag Banovic* ICTY-02-65/1-S (TC) (28 October 2003).

[50] *Loizidou v Turkey* (Preliminary Objections) Application No 15318/89; Judgment of 23 March 1995.

[51] For an extensive examination of these cases and the respective justifications see A Pauer (n 23) ss 161.

and so it was not totally unrealistic by the respective governments to expect that the state community would take recourse to a balancing, whereby the violation of Article 2 paragraph 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, that of India/Bangladesh and Tanzania/Uganda, 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 goes beyond imagination 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 also 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 intervention[52]—both with regard to the specific intervention as in relation to the attitude towards this concept as such. The unexpectedly high number of US casualties after the intervention in Somalia in the first half of 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 in a nationalistic war bordering genocide.[53] The tragic failure of the international community in Bosnia where the slaughtering of 8000 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, NATO launched air raids, after all negotiation attempts had failed. After 11 weeks the Serb troops were defeated. The consequences of this intervention constitute a burden for the international community up to this day[54] but this intervention is generally qualified a success even though such a qualification

[52] In this the principle of effectivity appears. See J Isensee, 'Weltpolizei für Menschenrechte - Zur Wiederkehr der humanitären Intervention' (1995) 50 *Juristenzeitung* 421–30 who characterizes this phenomenon very well with the saying: '... und wenn es glückt, so ist es auch verziehen' (427).

[53] As it is known, in the case on the '[a]pplication of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)' the ICJ, in its judgment of 27 February 2007, has confirmed that in Srebrenica, in July 1995, genocide on the Bosniak inhabitants has been committed. ibid 297.

[54] In this context, first of all the request by the UN GA for an advisory opinion of the ICJ has to be mentioned. See P Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 *Chinese JIL* 47–61 and P Hilpold (ed), Das Kosovo-Gutachten des IGH vom 22. Juli 2010 (Brill, 2012).

requires prudence in view of the direct humanitarian and ecological consequences of the intervention[55] and—what is 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 literature[56]—state practice was different.

When Yugoslavia brought an action against 10 NATO Member States before the ICJ because of the bombing raids, a window was opened to test the status of humanitarian intervention in international law.[57] Interestingly, only Belgium made explicit reference in her pleadings to this argument, sustaining, however, that there was not only a right to intervene but a real duty.[58] As it is known, the ICJ could in the end avoid to state on this question due to procedural reasons.[59]

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

More than those who denied the compatibility of this institute with UN law it were the respective advocates that buried it. All those well-meaning and high-spirited writings that tried to reconcile military interventions in favor of people struggling for their survival with the prohibition to use force according to Article 2 paragraph 4 of the Charter ended up in 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 directed to give preference to a paramount humanitarian need and

[55] See UNEP and UNCHS, 'The Kosovo conflict, Consequences for the Environment and Human Settlement' (1999); JE Austin and CE Bruch (eds), *The Environmental Consequences of War* (CUP 2000).

[56] See, for example, R Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 *AJIL* 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? Entschuldbar?' in R Merkel (ed), *Der Kosovo-Krieg und das Völkerrecht* (Suhrkamp 2000) 165.

[57] *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*) 1999 at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=yus&case=114&k=25>.

[58] See Case Concerning Legality of Use of Force (Provisional Measures) pleadings of Belgium, 10 May 1999, CR 99/15.

[59] As Serbia and Montenegro was not considered the successor of Yugoslavia she had to apply for admission to the UN which occurred on 1 November 2000. This admission did not have retroactive effect and therefore, on 29 April 1999 when the applicant filed the application it was not party to the ICJ Statute.

when it is prohibited because disruptive of the international peace order and abusive in its reference to humanitarian ends. It has been evidenced, however, 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 who they applied.[60]

On a whole, this situation was more than disappointing. The discussion was reflective of a greater structural problem of international law when it was either apologetic towards human rights abuses or utopian when creating the false security that intervenors 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.[61] The subscription to neither of the two doctrinal strands could really convince.[62]

It became more and more evident that humanitarian intervention was not the appropriate answer to fill the lacune the UN charter had left in the field of human rights protection. Humanitarian intervention has all the ingredients of an emergency approach that threatens the existence of the international order, basically made up of sovereign states. The challenge was not to find an alternative to international law based on sovereignty but to provide relief on the basis of existing international law. International law should not be temporarily suspended to counter an exceptional threat to human life. It should rather fully be brought to bear also in such situations. The idealists working on the new approach had the ambition to evidence that already existing international law offered an array of instruments to fight such abuses. The norm engineering that set in the immediate aftermath of the Kosovo intervention was not directed at creating a new substantial exception to the use of force. In fact, in an international society of nearly 200 members, such a task would be illusionary from the very beginnings. It rather tried to find an overarching concept that should bring together all those norms, principles and instruments that had come to life over the last decades exactly for the purpose to establish order in a 'humanized', individual-centered international system.

This approach was, at the same time, ingenious and revolutionary. In fact, it was designed to provide for prompt relief while any attempt to craft new international law in such a delicate area would not only be enormously time-consuming but, as already stated, also probably doomed to fail in the end.

Furthermore, to mend the system from inside contributed to minimize the risks which are always associated with any change. The new approach was

[60] See extensively, Hilpold (n 38) ss 454.

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

[62] 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.

portrayed not as an alternative to pre-existing international law but rather as a natural, further development. Thereby, also the psychology of norm-marketing should be on the side of this new approach. While changes requiring to abandon traditional achievements may engender fear of loss and resistance, the rhetoric of evolutionary change is decisively set in a positive light.

There are, of course, also risks with this approach. If the substantial innovation consists mainly in the creation of a new bond tying together pre-existing concepts the fault lines separating them up to this date could prove to be stronger than assumed. In the end, we could fall back to the traditional alternatives tainted by a disillusioning discussion and with time and energy spent for nothing.

5. The Responsibility to Protect—how the Concept came about

This whole discussion has made clear that the starting point for any attempt to overcome the protection deficits resulting from existing UN law was always the definition of sovereignty. Former UNSG Kofi Annan tried to tackle this question by the introduction of the concept of the 'two sovereignties'.[63]

This approach met with harsh resistance by the State Community as it evoked the idea of an abandonment of the traditional sovereignty concept or at least the admittance of a second, competing concept which should pit the individual freedom (sovereignty) against state sovereignty. The language used by the Secretary-General could in fact be understood as implying some sympathy by this eminent person for humanitarian intervention though no explicit statement was made in this sense. Also the way questions are asked can convey a standpoint.[64]

The fact that this attempt found no approval reveals also that there was no prospect for the concept of humanitarian intervention to find broader acceptance. It became clear that in order to avoid a stalemate in this discussion also a change in the language, in the way this reform attempt was presented, was needed.

The concept of sovereignty was to be upheld,[65] but at the same time, it was to be interpreted in the light of modern developments.

[63] See K Annan, 'Two Concepts of Sovereignty' *The Economist* (London 18 September 1999). See also his Address to the 54th Session of the General Assembly, 20 September 1999, reprinted in: K Annan, *The Question of Intervention: Statements by the Secretary General* (United Nations 1999) 44.

[64] The following sentences suggest that Kofi Annan considered 'humanitarian intervention', however defined in concrete, to be at least an option:

> On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? ibid.

[65] For the ICJ, the whole of international law rests on the principle of sovereignty. See *Case concerning military and paramilitary activities in and against Nicaragua* (n 48) para 263.

As it is known, the most decisive contribution to this end was given in autumn 2001 by the International Commission on Intervention and State Sovereignty (ICISS), a study commission instituted by the Canadian government, when it introduced the concept of the 'responsibility to protect'. The pedigree of this concept is far older[66] but nonetheless the Canadian government, or, respectively, the ICISS, deserve the main recognition for having found the common denominator for these developments and for having opened a completely new avenue for discussion.

While in international politics and academic writings new ideas and concepts come up continuously[67] only to fade away soon after, the resilience, not to say the enormous success, of this concept came to the surprise of many.

Several explanations can be given for this success: First of all, this concept was introduced at the right moment, when there was enormous need to give an answer to the failures of the State Community in the Yugoslavia crisis and in Ruanda and to the questions left open by NATO intervention in Kosovo. The reasons for this success were, however, not only related to the specific circumstances of this concept's introduction but can, even in larger terms, be attributed to its specific nature. In fact, the ICISS commission managed to provide this concept with all the attributes that regularly make up for success[68]: It plays with established concepts nobody would dare to question as to their legitimacy and at the same time this concept is placed in a new context that should help to overcome traditional conflicts. It promises a solution to fundamental problems of International Law, but at the same time it safeguards the sovereignty of states as it is up to them to find the specific balance between the competing interests. The

[66] As it is known, at the one hand, the 'responsibility to protect' can be traced back to the concept of the 'duty to protect'. This duty to protect is defined as a positive obligation for states to prevent private actors in certain circumstances from infringing on the rights of other individuals. See SP Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442–77, 448 with reference to Th Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (CUP 1981) ss 72.
The concept of 'responsibility to protect' as such was introduced by Francis M Deng and Roberta Cohen with reference to the situation of internally displaced people. See Th G Weiss and DA Korn, *Internal Diplacement: Conceptualization and its Consequences* (Routledge 2006).

[67] In this context one can refer, eg, 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.

[68] A similar phenomenon can be noticed with regard to the concept of self-determination. Also the success of this concept can be attributed, to a considerable measure, to its attitude to make promises and to engender hopes without really having to fulfil them. See, on this subject, P Hilpold, 'The Right to Self-Determination: Approaching an Elusive Concept through a Historic Iconography' (2009) 11 *Austrian Rev Intl Eur L* 2006 23–48.

problem solution process is put on track but the solution itself has to be found through a sovereign negotiation process.[69]

Although the report itself states that it regards 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-interpretes it in 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'[70] but as a concept based on human security and implying, as a consequence, also responsibilities.

The respective responsibility is attributed primarily to the individual state and only exceptionally, if the states fail to come up to this responsibility, it becomes 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 considers also 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, the responsibility to protect in general embraces three specific responsibilities, we will further on call the material pillars of R2P: the responsibility to prevent, the responsibility to react and the responsibility to rebuild.

Again, these responsibilities as such are nothing new but the way they are presented and interconnected is. There is both light and shadow with this approach. On the one hand, the prospects for this responsibility to find easy recognition were good exactly because its content was already known. On the other hand, as already stated, the presence of innovative features within this concept cannot be denied and they should pose both a challenge as a chance for its future acceptability. Framed in these terms R2P conveys the idea of an international society providing for well-structured procedures to prevent human rights abuses, to guarantee intervention in case of urgent need and to rebuild the civil infrastructure where it had been destroyed by an avoidable conflict. A further innovative trait is to be found in the idea of sequencing. Through this three-pronged strategy the international community should be enabled to follow the natural course of a humanitarian crisis and to intervene with appropriate measures at these different stages.

Looked at more closely, this approach is, without doubt, an extremely ambitious one. In fact, it is not only based on the assumption that these various stages can be neatly distinguished, which is important as the respective instruments at hand differ considerably, but it relies also on the condition that there is a broad understanding on the criteria to apply to assess these various situations. It is

[69] C Schmitt, by coining the formulation 'dilatorischer Formelkompromiss' in his 'Verfassungslehre' has given a name to this phenomenon.

[70] See n 39.

obvious that an instrument designed to tackle international and potentially universal challenges has to be grounded in its application on criteria of equal reach. Finally a structured intervention presupposes the existence of respective means and the preparedness by the State Community to employ them.

After the ICISS Report was issued all these elements and conditions came under close scrutiny by the State Community.

Even though since 2001 not even a decade has passed, the evolution of R2P is remarkable. In this period, two stages can be distinguished:

- From 2001 to 2005 the main impetus of the promotors of R2P was to give some sort of legal status to this concept.
- After R2P had found universal recognition at the World Summit in September 2005 the new challenge was—and still is—to give substance to this concept. While for some advocates of this concept this whole process may be too slow, in a more distanced consideration the progress achieved so far is surely remarkable.

6. Approaching a Decade of R2P—what has been Achieved

A. The Period from 2001 to 2005—a Contested Political Demand Finally Finds Universal Recognition

As already stated, the broad recognition R2P has found in the few years between 2001 and 2005 is due, to a large part, to the specific political conditions of these years characterized by the overall impression that the State Community had failed in front of several humanitarian catastrophes. Something needed to be done. Faced with the accusation of inactivity or even outright connivence with regard to the outrageous crimes of the past, and eager not to approve an instrument like that of humanitarian intervention which could undermine the peace order established by the UN Charter, states preferred a political compromise which would be vague enough to postpone the real hard questions to a future date while creating, at the same time, the impression that the situation was under control.

This norm creation process was, however, adjuvated by a second development, the general UN reform process. While the discussion about a reform of this organization is an ongoing process and the reform proposals, in particular those of an institutional nature, are very numerous, at the beginning of the 21st century the impression was that the State Community was more serious than ever about reform, both with regard to substantial law as with regard to the institutional system.[71]

[71] See P Hilpold, 'Reforming the United Nations: New Proposals in a Long-Lasting Endeavour' (2005) 52 *Netherlands Intl L Rev* 389–431 as well as J Varwick and A

In this context, the attempt to render peace preservation more effective ranked high among the top reform priorities. Again a series of material and institutional reforms should bring about the respective results.

Both the 'High-level Panel on Threats, Challenges and Change' set up in 2003 by the UN Secretary-General as well as the Secretary-General himself in his own Report of 2005 endorsed the concept of R2P gleaned from the ICISS Report, without mentioning, however, this document.[72] While the ICISS Report did not fully rule out unilateral measures, at least as a factual possibility, the reports by the High-level Panel and the Secretary-General gave greater value to the prohibition of the use of force. They rather tried to make both prevention and the collective security mechanism more effective. To this end, a series of criteria was elaborated that should give guidance to the Security Council (or to the General Assembly) when deciding on collective measures.[73] To take recourse to such criteria was, however, not new. Already the many attempts to legitimize humanitarian intervention relied

Zimmermann (eds), *Die Reform der Vereinten Nationen - Bilanz und Perspektiven* (Duncker & Humblot 2006) 33–46.

[72] See –, 'A More Secure World: our Shared Responsibility' Report of the High-level Panel on Threats, Challenges and Change A/59/565 (2 December 2004) para 203:

> 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.

With regard to this report see H Neuhold, 'High-level Panel on Threats, Challenges and Change' (2009) Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e2040&recno=7&searchType=Quick&query=neuhold> online edition.

See also –, 'In Larger Freedom: Towards Development, Security and Human Rights for all' Report of the Secretary-General A/59/2005 (21 March 21005) para 135:

> I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.

[73] These sets of criteria corresponded more or less. For example the ICISS Report required right authority, just cause, right intention, last resort, proportional means and reasonable prospects. See the ICISS Report 2001, 32, para 4.16. The High-Level Panel required 'seriousness of threat, proper purpose, last resort, proportionate means, and balance of consequences'. See the High-Level Panel Report para 207.

heavily, in the past, on such approaches, although the results remained totally unsatisfactory.[74]

The decisive question was, how would the State Community take up these proposals. When the final negotiating process set in, it became clear, however, that there was a large gap between the high-flying proposals by well-meaning eminent persons and groups and the down-to-earth reality of the international political process. Up to the very end of this process it was not clear whether R2P would find its way into the final document. The fact that this eventually happened was considered to be one of the most outstanding achievements in a reform process otherwise characterized by meager results. SG Kofi Annan, who had come to the end of his term, had hailed the insertion of R2P in the Outcome Document as one of his own most important achievements.

A closer look at the relevant paragraphs of the World Summit's Outcome Document of 2005 reveals, however, that important concessions had to be made to states, favoring in this way a more traditional understanding of sovereignty.

The relevant paragraphs 138 and 139 read as follows:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. 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 Chapter 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 organisations as appropriate, should peaceful means be inadequate and national authority manifestly fail to protect the 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

[74] The attempt to specify situations where the recourse to force should be allowed by the indication of a set of general criteria should not be overstated in its practical value as it shifts only the interpretation problem from the general concept to the specific criteria. See P Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' 12 (2001) *EJIL* 437–67.

> crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

While originally R2P was rather a broad concept, now it was restricted to an instrument to prevent the most egregious crimes (genocide, war crimes, ethnic cleansing and crimes against humanity), thereby establishing also a close link to international criminal law. Due to the high legitimacy and reputation the body of norms of international criminal justice had acquired, a strict conceptual association with this field of international law was probably considered to enhance the acceptability of R2P.

It is striking to see that these two paragraphs make three times reference to the crimes indicated above. The intention transpires clearly that there should be no doubt about this norm's limited scope of application.

Explicitly, this responsibility is attributed, first of all, to the individual State. According to paragraph 139 of the Outcome Document the international community should only 'encourage and help States [as appropriate] to exercise this responsibility and support the United Nations in establishing an early warning capability'.

The following paragraph opens, on a 'case-by-case basis', to the possibility of more far-reaching encroachments on national sovereignty, but only in the case the peaceful means should 'be inadequate and national authority manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.

If one were to sum up the content of R2P as it was formulated at the World Summit in 2005 one has to recognize that, notwithstanding the many caveats, substance prevails. Without doubt, the recognition that the Security Council has the power to act if no other alternative is given to prevent the crimes indicated above, constitutes an important achievement. Although already in the past the prevailing opinion in the literature seemed to accept such a power, this explicit statement is a further, important step to 'humanize' international law.[75] The development of the three-pronged strategy (responsibility to prevent, to react and to rebuild) can be seen as a further achievement. Even though these single (material) pillars introduce, as such, nothing new in international law, their combined presentation as a system of interconnected responsibilities is of a new quality and opens up the possibility of new synergies.

Of course, the many caveats introduced cannot be ignored and it is their handling that should primarily influence the further destiny of this concept.

[75] Reference is made here to the title of the book by Meron (n 6).

B. The Outcome Document and the Importance of Prevention

R2P has been characterized a 'doctrine of prevention'.[76] There can be no doubt that prevention stands conceptually in the forefront of R2P. In all political discussions the argument that prevention has to be enhanced is the starting point for introducing R2P. Interestingly, this is not the case with doctrinal discussion where primarily reference is made to the second (material) pillar, the responsibility to react. The same is true for opponents of R2P who present this concept as a tarnished form of humanitarian intervention.

This contradiction can be explained by the fact that prevention may make for an easy sell in the political rhetoric but it is far harder to implement in practice. Furthermore, if looked at more closely, prevention may raise far more problems than expected.

There is a growing literature highlighting the difficulties associated with the attempt to give substance to prevention. Also the much-awaited Report presented by the Secretary-General Ban Ki-Moon in January 2009 does not give an exhausting answer to this question. It does, however, introduce a second (procedural) pillar structure for the implementation of R2P, distinguishing the protection responsibilities of the State (pillar one); international assistance and capacity-building (pillar two) and timely and decisive response by the international community (pillar three).[77]

The following questions with regard to the responsibility to prevent remain open:

1. If R2P refers only to the most serious crimes, it is unclear what should be the role of prevention. The respective crimes usually do not happen 'out of the blue' but they are preceded by minor violations of growing intensity. What should be the role of the international community in such situations? Without doubt the international community can encourage and help States to exercise their responsibility. But what if it becomes evident that preventive measures short of the use of force will not be sufficient to avoid a deterioration of the situation? Do we have to wait until these crimes have fully materialized, with all the ensuing human suffering? Such a solution appears unsatisfactory even though the wording of the Outcome Document does not permit a different answer. In his Report of January 2009, the Secretary-General calls for pragmatism: 'In a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through "timely and decisive" action (paragraph 139 of the Summit

[76] See SP Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 442–47, 443.

[77] See –, 'Implementing the responsibility to protect', Report of the Secretary-General of 12 January 2009 A/63/677.

Outcome), not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results'.[78]

This affirmation can only be applauded, even though it sounds somewhat strange placed as it is in an argumentative current inspired primarily by exactly the opposite idea. In fact, R2P can be seen to a large extent as an attempt to invite states to take their pre-existing responsibilities seriously. The main tool to achieve this end consists exactly in structuring and sequencing them.

2. In a more general sense, we have to ask in what relation the three material pillars of R2P stand with regard to the procedural ones. It appears that the responsibility to prevent is attributed both to individual states as to the international community. But in which way should the overall preference given to states in this field be respected?

   As has been mentioned, the whole discussion leading up to the Outcome Document was characterized by the search for criteria the implementation of the responsibility to protect. The Outcome Document itself, however, totally ignores this approach.

   The Report by the Secretary-General invites a broad interpretation of the third (procedural) pillar: '... the choice need not be a stark one between doing nothing or using force. A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners.'[79]

3. Assuming that sequencing is possible, there can be no doubt that absolute preference should be given to prevention. At first sight it appears that there is no better investment than that in prevention. In practice, however, this principle may be difficult to implement.[80] In fact, prevention is expensive and it is often difficult to raise funds to counter an abuse that has not yet materialized. A longer forerun usually increases the effectivity of prevention—and amplifies the problem described before as people do not feel touched by problems that could happen potentially in distant countries.

4. Prevention is an enormously broad concept and so becomes the case for intervention as the relationship between cause and antidote is often highly speculative.[81]

[78] ibid para 50. See also n 96 and accompanying text.
[79] ibid para 11 lit (c) 9.
[80] See AJ Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14 *Glob Gov* 135–56, 142.
[81] As 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. ibid 144.

5. It is not clear which international level, the universal or the regional one, bears the primary responsibility for preventive measures. The regional level seems often to be the more effective one but a fragmented approach risks to render the whole concept incoherent and dependent upon the regional institutional capabilities which vary considerably.[82]

Similar problems have arisen with regard to the responsibility to rebuild. Also peacebuilding activities by the UN are older than the use of the respective term.[83] In fact, they date back several decades. As postwar 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 were reported, like 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 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 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 specific and explicit preventive tasks 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.[84]

Again, in practice, it will be difficult to distinguish the responsibility to rebuild from the responsibility to prevent as both pillars of R2P closely interact and more often than not are only two sides of the same coin. What sense does it make, therefore, to distinguish them? The main added value that may have been created by this conceptual distinction is probably to be found in the fact that it

[82] See extensively KM Haugevik, 'Regionalising the Responsibility to Protect: Possibilities, Capabilities and Actualities' (2009) 1 *Global Responsibility to Protect* 346–63. Haugevik analyses in particular the capabilities of the European Union, the Organization for Security and Cooperation in Europe, the African Union, the Association of Southeast Asian Nations and the Organization of American States. She demonstrates that there are many obstacles for regional organizations to play a greater role in implementing R2P, first of all their decision-making procedures which are often ineffective as well as an attitude by some states to pursue their own national agendas under the cover of such organizations.

[83] See SG Jones and J Dobbins, 'The UN's Record in Nation Building' (2005–06) 6 *Chicago JIL* 703, making reference to the missions in Kongo (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 also the peace building activities in Kosovo (1999–present) can be added.

[84] See extensively S Weinlich, 'Weder Feigenblatt noch Allheilmittel' (2006) 54 *Vereinte Nationen* 2–11, 9.

has enhanced awareness of the complexity of intervention and of the necessity to adopt a multilayer strategy in order to make really a difference on the ground. A rigid, dogmatic sequencing of interventive measures would most probably be bound to fail. At the same time, however, awareness of the fact that isolated measures are most often futile when adopted in relation to dynamically evolving (deteriorating) situations is of basic importance.

7. From 2005 to the Present—an Idea Getting Strength

The time from 2005 to the present has been extraordinarily dynamic with regard to the further development of R2P. It may be true that it has not been possible to develop substantially the material formula found in the Outcome Document. It may also be true that post-2005 many governments have suffered 'buyer's remorse' with regard to this concept.[85]

On the other hand, however, the fact cannot be overlooked that R2P seems here to stay. This is in particular true after the Security Council, in 2011, relied exactly on this concept as a justification to authorize UN Member States to 'take all necessary measures' to protect the Libyan civil population and decided to establish a no fly zone over Libya.[86] As this operation can be considered a success[87] the concept of R2P was given a further boost.[88]

Already the broad consensus found in 2005 in agreeing with the formula of R2P had made clear that international law doctrine had to get acquainted with this new concept. Initial reaction to the doctrine was overall negative and distrusting.[89] For many, this norm creating initiative smacked of a private

[85] See AJ Bellamy, 'Realizing the Responsibility to Protect' (2009) 10 *International Studies Perspectives* 111–28, 112.

[86] See UN SC Res 1973 (17 March 2011). Already UN SC Res 1970 (26 February 2011) relied on R2P and imposed a series of coercive measures without, however, authorizing the Member States to 'take all necessary measures' (ie the use of force) to protect the civil population.
In general, the Libyan crisis of Spring 2011 can be seen as a watershed with regard to the explicit affirmation of R2P within the UN institutions. In fact, also the Human Rights Council referred to R2P in Res S 15/1 requiring the suspension of Libya from this council.
Reference to R2P was made also in SC Res 1975 (30 March 2011) with regard to the post-electoral crisis in Cote d'Ivoire.

[87] Of course, this assessment refers primarily to the military outcome of the intervention and to the fact the outrageous human rights abuses could be stopped. Regime change was not an immediate goal of the operation but eventually inevitable.

[88] As AJ Bellamy has evidenced, Resolution 1973 'is the first time that the Security Council has authorized the use of military force for human protection purposes against the wishes of a functioning state'. See AJ Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 *Ethics & International Affairs* 1–7, 1.

[89] See, for example, C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *AJIL* 99–120; P-T Stoll, 'Responsibility, Sovereignty and

adventure by a group of well-meaning academics and politicians who accidentally had found support by an equally well-meaning government, the Canadian one. The spurious academic credentials of this concept which did not care about traditional procedures for creation of international law added further weight to this suspicion. The apparent resilience of this concept should, however, be reason to question traditional doctrine. Several recent studies on R2P struggle with the question on how to qualify this concept with reference to traditional international law textbook formulas. Neither the argument that R2P is a mere declaratory confirmation of already existing international norms nor the assumption that new customary international law has been created appears to be satisfactory. In the first case, this concept would be more or less irrelevant, while to assume the formation of customary international law the presence of adequate practice would be required. This discussion overlooks, however, that at the basis of all international law obligations there is the principle of consent. International law norms are interpreted, but also newly created in a 'process of continuous interaction, of continuous demand and response'.[90] The 'sources of international law' as they are indicated in Article 38 of the ICJ Statute, and as incomplete as they are, are only formal indicators of this underlying process.[91] The universal acceptance of R2P in 2005 and the repeated confirmation of this principle in the following years[92] give sufficient proof of such a consent.

The main challenge for the present is, however, less the acceptance of R2P as such but rather to find consent about its meaning. After 2005 a group of states (Cuba, Iran, North Korea, Pakistan, Sudan and Venezuela) has voiced strong misgivings that R2P could be associated too closely to humanitarian intervention. In July 2009 the President of the UN General Assembly Fr Miguel d'Escoto Brockmann even tried to draw into question the legitimacy of the

Cooperation - Reflections on the 'Responsibility to Protect'' in D König and others (eds), *International Law Today: New Challenges and the Need for Reform?* (Springer 2007) 1–16; C Focarelli, 'The Responsibility to Protect and Humanitarian Intervention: too many Ambiguities for a Working Doctrine' (2008) 13 *JCSL* 191–213 and this author himself: 'The Duty to Protect and the Reform of the United Nations: a New Step in the Development of International Law?' (2006) 10 *Max Planck Ybk UN L* 35–69.

[90] See M McDougal, 'The Hydrogen Bomb Tests and the International Law of the Sea' (1955) 49 *AJIL* 356.

[91] See B Simma, 'Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung' in R Bernhardt (ed), *Fünftes Deutsch-Polnisches Juristen-Kolloquium* (Nomos 1981) 45–76, 58. In the same direction go J Brunnée and SJ Toope, when they develop, building on Lon Fuller, an 'interactional account of international law'. See J Brunnée and SJ Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2009) *Global Responsibility to Protect* 10, available at <http:/ssm.com/abstract=1551296> accessed 2 March 2010. A final version of this paper will appear in (2010) 2/3 *Global Responsibility to Protect*.

[92] See also UN GA Res 63/308 UN Doc A/RES/63/308, 7 October 2009.
Also the UN Security Council has referred to R2P. See Res 1674 (28 April 2006) UN Doc S/RES/1674 para 4 and Res 1706 (31 August 2006) UN Doc S/URES/1706, preamble.

2005 agreement on R2P. The harsh protest against this attitude by a large number of delegates demonstrated, however, that the 'point of no return' with regard to this question has already been reached. At this meeting, even the most outspoken critics of R2P had to recognize this fact and therefore they tried to concentrate their efforts on the attempt to limit its purview. While the 'responsibility to prevent' found broad recognition the strongest opposition was voiced against the 'responsibility to react'.[93]

In order to avoid abusive interventions in the name of R2P again several delegates pleaded for the drafting of respective criteria.[94]

As has already been indicated, it is doubtful whether any such attempt will succeed or bring any useful results. In any case care must be taken that R2P is not carved up in its main (material) pillars with some elements accepted and others discarded. In fact, the old dictum that the whole is more than the sum of its parts[95] finds full confirmation with R2P.

Overall the dimension of approval R2P is coming to enjoy is impressive although many details are still open for discussion. One of the main reasons why this concept managed to persist may be found in the fact that the line of division between advocates and detractors of this concept does not follow any traditional fault line in international law and politics. The most committed proponents of this concept come from those countries which have experienced human rights abuses of the kind R2P purports to counter.

On a whole, R2P is a rare example of an idea becoming enormously powerful within very few years. It is still too early to say what consequences the introduction of this concept will have on the level of substantial law. The official endorsement of R2P by the UN Secretary-General Ban Ki-Moon in 2009 and 2010 was hailed by some as a success; others deplored an excessive caution in the relevant documents.[96] The authorization by the Security Council to use force against Libya will in any case be remembered as a pivotal step for the further affirmation of this principle.

[93] For a detailed summary of this discussion see Global Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment' at <www.GLOBALR2P.org> last accessed 31 January 2012. There were also attempts to use the R2P rhetoric to further strengthen traditional sovereignty. In fact, if the responsibility to protect lies, in the first stage, with States and States could claim exclusive competence to judge when stage two is reached, at the factual level any intervention could be excluded. It is obvious, however, that such an interpretation of R2P cannot be accepted. See H Nasu, 'Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 *JCSL* 209–41, 216.

[94] ibid 7.

[95] Artistotle, *Metaphysics* Book 8.6.1045a: 8-10.

[96] See –, 'Implementing the Responsibility to Protect: Report from the Secretary-General' UN A/63/677, 12 January 2009 and 'Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary General' UN doc A/64/864, 14 July 2010.
For a critical stance towards these documents see TG Weiss, 'RtoP Alive and Well after Libya' (2011) *Ethics & International Affairs* 1–6, 2.

It has already been mentioned that the norm creation process leading to R2P can be compared with that characterizing the development of the law of self-determination. In both cases, at the beginning we have a political slogan of uncertain meaning. Nonetheless, as the case of self-determination demonstrates, political rhetoric can solidify to legal principles and even if they remain vague and prone to be abused by opposed camps some consensual lines will emerge over time.[97] With so many ideas devised in international law doctrine and in political discussions why was it for R2P to succeed while many other ideas disappeared and went lost? Without doubt, the time was very propitious for this concept. While the concept of self-determination was reflective of 19th and 20th century nationalism, R2P could become the main theme of the 21th century's globalized and 'humanized' international system. Continuing commitment to this principle in the next years could have decisive influence on the way international law is discussed, understood and perhaps also crafted.

[97] As PH Koojimans has stated with regard to the right to self-determination, provisions of non-binding resolutions of international organizations can gradually 'crystallize' into 'hard' norms of international law. See PH Koojimans, 'Some Thoughts on the Relations Between Extra-Legal Agreements and Law-Creating Process' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International 1996) 425–37, 434. This may happen, if though the content of the norm remains uncertain. The result is then a 'hard' frame and a 'soft' content. On the vagueness of the law of self-determination see also P Hilpold, 'Self-Determination in the 21st Century - Modern Perspectives for an Old Concept' (2006) 36 *Israel Ybk of Human Rights* 247–88.