

# THE RESPONSIBILITY TO PROTECT AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW\*

## *LA RESPONSABILIDAD DE PROTEGER COMO PRINCIPIO GENERAL DE DERECHO INTERNACIONAL*

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**RESUMEN:** El objeto de este ensayo es explorar la base legal del principio de RtP, una noción que ha atraído debates profundos y la atención de doctrinarios desde la última década, y para determinar cuáles de estos aspectos han cristalizado en leyes positivas internacionales. Por lo tanto, el autor analizará las fuentes del derecho internacional como se contempla en el artículo 38 del Estatuto de la Corte Internacional de Justicia. Se encontrará que partes de RtP están comprimidas por instrumentos ya existentes internacionales y prácticas de los Estados también como opiniones jurídicas de Estados y apoyo de las Naciones Unidas una responsabilidad para reaccionar ante el sufrimiento humano.

**Palabras clave:** Responsabilidad de proteger, RtP, R2P, la resolución mundial de la ONU del 2005, crímenes internacionales, fuentes del derecho internacional, Principios generales del derecho internacional, artículo 38d del Estatuto de la Corte Internacional de Justicia.

*ABSTRACT: The object of this essay is to explore the legal basis of the principle of RtP, a notion which has attracted deepened debate and scholarly attention within the last decade, and to determine which of its aspects have crystallized into positive international law. Therefore, the author will analyze the sources of international law as contemplated by Art. 38 of the ICJ Statute. It will be found that parts of the RtP are comprised by already existing international instruments and state practice as well as opinio juris of states and the UN support a responsibility to react to widespread human suffering.*

**Descriptors:** *Responsibility to Protect, RtP, R2P, UN World Summit Outcome 2005, International Crimes, Sources of International Law, General Principles of International Law, Art. 38 ICJ Statute.*

*RÉSUMÉ: L'objet de cet essai est d'explorer la base juridique du principe de la RTP, une notion qui a attiré l'attention d'approfondir le débat et scientifique au sein de la dernière décennie, et de déterminer lesquels de ses aspects se sont cristallisés dans le droit international positif. Par conséquent, l'auteur va analyser les sources du droit international tel qu'il est prévu par l'art. 38 du Statut de la CIJ. Il se trouve que certaines parties de la RTP sont constitués par les instruments internationaux déjà existants et la pratique des États, ainsi que l'opinio juris des États et le soutien de l'ONU la responsabilité de réagir à la souffrance humaine généralisée.*

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## I. INTRODUCTION

16 years ago, the Rwandan genocide unfolded. While within only 100 days about 800,000 people were killed<sup>1</sup> neither the UN Security Council (Security Council) seemed able to mandate a sufficiently equipped military force nor did a single state intervene in order to halt the slaughter.<sup>2</sup> Conversely, more than a decade ago, the first jets of the North American Treaty Alliance (NATO) started into the direction of the Republic of Kosovo. Purportedly being conducted to halt the fighting and to secure the massive flow of Kosovo-Albanian refugees,<sup>3</sup> but without authorization by the Security Council, the air bombing campaigns entailed significant casualties within the civil population.

Both conflicts show the difficulties in striking a balance between two pillars of international law: the prohibition of the use of force and the protection of human rights.<sup>4</sup> What for a long time had been framed in terms of “humanitarian intervention” has seen a surprising reminiscence in modern theories of a “just war”<sup>5</sup>. Rhetoric, at least, has changed: In-

<sup>1</sup> Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (1999), p. 3 [*Carlsson-Report*].

<sup>2</sup> *Ibidem*, p. 30.

<sup>3</sup> *Cfr.* Press Conference of the Secretary-General of the NATO, Javier Solana, 25 March 1999, available online at <http://www.nato.int/Kosovo/all-frce.htm> (last visited 12 May 2010).

<sup>4</sup> *Cfr.* Francioni, F., “Balancing the Prohibition of the Use of Force with the Need to Protect Human Rights: A Methodological Approach”, in Simma, B. & Cannizzaro, E. (eds.), *Customary International Law and the Use of Force. A Methodological Approach*, Leiden/Boston, Martinus Nijhoff Publishers, 2005, pp. 269 and 270; Petersen, N., “Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung”, 46 *Archiv des öffentlichen Rechts*, (2008) 502, p. 509.

<sup>5</sup> *Compare* US-President Barack Obama’s Nobel Peace Prize Speech, 11 December 2009, available online at <http://www.nytimes.com> (last visited 12 May 2010); or Bruha, T., Heselhaus, S. & Marauhn, T. (eds.), *Legalität, Legitimität und Moral. Können Gerechtigkeitspostulate Kriege rechtfertigen?*, Tübingen, Mohr Siebeck, 2008.

stead of speaking of a *right* to intervention, the notion of a *Responsibility to Protect* (RtP) has gained ground.<sup>6</sup>

This essay will try to explore the question of whether and in which of its aspects the RtP concept forms part of positive international law. After giving a short overview of the evolution of the notion of RtP and thus developing a definition for further discussion, I will attempt to anchor this principle in the recognized sources of international law as conceived by Art. 38 of the Statute of the International Court of Justice (ICJ)<sup>7</sup>. While much of recent scholarly debate concerning the RtP's legal status has centered around its customary character, this work will analyze treaty law and general principles of international law as well. It will be argued that the RtP has emerged as a general principle of international law.

Finally, it will be discussed which ramifications flow from this supposition; especially what influence the crystallization of the RtP into a positive legal norm could potentially have on the attitude of actors on the international plane.

## II. THE NOTION OF "RESPONSIBILITY TO PROTECT"

The three documents generally seen as most important for conceptualizing the basic idea of a RtP are the Report of the International Commission on Intervention and State Sovereignty, the Report of the High Level Panel and the 2005 UN World Summit Outcome Document which therefore have attracted deepened scholarly attention and debate.<sup>8</sup> However, the notions of a RtP used by them vary extensively with respect to scope, prerequisites and means of this responsibility.

<sup>6</sup> See UN Press-Conference on Situation in Sri-Lanka, 22 April 2009, available at [http://www.un.org/News/briefings/docs//2009/090422\\_Sri\\_Lanka.doc.htm](http://www.un.org/News/briefings/docs//2009/090422_Sri_Lanka.doc.htm) (last visited 12 May 2010); Transcript of the Speech of US-President Obama in Cairo, 4 June 2009, available online at [http://www.nytimes.com/interactive/2009/06/02/us/politics/200900604\\_OBAMA\\_CAIRO.html](http://www.nytimes.com/interactive/2009/06/02/us/politics/200900604_OBAMA_CAIRO.html) (last visited 12 May 2010).

<sup>7</sup> Available online at [www.icj-cij.org](http://www.icj-cij.org).

<sup>8</sup> For a comprehensive list of recent authorities please refer for instance to von Arnould, A., *Souveränität und Responsibility to Protect*, 84 *Journal of International Peace and Organization* (2009) 11 and the following references.

### 1. *The Report of the International Commission on Intervention and State Sovereignty*

In 2000, as an answer to the UN's failure to react to the genocidal acts in Rwanda and Srebrenica<sup>9</sup> the Canadian government initiated and sponsored an expert group – the International Commission on Intervention and State Sovereignty (ICISS). Its task was to develop a solution for the felt paralysis of the system of collective security presumably caused by the veto power of the five permanent members of the Security Council.<sup>10</sup> Hence, the goal was to find international consensus beyond the notion of “humanitarian intervention” despite the perceived loss of authority of the UN in the aftermath of the Kosovo intervention of the NATO states.<sup>11</sup>

In its report from 2001<sup>12</sup> the ICISS was the first institution to develop a holistic concept of a RtP. It conceived the principle in three forms: a responsibility to prevent,<sup>13</sup> a responsibility to react,<sup>14</sup> comprising, *ultima ratio*, military means, and a responsibility to rebuild.<sup>15</sup>

#### A. *From Right to Responsibility*

A manifest obstacle proponents of a right to humanitarian intervention had to overcome, was that such an idea runs counter to the principle of sovereign equality of all states as stipulated in Art. 2 para. 1 UN

<sup>9</sup> For background information please cf. Carlsson Report, *supra* note 1 and Report of the Secretary-General pursuant to General Assembly Resolution 53/35 “The fall of Srebrenica“, UN Doc. A/54/649 (1999).

<sup>10</sup> Thakur, R., “The responsibility to protect“, in Thakur, R., (ed.), *The United Nations, Peace and Security. From Collective Security to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2006, p. 246; Heselhaus, S., “Ungerechtigkeit durch Untätigkeit? Das Nichthandeln des Sicherheitsrats“, in Bruha, T., Heselhaus, S. & Marauhn, T. (eds.), *Legalität, Legitimität und Moral. Können Gerechtigkeitspostulate Kriege rechtfertigen?*, Tübingen, Mohr Siebeck, 2008, p. 238.

<sup>11</sup> Schaller, C., Gibt es eine “Responsibility to Protect?“, *APuZ* (2008) 9, p. 10; Heselhaus, *ibidem*, p. 236.

<sup>12</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect. The Report of the International Commission on Intervention and State Sovereignty* (2001) [ICISS-Report].

<sup>13</sup> *Ibidem*, p. 19 *et seq.*

<sup>14</sup> *Ibidem*, p. 29 *et seq.*

<sup>15</sup> *Ibidem*, p. 39 *et seq.*

Charter.<sup>16</sup> One of the greatest achievements of the ICISS-Report now can be seen in the reinterpretation of sovereignty as implying responsibility towards one's own people.<sup>17</sup> The formerly state-centric approach shifts in favor of the endangered people, which constitutes a ground-breaking refocusing on the individual.<sup>18</sup>

The ICISS expert panel therefore draws the conclusion that sovereignty is conditional<sup>19</sup> -in the case of inability or unwillingness of the home-state to prevent large-scale and widespread human suffering, an "international responsibility" comes into play, which is not limited by the principle of non-intervention.<sup>20</sup>

### B. Addressees

The ICISS emphasizes that the primary duty to rectify a grave humanitarian situation lies with the state in which's borders such situation exists; in the case of its failure to remediate the situation, however, the responsibility falls back to the international community.<sup>21</sup> The Security Council is still held the most appropriate organ for authorization of military interventions.<sup>22</sup> Yet, the permanent members are urged not to make use of their veto power in cases when their "vital interests" are not touched upon.<sup>23</sup>

<sup>16</sup> *Ibidem*, p. 16, § 2.28.

<sup>17</sup> *Ibidem*, p. 13.

<sup>18</sup> Winkelmann, I., "Responsibility to Protect: Die Verantwortung der Internationalen Gemeinschaft zur Gewährung von Schutz", in Dupuy, P.-M. *et al.* (eds.), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat*, Kehl, N. P. Engel Verlag, 2006, p. 452; Hilpold, P., "The Duty to Protect and the Reform of the United Nations-A New Step in the Development of International Law?", *Max Planck UNYB*, (2006) 35, p. 50.

<sup>19</sup> Rodin, D., "The Responsibility to Protect and the Logic of Rights", in Jütersonke, O. & Krause, K. (eds.), *From Rights to Responsibilities. Rethinking Interventions for Humanitarian Purposes*, Lausanne, Programme for Strategic and International Security Studies, 2006, p. 55.

<sup>20</sup> ICISS-Report, *supra* note 12, p. XI.

<sup>21</sup> *Ibidem* p. 17.

<sup>22</sup> *Idem*.

<sup>23</sup> *Ibidem* p. 49.

Moreover, and this is what became the stone of contention, other avenues than action under Chapter VII UN Charter are considered.<sup>24</sup> If the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or if it fails to deal with it within a reasonable time, the UN General Assembly (General Assembly), pursuant to the “Uniting for Peace” -procedure,<sup>25</sup> or regional organisations<sup>26</sup> are allowed to intervene.

### C. *Preconditions*

The Report provides for several criteria referring to cause, intention, means and scope of an intervention as prerequisites for a genuine case of RtP.<sup>27</sup> However, these are fairly vague, have a severe dimension of overlap and are hence open to interpretation. Furthermore, since no authoritative institution for their final determination is pondered,<sup>28</sup> in the decentralized international system<sup>29</sup> the danger of unilateral interpretation and enforcement of alleged common necessities is manifest. Moreover, the focus on the “Global War against Terror” since September 2001 let the RtP sink into oblivion for some time.<sup>30</sup>

## 2. *The Report of the High Level Panel*

However, in 2003 by-then UN Secretary General Mr. Kofi Annan commissioned a High Level Panel (HLP) of experts to come forward with

<sup>24</sup> *Ibidem*, p. 56.

<sup>25</sup> UN Doc. A/RES/377 (V) (1950).

<sup>26</sup> ICISS-Report, *supra* note 12, p. 53 *et seq.*

<sup>27</sup> *Ibidem*, p. XII.

<sup>28</sup> Decaux, E., “La question des seuils de declenchement de la Responsabilite de Proteger en cas de violation grave des droits de l’homme”, in Societe Française pour le droit international (ed.), Colloque de Nanterre. La responsabilite de proteger, Paris, Editions Pedone, 2008, p. 339; Hilpold, *supra* note 18, p. 47.

<sup>29</sup> Graf Vitzthum, W., *Völkerrecht*, 4th ed., Berlin, De Gruyter, 2007, Chapter 1, para. 45; Kadelbach, S. & Kleinlein, T., “International Law-a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles”, 50 *German Yearbook of International Law*, (2007) 303, p. 331.

<sup>30</sup> Evans, G., *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, Washington, D.C., Brookings Institution Press, 2008, p. 44; Weiss, T. G., “The Responsibility to Protect in a Unipolar Era”, 35 *Security Dialogue*, (2004) 135, p. 136.

proposals on UN reform and thus to take up the concept of RtP.<sup>31</sup> They were supposed to be transformed into concrete strategies, which could be presented to the World Summit in 2005.<sup>32</sup>

The Report,<sup>33</sup> published in 2004, directly takes up the idea of sovereignty as implying responsibility towards one's own people and promotes the three-pronged approach of the RtP (prevention, reaction, rebuilding).<sup>34</sup> It also conceives a set of situations in which a RtP is triggered.<sup>35</sup> In addition, the primary responsibility of the home state entails a responsibility of the international community. Yet, it only mentions the Security Council as sole institution to authorize enforcement of an intervention based on the principle of RtP<sup>36</sup> and does not hint any other authority in cases of inaction of the latter. It merely urges its members to refrain from using their veto power if no "vital" national interests are at stake and especially in cases of genocide and large-scale human rights violations.<sup>37</sup> However, this particular part of the report does not relate to the RtP.

The conclusions of the High Level Panel were taken up and endorsed by the Secretary General in its report to the General Assembly preparing the World Summit.<sup>38</sup>

### 3. *The UN World Summit Outcome Document*

The World Summit Outcome Document was adopted unanimously by the General Assembly in its Resolution 60/1.<sup>39</sup> Its paras 138 and 139 explicitly endorse the principle of RtP but limit it to situations of genocide, crimes against humanity, ethnic cleansing and war crimes, *i.e.* the in-

<sup>31</sup> *Vgl.* Hilpold, *supra* note 18, p. 35 *et seq.*

<sup>32</sup> Bellamy, A. J., *Conflict prevention and the Responsibility to Protect, Global Governance* (2008), available online at [http://findarticles.com/p/articles/mi\\_7055/is\\_2\\_14/ai\\_n29462264/](http://findarticles.com/p/articles/mi_7055/is_2_14/ai_n29462264/) (last visited 12 May 2010), p. 4.

<sup>33</sup> Report of the High Level Panel, *A more secure world. Our shared responsibility*, (2004) [*HLP-Report*].

<sup>34</sup> *Ibidem* § 201.

<sup>35</sup> *Ibidem* §§ 201 and 203.

<sup>36</sup> *Ibidem* § 203.

<sup>37</sup> *Ibidem* § 256.

<sup>38</sup> *Cf.* Report of the Secretary General, "In Larger Freedom: Towards Development, Security and Human Rights for All", UN Doc. A/59/2005 (2005), especially § 153.

<sup>39</sup> UN Doc. A/RES/60/1 (2005).

ternational crimes stipulated in Art. 5 of the Statute of the International Criminal Court (*ICC Statute*).<sup>40</sup> No further criteria are mentioned.

While para. 138 deals with the primary responsibility of states to protect their own populations, only in para. 139 the RtP is enlarged to the community of states as a whole. Emphasize is put on peaceful means, which notably have to be employed “through the” UN. Should they prove inadequate and national authorities are “manifestly failing“ to protect their populations, the community of states sees itself “prepared” to take collective action. Yet, this can only take place “through the Security Council”. A faculty to act without authorization by the Security Council is not considered.

#### 4. *Definition*

The core of the RtP concept, i.e. the substantial overlap of all three documents, hence comprises a secondary responsibility to protect populations from international crimes in case of the inability or unwillingness of the home state to fulfil its primary responsibility to protect. Eventually, this can entail the use of force.<sup>41</sup> Requirements, scope and addressees of the responsibility, however, were subject to significant changes in the short period of four years. In how far this notion of the RtP and its components can be regarded as forming part of international law will be discussed now.

### III. THE LEGAL BASIS OF THE RTP

#### 1. *Starting Point*

Art. 38 para. 1 of the ICJ Statute enumerates the sources of international law,<sup>42</sup> treaty law, customary international law and general principles of

<sup>40</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

<sup>41</sup> *Concerning a definition of the RtP see also* Schaller, *supra* note 11, p. 9; Gattini, A., “Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment”, 18 *European Journal of International Law* (2007), 695, p. 698; von Arnald, *supra* note 8, p. 20.

<sup>42</sup> Ipsen, K., *Völkerrecht*, 5th ed., Munich, C. H. Beck, 2004, Chapter 3, § 2.

law, between which there exists no hierarchical order.<sup>43</sup> Judicial decisions and the teachings of the most highly qualified publicists are subsidiary means for the determination of these rules of law. The task will therefore be to analyze named sources for providing sufficient legal grounding for the RtP.

## 2. *Treaty Law, Art. 38 para. 1 lit. a ICJ Statute*

### A. *The Genocide Convention*

Art. 1 of the Genocide Convention<sup>44</sup> obligates states parties to prevent and punish genocide. This duty has been applied and interpreted by the ICJ when in 2007 Bosnia-Herzegovina under Art. IX of the convention accused Yugoslavia of, by supporting paramilitary units in Bosnia having systematically persecuted and forcibly expelled parts of the Bosnian minority.<sup>45</sup>

While finding the events committed in the enclave of Srebrenica to qualify as genocide as contemplated in Art. 2 of the Genocide Convention,<sup>46</sup> the Court could not ascertain an act of genocide attributable to Yugoslavia.<sup>47</sup> It, however, attested a breach of the duty to prevent genocide.<sup>48</sup> Hence, the ICJ construed the convention in such a way as to impose an obligation to employ all means reasonably available to prevent genocide.<sup>49</sup> According to the Court, the scope of this duty depends on the capacity to effectively influence actions of persons committing genocide, which can be measured by geographical and political links between the respective states.<sup>50</sup> It lies in this duty's nature to arise prior to the actual crime.<sup>51</sup>

<sup>43</sup> Vitzthum, *supra* note 29, chapter 1, § 154.

<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

<sup>45</sup> ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 46 I.L.M. (2007) 188 [*Genocide Convention Case*].

<sup>46</sup> *Ibidem*, § 431.

<sup>47</sup> *Ibidem*, § 415.

<sup>48</sup> *Ibidem*, § 438.

<sup>49</sup> *Ibidem*, § 430.

<sup>50</sup> *Ibidem*, § 431.

<sup>51</sup> *Idem*.

Hence, the duty to prevent genocide, being part of the RtP concept, is entrenched in the international instrument of the Genocide Convention.<sup>52</sup> That states attempt to avoid marking a situation “genocide”,<sup>53</sup> shows that they attach value to that assertion and reckon that certain ramifications will flow from it.<sup>54</sup>

However, one has to point to the particularities of the case at hand: Serbia was accused of having committed said atrocities, its military forces were already stationed on Bosnian soil and in fact controlled the events.<sup>55</sup> Therefore, it was possible for the ICJ to opine that the means employed have to be lawful<sup>56</sup> without making clear what this means, in particular, if the prohibition of the use of force constitutes a limit to the duty to prevent genocide.<sup>57</sup>

Furthermore, the ICJ explicitly states that it does not purport to base its judgement on any other legal source than the Genocide Convention.<sup>58</sup> Basically, treaties are only binding on states parties to it.<sup>59</sup> Nevertheless, the judgement contains further implications: The Genocide Convention codifies fundamental principles,<sup>60</sup> which according to the Court are recognized by all civilized nations and therefore are also binding on non-states-parties and international organisations.<sup>61</sup> Moreover, while genocide for some time was deemed the “crime of crimes”,<sup>62</sup> today the opinion of an

<sup>52</sup> See Arbour, L., “The responsibility to protect as a duty of care in international law and practice”, 34 *Review of International Studies* (2008) 445, p. 449.

<sup>53</sup> See Carlsson-Report, *supra* note 1, p. 38.

<sup>54</sup> Clapham, A., Responsibility to Protect—“Some Sort of Commitment”, in Chetail, V. (ed.), *Conflicts, security and cooperation, Liber Amicorum Victor-Yves Ghebali*, Brussels, Bruylant, 2007, p. 234.

<sup>55</sup> *Genocide Convention Case*, *supra* note 45, § 248.

<sup>56</sup> *Cf. ibidem*, § 430.

<sup>57</sup> *Cf. Gattini*, *supra* note 41, p. 701.

<sup>58</sup> *Genocide Convention Case*, *supra* note 45, § 429.

<sup>59</sup> *Cf. Art. 34 Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [VCLT].

<sup>60</sup> *Cf. The Crime of Genocide*, UN Doc. A/RES/96 (I) (1946).

<sup>61</sup> ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Rep. 1951, p. 23 [*Reservations Case*]; Oellers-Frahm, K., IGH: Bosnien-Herzegowina gegen Jugoslawien, Urteilsbesprechung, *Vereinte Nationen* [2007] 163, p. 167.

<sup>62</sup> Compare Meyer, F., “Die Verantwortlichkeiten von Vertragsstaaten nach der Völkermordkonvention”, *Online-Zeitschrift für Höchstgerichtliche Rechtsprechung im Strafrecht* [2007] 218, p. 218.

equivalent gravity of all international crimes takes hold.<sup>63</sup> Hence, this case will probably have an impact on how duties with respect to all international crimes are construed.

## B. *Other Human Rights Treaties and International Humanitarian Law*

### a. Significance

Basic notions of humanity, as codified in international humanitarian law, have always constituted part of the international legal order.<sup>64</sup> Hence, the ICJ opined

Many rules of humanitarian law... are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>65</sup>

Since the enactment of the UN Charter, however, the focus of international law has further shifted from states to individuals.<sup>66</sup> The system of human rights protection has advanced from the legally non-binding Universal Declaration of Human Rights<sup>67</sup> to human rights treaties with

<sup>63</sup> Cf. Schabas, W., "Preventing Genocide and Mass Killing: The Challenge for the United Nations", *Minority Rights Group International Report* (2006), available online at [www.minorityrights.org/download.php?id=157](http://www.minorityrights.org/download.php?id=157) (last visited 12 May 2010), Preventing Genocide, *supra* note 55, p. 9; Clapham, *supra* note 54, p. 184; Arbour, *supra* note 52, p. 451; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General Pursuant to Security Council Resolution 1564 of 18<sup>th</sup> September 2004, available online at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-697TAR?OpenDocument> (last visited 12 May 2010), p. 4.

<sup>64</sup> ICJ, *Corfu Channel Case, (United Kingdom of Great Britain and Northern Ireland v. Albania)*, 9 April 1949, ICJ Rep. 1949, p. 22.

<sup>65</sup> ICJ, *Legality of Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, § 79.

<sup>66</sup> Fassbender, B., "Idee und Anspruch der Menschenrechte im Völkerrecht", 46 *Aus Politik und Zeitgeschichte* (2008) 3, p. 7; ICTY, *Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 97, available online at [www.icty.org](http://www.icty.org).

<sup>67</sup> UN Doc. A/Res/217 A(III) (1948).

almost global ratification,<sup>68</sup> and regional protection systems on several continents.<sup>69</sup> Also the ICC Statute, by defining and criminalizing international crimes as minimum consensus of the international community, protects basic norms of human comportment.<sup>70</sup>

This “proliferation” has to be seen in the context of the development of an international community with a common value system.<sup>71</sup> Arguably, it is established that the protection of the most fundamental human rights, as well as international humanitarian law, is in the interest of all states and therefore, owed *erga omnes*.<sup>72</sup> The “Humanization of International Law”<sup>73</sup> can be seen as having proceeded so far that these norms, e.g. the prohibition of international crimes, have been elevated to the level of *jus cogens*.<sup>74</sup>

<sup>68</sup> For exact figures please confer [www.ohchr.org](http://www.ohchr.org).

<sup>69</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222; American Convention on Human Rights, 1144 U.N.T.S. 123, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); African [Banjul] Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

<sup>70</sup> Paulus, A. L., *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, München, C.H. Beck, 2001, p. 261; Fassbender, *supra* note 66, p. 5; Verlage, C., *Responsibility to Protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit*, Tübingen, Mohr Siebeck, 2009, p. 45.

<sup>71</sup> Cf. Simma, B., “From Bilateralism to Community Interest in International Law”, 250 *Recueil des Cours* (1994 VI), p. 217 *et seq.*; Paulus, *ibidem*, p. 252; Petersen, *supra* note 4, p. 521.

<sup>72</sup> Simma, B., “NATO, the UN and the Use of Force: Legal Aspects”, 10 *European Journal of International Law* (1999) 1, p. 2; ICJ, *Barcelona Traction, Light and Power Company, Limited*, ICJ Rep. 1970, §. 33; with respect to international humanitarian law ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, § 157.

<sup>73</sup> See Meron, T., *The Humanization of International Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2006; Rensmann, T., “Die Humanisierung des Völkerrechts durch das *ius in bello*”, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) 111.

<sup>74</sup> Cf. Simma, B. & Alston, P., “The Sources of Human Rights Law”, 12 *Australian Yearbook of International Law* (1992) 82, p. 103; Hilpold, *supra* note 18, 42; Verlage, *supra* note 70, 175; Brunée, J., “International Law and Collective Concerns: Reflections on the Responsibility to Protect”, in Ndiaye, T. M. & Wolfrum, R. (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Men-*

### b. Consequences

Chapter III of the International Law Commission (ILC)'s Articles on State Responsibility<sup>75</sup> attach particular consequences to grave breaches of *jus cogens* norms. It can be assumed that violations of international law following from the perpetration of one of the crimes listed in Art. 5 ICC Statute are of a grave nature.<sup>76</sup>

It then follows from Art. 41 of the Articles that no state shall recognize such situation as lawful nor act in a way conducive to it.<sup>77</sup> It is especially under an obligation to bring the illegal situation to an end. This duty has to be borne by all states "whether or not they are individually affected" and requires "a joint and coordinated effort" in order to counter the effects of a violation of international law.<sup>78</sup> This can for example comprise the invocation of said breach of an *erga omnes* norm under Art. 48 No. 1 lit. b of the State Responsibility Articles.<sup>79</sup>

### c. Interim Conclusions

Therefore, there are arguably good reasons for deducing a duty to react to international crimes from the *erga omnes*, respectively the *jus cogens* character of an international norm.<sup>80</sup> Thus, regional and universal treaties protecting fundamental human needs are understood as specific en-

*sah*, Leiden/Boston, Martinus Nijhoff Publishers, 2007, p. 49; *with respect to genocide: ICJ, Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, [2006], available online: [www.icj-cij.org](http://www.icj-cij.org), § 64; *concerning the notion of jus cogens cf. Art. 53 VCLT.*

<sup>75</sup> Reprinted in Crawford, J., *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002.

<sup>76</sup> *Cf. ibid.*, Art. 40, § 4 *et seqq.*

<sup>77</sup> *Concerning this issue cf. also* Nolte, G. & Aust, H. P., "Equivocal Helpers: Complicit States, Mixed Messages and International Law", ICLQ 58 (2009) 1.

<sup>78</sup> *Cf. supra* note 75 *ibid.*, Art. 41, § 3.

<sup>79</sup> Szurek, S., "Responsabilité de Protéger; Nature de l'obligation et responsabilité internationale", in Société Française pour le droit international (ed.), *Colloque de Nanterre. La Responsabilité de protéger*, Paris, Editions Pedone, 2008, p. 110.

<sup>80</sup> *Cf. Brunée, supra* note 80, p. 50; Stahn, C., "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", 101 *American Journal of International Law* (2007) 99, p. 115.

forcement regimes working *erga omnes*, even outside one's own territory.<sup>81</sup> This conclusion cannot be drawn from their bare wording, but rather from the idea that they are an expression of international solidarity.<sup>82</sup>

For the ILC in 2001 it was open to question if the duty to cooperate in Art. 41 codified existing rules or reflected the progressive development of international law.<sup>83</sup> Nonetheless, three years later, in its *Wall Opinion*<sup>84</sup> the ICJ referring to provisions of international humanitarian law and their *erga omnes* character, in fact deduced a duty to states not party to the specific conflict to bring the illegal situation in the occupied Palestinian territory to an end.<sup>85</sup>

However, even if this construction of a duty to react is highly persuasive from a doctrinal point of view, it remains rather vacuous when it comes to implementation. Art. 41 refers to the vague caveat of "lawful means". While unilateral enforcement by a sole state seems to be precluded by the word "cooperation", additional parameters of the RtP have to be ascertained by reference to further international norms.

### C. The UN Charter

Of special importance can thus be the UN Charter. Being accepted by 192 states worldwide without reservation, it articulates the international consensus on norms giving structure and content to the international legal order.<sup>86</sup> Human rights are mentioned, *inter alia*, in its preamble and general objectives in Art. 1 para. 3. They are, however, not listed in Art. 2, enumerating the basic principles of the UN.

<sup>81</sup> Zimmermann, A., "Durchsetzung des Völkerrechts zwischen Fragmentierung, Multilateralisierung und Individualisierung, in Fischer-Lescano", A. et al. (eds.), *Frieden in Freiheit. Festschrift für Michael Bothe*, Baden-Baden, Nomos Verlag, 2008, p. 1084; cf. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Rep. 2005, §§ 178 & 166.

<sup>82</sup> Cf. *Genocide Convention Case*, *supra* note 45, Separate Opinion Judge Ranjeva, § 4; Rensmann, *supra* note 73, p. 125.

<sup>83</sup> Crawford, *supra* note 581, Art. 41, § 3.

<sup>84</sup> *Supra* note 72.

<sup>85</sup> *Ibid.*, § 158; referring to Art. 41 of the ILC's *Articles on State Responsibility* Separate Opinion Judge Kooijmans, § 41, 42.

<sup>86</sup> Thakur, *supra* note 10, p. 245; cf. Kadelbach/Kleinlein, *supra* note 29, p. 318.

The main goal of the UN in 1945, the maintenance of peace,<sup>87</sup> was thought to be achieved by forestalling international conflicts.<sup>88</sup> The majority of today's conflicts, however, are internal.<sup>89</sup> The Charter does not explicitly speak of a responsibility to protect. Yet, it constitutes a living instrument open to interpretation in light of humanitarian needs.<sup>90</sup> Therefore, its application and amendment cannot take place without recourse to other rules of international law.<sup>91</sup>

#### a. Art. 39 UN Charter

This becomes particularly evident in the discussion around the power of the Security Council to qualify mere internal conflicts as a threat to peace and security. Thus, the concept of "Human Security" as opposed to "State Security" gained significant support.<sup>92</sup> Since the 1990s the Security Council routinely authorizes interventions in internal conflicts without transboundary link.<sup>93</sup> The majority of sta-

<sup>87</sup> Cf. Preamble and Art. 1 para. 1 UN Charter; Jessup, P. C., *A Modern Law of Nations; An Introduction*, New York, The MacMillan Company, 1949, p. 169.

<sup>88</sup> Dunbabin, J. P. D., "The Security Council in the Wings: Exploring the Security Council's Non-involvement in Wars", in Lowe, V. *et al.* (eds.), *The United Nations Security Council and War*, Oxford, Oxford University Press, 2008, p. 508.

<sup>89</sup> Thakur, *supra* note 10, 245, Dunbabin, *ibid.*

<sup>90</sup> Cf. Llorens, J. C., "Le Role des Organisations Internationales", in Societe Française pour le droit international (ed.), *Colloque de Nanterre. La Responsabilite de Proteger*, Paris, Editions Pedone, 2008, p. 321; Tomuschat, C., "Obligations Arising for States Without Or Against Their Will", 241 *Recueil des Cours* (1993 IV) 195, p. 306; Franck, T., Legality and Legitimacy in Humanitarian Interventions, in Nardin T. & Williams, M. S. (eds.), *Humanitarian Intervention*, New York/London, NY University Press, 2006, p. 143; Hilpold, *supra* note 18, p. 68; Ress, G. in Simma, B. (ed.), *The Charter of the United Nations. A Commentary*, 2<sup>nd</sup> ed., New York, Oxford University Press, 2002, Interpretation, § 19.

<sup>91</sup> Herdegen, M., *Völkerrecht*, 7<sup>th</sup> ed., Munich, C.H. Beck, 2008, § 5; Schrijver, N. J., *The Future of the Charter of the UN*, Max Planck UNYB (2006) 1, p. 7 *et seq.*

<sup>92</sup> Cf. General Assembly Thematic Debate on Human Security, 22 May 2008, available online at <http://www.un.org/ga/president/62/ThematicDebates/humansecurity.shtml> (last visited 10 May 2010); Schrijver, *ibidem*, p. 11.

<sup>93</sup> Cf. UN Doc. SC/RES/688 (1991); SC/Res/1181 (1998); SC/Res/1769 (2007); further examples are provided by Hamilton, R. J., "The Responsibility to Protect: From Document to Doctrine – But what of Implementation?", 19 *Harvard Human Rights Journal* (2006) 289.

tes<sup>94</sup> now recognize that tense humanitarian situations can constitute a threat to international peace and security pursuant to Art. 39 UN Charter.<sup>95</sup>

### b. A Modern Concept of Sovereignty

Art. 2 para. 7 UN Charter prohibits UN organs to intervene in the national affairs of member states. With respect to third states, a sovereign can rely on the customary principle of non-intervention.<sup>96</sup> Yet, also concepts of sovereignty are open to change<sup>97</sup> and since the adoption of the UN Charter the state is not any more the sole authority to warrant basic protection of human rights.<sup>98</sup>

The idea of “sovereignty as responsibility”<sup>99</sup> is not new, but has its origins in the construct of the *traité social* - the concept of the state as a means for the protection of human rights.<sup>100</sup> The genuinely innovative part of the RtP therefore can be seen in the enlargement of such a responsibility from the sovereign to the international community.<sup>101</sup> Since nowadays, it is generally accepted, that the violation of fundamental human

<sup>94</sup> Exceptions remain the People’s Republic of China and the Russian Federation, *cf.* their statements concerning the situation in Myanmar, UN Doc. S/PV.5526 (2006), p. 2, 4.

<sup>95</sup> *Cf.* SC/RES/1894 (2009), § 3; statements of Costa Rica, UN Doc. A/63/PV.97, p. 24; Condorelli, L., “Responsabilité de Protéger et Recours à la Force Armée. Par Qui et Quelles Conditions”, in Société Française pour le droit international (ed.), *Colloque de Nanterre. La Responsabilité de Protéger*, Paris, Editions Pedone, 2008, p. 315; Nolte, G., “Sovereignty as Responsibility?”, 99 *ASIL Proceedings* (2005) 389, p. 391; Boisson de Chazournes, L. & Condorelli, L., “De la « responsabilité de protéger » ou d’une nouvelle parure pour une notion déjà bien établie”, 110 *Revue Générale de Droit International Public* (2006) 11, p. 13; Schrijver, *supra* note 91, p. 10.

<sup>96</sup> Nolte, G., in Charter Commentary, *supra* note 90, Art. 2 (7), § 7; Verlage, *supra* note 70, p. 174.

<sup>97</sup> *Cf.e.g.* Nolte, *supra* note 95, p. 389; Stahn, *supra* note 80, p. 112.

<sup>98</sup> Fassbender, Menschenrechte, *supra* note 66, p. 3.

<sup>99</sup> Coined by Deng, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, D. C., Brookings Institution Press, 1996.

<sup>100</sup> *Cf.* Rousseau, J. J., *Du contrat social ou Principes du droit politique*, Du contrat social, du principes du droit politique, Paris, Didot l’aîné, 1792.

<sup>101</sup> Nolte, *supra* note 95, p. 391; Schaller, *supra* note 11, p. 9; ICISS-Report, *supra* note 12, p. 13, § 2.15.

rights norms, operating *erga omnes*, lies outside the “domestic sphere” of a state,<sup>102</sup> Art. 2 para. 7 UN Charter cannot constitute a bar to intervention.

### c. The International Prohibition of the Use of Force

However, the loss of legitimate sovereignty does not entail legitimacy of the use of force.<sup>103</sup> The principle of RtP is not clear on the question whether it can be enforced by military means without Security Council authorization.<sup>104</sup>

Article 2 para. 4 UN Charter and the customary prohibition of the use of force, which significantly overlap,<sup>105</sup> are still considered as absolute subject only to two narrow exceptions, self-defence under Article 51 and authorization by the Security Council pursuant to Article 42 UN Charter.<sup>106</sup> Even if not considered as absolute,<sup>107</sup> *the condemnation of the use of force* has been accorded a crucial role in international relations,<sup>108</sup> presumably even the status of *jus cogens*<sup>109</sup>

<sup>102</sup> Nolte, *ibid.*; Thakur, *supra* note 10, p. 254; Toope, J. S., Does International Law Impose a Duty upon the UN to Prevent Genocide?, McGill L. J. (2000) 187, p. 188; Cassese, A., *Ex inuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, *EJIL* (1999) 23, p. 26.

<sup>103</sup> Francioni, *supra* note 4, p. 276.

<sup>104</sup> Cf. Wheeler, N. J., “A Victory for Common Humanity? The Responsibility to Protect and the 2005 World Summit”, *Journal of International Law and International Relations*, Symposium Issue, [2005] 95, p. 104; Bannon, A. L., “The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism”, 115 *Yale Law Journal* (2006) 1157, p. 1157.

<sup>105</sup> ICJ, *Military and paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986, § 181.

<sup>106</sup> For many Simma, Use of Force, *supra* note 72, p. 3.

<sup>107</sup> E.g. Herdegen, M., “Völkerrechtliche Maßstäbe für Vorbeugende Militäreinsätze”, *Int. Law Rev. Colomb.* (2006) 339, p. 351.

<sup>108</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24. 10. 1970, UN Doc. A/8082 (1970); *Congo v. Uganda*, *supra* note 81, § 148.

<sup>109</sup> Marauhn, T., “Konfliktbewältigung zwischen Legitimität und Legalität”, in Bruha, T., Heselhaus, S. & Marauhn, T. (eds.), *Legalität, Legitimität und Moral. Können Gerechtigkeitspostulate Kriege rechtfertigen?*, Tübingen, Mohr Siebeck, 2008, p. 253; Hilpold, *supra* note 18, p. 42; Simma, Use of Force, *supra* note 72, p. 3.

principle to be weighed against it would have to have at least the same rank.<sup>110</sup>

Since the ban on the use of force also protects fundamental human rights,<sup>111</sup> it would be necessary to prove that the RtP in its unilateral mode, would be of at least the same rank.

The significance... of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.<sup>112</sup>

### 3. Customary International Law, Art. 38 para.1 lit.b ICJ Statute

#### A. General Standard

Customary international law basically consists of two elements: state practice, backed up by the recognition to be legally obliged to this behaviour, so called *opinio juris*.<sup>113</sup> State practice must show a high degree of continuity and prevalence.<sup>114</sup> It can also be of relevance which states exactly contribute to this *consuetudo*, especially if the time-frame for the alleged evolution of an international norm is rather small.<sup>115</sup> Here in particular states would be affected that are politically and economically able to undertake missions, but also those states whose domestic situation would trigger a primary duty to act under the RtP doctrine.<sup>116</sup> Concerning the preventive aspect of the RtP, a multiplicity of states would be addressed.

<sup>110</sup> Cf. Art. 53 VCLT.

<sup>111</sup> Thakur, *supra* note 10, p. 254; cf. Franck, T., "Rethinking Collective Security", in Schmitt, M. N. & Pejic, J. (eds.), *International Law and Armed Conflict: Exploring the Fault Lines*, The Netherlands, Koninklijke Brill BV, 2007, p. 21.

<sup>112</sup> ICJ, *Nicaragua*, *supra* note 105, § 207.

<sup>113</sup> ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands)*, ICJ Rep. 1969, § 77 [*Continental Shelf Cases*].

<sup>114</sup> *Ibid.* § 74, "extensive and virtually uniform"; Herdegen, *Völkerrecht*, *supra* note 91, § 16; Verlage, *supra* note 70, p. 55 „quasi-universal“.

<sup>115</sup> ICJ, *Continental Shelf Cases*, *ibidem*; Herdegen, *ibidem*.

<sup>116</sup> Cf. Verlage, *supra* note 70, pp. 59 y 73.

### B. *The 2005 World Summit*

General Assembly Resolution 60/1, the outcome document of the 2005 World Summit of 192 country leaders, in its paras 138 and 139 explicitly endorses the principle of a RtP. Some authors suggest that its unanimous adoption led to the birth of the RtP as “instant customary law”.<sup>117</sup> From the sole unanimous adoption, however, no solid state practice can be deduced.<sup>118</sup> And even if one was to view the consensus of all states as a further source of international law,<sup>119</sup> the mere unanimous adoption of a resolution is no valid evidence for this fact.<sup>120</sup>

Since the General Assembly by Arts 11-14 UN Charter is only mandated to make recommendations, its resolutions are not directly binding.<sup>121</sup> They can be evidence of *opinio juris*, though.<sup>122</sup> In order to ascertain if this is the case, an inquiry into content and conditions of its adoption has to be made; it is also necessary to ascertain whether an *opinio juris* exists as to its normative character.<sup>123</sup>

Resolution 60/1 expressly affirms that “each state has the responsibility to protect its people” and that the international community will intervene, probably with military measures, if the home state is “manifestly failing” on its primary duty. The limitation of the RtP to international crimes as stipulated in Art. 5 of the ICC Statute might even be conducive to the doctrine since these can be further defined by international criminal adjudication.

<sup>117</sup> *Ibidem*, p. 115.

<sup>118</sup> Cf. Herdegen, *Völkerrecht*, *supra* note 91, § 16; Ipsen, *supra* note 42, § 16; ICJ, *Nicaragua*, *supra* note 105, § 97.

<sup>119</sup> *In this sense especially* Simma, B., “Zur Bedeutung von Resolutionen der Generalversammlung”, in Rudolf, B. *et al.* (eds.), *Fünftes deutsch-polnisches Juristen-Kolloquium, Band 2, Die Bedeutung der Resolutionen der Generalversammlung der Vereinten Nationen*, Baden-Baden, Nomos Verlagsgesellschaft, 1981, p. 61.

<sup>120</sup> *Ibidem*, p. 62 *et seq.*

<sup>121</sup> Cf. Verdross, A. & Simma, B., *Universelles Völkerrecht. Theorie und Praxis*, 3<sup>rd</sup> ed., Berlin, Duncker und Humblot, 1984, p. 408, § 635; Vitzthum, *supra* note 29, p. 76, § 150; Heselhaus, *supra* note 10, p. 227.

<sup>122</sup> ICJ, *Nicaragua*, *supra* note 105, § 188; Herdegen, *Völkerrecht*, *supra* note 91, Chapter 16, § 4; Verdross/Simma, *ibid.*, p. 368, § 583; Schaller, *supra* note 11, p. 13.

<sup>123</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Rep. (1996), § 70.

However, no further criteria for intervention are spelled out. In the same vein, the Security Council shall decide on a “case by case” basis. Generally, the provisions are marked by a rather vague language and from a substantial perspective are less vigorous than the previous reports.<sup>124</sup> So was the word “obligation”, contained in the original draft, changed into the weaker “responsibility”.<sup>125</sup> This does not allow for the conclusion that states were willing to define binding situations in which the RtP would come into action. The unanimous adoption can also be seen as characteristic for a mere political declaration.<sup>126</sup> Consequentially, the General Assembly shall further deliberate about the concept.<sup>127</sup>

Furthermore, the RtP is weakened by the fact that no default mechanisms in case of paralysis of the Security Council, the situation because of which the doctrine was actually invented, are pondered.<sup>128</sup> Accordingly, it is not discussed under the heading of “Peace and Collective Security” but “Human Rights”.<sup>129</sup> Even though the “Uniting for Peace”-procedure has become an important tool for the General Assembly, it has never actually proposed the deployment of force pursuant to it.<sup>130</sup>

Hence, there are arguably good reasons to deduce from this reluctant habit, that states, even if they in principal accept a RtP, were not willing to legally bind themselves by General Assembly Resolution 60/1.

<sup>124</sup> Hilpold, *supra* note 18, p. 38; Von Arnould, *supra* note 8, p. 25.

<sup>125</sup> Cf. in this respect the letter of the Permanent US Representative to the UN, Bolton, to the President of the General Assembly, *reprinted in* Verlage, *supra* note 70, Annex; Rodin, *supra* note 19, p. 45, 58.

<sup>126</sup> Herdegen, *Völkerrecht*, *supra* note 91, Chapter 20, § 2.

<sup>127</sup> UN World Summit Outcome, *supra* note 39, § 139.

<sup>128</sup> Stahn, *supra* note 80, p. 118.

<sup>129</sup> Welsh, J., “The Responsibility to Protect: Securing the Individual in International Society?”, in Jütersonke, O. & Krause, K. (eds.), *From Rights to Responsibilities. Rethinking Interventions for Humanitarian Purposes*, Lausanne, Programme for Strategic and International Security Studies, 2006. p. 39.

<sup>130</sup> Schrijver, *supra* note 91, p. 15.

### C. Adoption of the RtP after 2005

#### a. Within the UN System

##### i) The Security Council

In contrast, resolutions of the Security Council are binding on UN member states, Arts 25, 48 UN Charter.<sup>131</sup> Beyond that, they function as a promoter of general legal convictions<sup>132</sup> and can be seen as an expression of state practice.<sup>133</sup>

This is also true for “abstract” resolutions, not linked to a particular situation constituting a threat to international peace and security, e.g. S/RES/1674 (2006) concerning the protection of civilians in armed conflict. Being adopted unanimously<sup>134</sup> it explicitly refers to paras 138 and 139 of the World Summit. Following resolutions such as 1769 (2007), 1778 (2007), 1856 (2008), 1861 (2009) and 1863 (2009) with respect to Darfur, Congo and Chad/Somalia explicitly refer to S/RES/1674. S/RES/1861 (2009) concerning Chad and the Central African Republic expressly confirms the primary responsibility of the respective government to guarantee the security of civilians in their territory.<sup>135</sup>

Most recently, S/RES/1894 (2009), dealing with the topic of civilians in armed conflict, however, made reference to S/RES/1674 and unanimously “reaffirmed” paras 138 and 139 of the Outcome Document by explicitly invoking the RtP, which constitutes a remarkable commitment to such a fairly new concept.

##### ii) States' Affirmation of the RtP - The 2009 General Assembly's Debate on the Responsibility to Protect

Various state representatives invoked and supported the concept of RtP on the international plane.<sup>136</sup> Yet, these remain mere declarations of intent

<sup>131</sup> Herdegen, *Völkerrecht*, *supra* note 91, Chapter 20, § 3; Verlage, *supra* note 70, p. 102/103.

<sup>132</sup> Herdegen, *ibidem*.

<sup>133</sup> Heselhaus, *supra* note 10, p. 231.

<sup>134</sup> 5430<sup>th</sup> meeting of the UN Security Council, UN Doc. S/PV.5430 (2006).

<sup>135</sup> *Cf.* Preambulatory clause 11.

<sup>136</sup> *Cf.* The Security Council Debate on the Protection of Civilians in Armed Conflict, UN Doc. S/PV.6066 (Resumption 1) (2009); *see* the statements of the President of the

as long as they are not implemented.<sup>137</sup> The very progressive position of the African Union or the European Parliament, openly assuming their power and preparedness to unilateral intervention in cases of widespread human rights violations,<sup>138</sup> has remained isolated. Furthermore, only few intervening states ever relied on a further exception to the prohibition of the use of force but rather on implied Security Council authorization or extra-legal arguments to justify their intervention.<sup>139</sup>

It was therefore awaited with high anticipation if states, four years after the initial adoption of the concept, during the General Assembly debate on the RtP, would still hold on to the concept or eventually abandon its ideas.

*- The first report by the Secretary-General*

In January 2009, Secretary-General Ban-Ki Moon released his report “Implementing the Responsibility to Protect”.<sup>140</sup> What speaks from this work is strong support for the concept of RtP as agreed on in 2005. He urges that the consensus reached is not open for re-negotiation but ought to be implemented within due course.<sup>141</sup> Responsibility is considered as “the ally of sovereignty”.<sup>142</sup>

While also conceiving the RtP within a three-pronged strategy, the Secretary-General took a slightly different approach than the ICISS,

General Assembly and the representative of Egypt during the General Assembly debate on Human Security, *supra* note 98 and the following references concerning the General Assembly debate on the Responsibility to Protect.

<sup>137</sup> Sur, S., “Responsabilite de Proteger et Crise du Droit Humanitaire”, in Societe Française pour le droit international (ed.), *Colloque de Nanterre. La Responsabilite de Proteger*, Paris, Editions Pedone, 2008, p. 301.

<sup>138</sup> European Parliament, Resolution concerning the Right to Intervention for Humanitarian Purposes (1994), reprinted in in BT-D.12/7513; Art. 4 (h) & (j) of the Constitutive Act of the African Union, (2000), available online: <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited 12 May 2010).

<sup>139</sup> Cf. Gray, C., *International Law and the Use of Force*, 3<sup>rd</sup> ed., Oxford, Oxford University Press, 2008, p. 32; Press Conference of NATO Secretary-General, *supra* note 3.

<sup>140</sup> Report of the UN Secretary General, “Implementing the responsibility to protect”, UN Doc. A/63/677 (2009).

<sup>141</sup> *Ibidem*, § 3.

<sup>142</sup> *Ibidem*, § 10.

though: The first step shall always consist of the responsibility of each individual state to rectify the grave humanitarian situation in its own territory.<sup>143</sup> Should this prove inadequate, the international community is supposed to peacefully assist the state in protecting its civilians through measures such as confidential or public persuasion, education and training.<sup>144</sup> Merely in a third step the RtP requires timely and decisive response, which can only take place after authorization by the Security Council.<sup>145</sup> Notably, the Secretary puts much emphasis on the invention of an early warning capacity within the UN-system.<sup>146</sup> This report was presented prior to the Assembly debate and therefore served as common starting point for discussion of the RtP.

*- The Debate in the Assembly*

During the 2009 General Assembly debate dedicated to the follow up of the Millennium Summit, 94 speakers, representing 180 member states of the UN and two observer missions submitted their opinions on the question of a RtP.<sup>147</sup>

Some supporters of the RtP had remained anxious about its outcome and feared that the concept would be further diluted by mere diplomatic promises. However, there in fact emerged a generally positive reaction towards the doctrine of RtP from within the plenum. The vast majority of participating states aligned themselves with the opinion proposed of the Secretary-General that responsibility works as an ally of sovereignty.<sup>148</sup>

Only some states denounced the RtP as a mere tool of powerful hegemons to subject developing states,<sup>149</sup> equal to humanitarian inter-

<sup>143</sup> Cf. *ibidem*, §§ 13 *et seq.*

<sup>144</sup> Cf. *ibidem*, §§ 28 *et seq.*

<sup>145</sup> Cf. *ibidem*, §§ 49 *et seq.*

<sup>146</sup> Cf. *ibidem*, §§ 65 and Annex.

<sup>147</sup> See UN General Assembly, 63<sup>rd</sup> session, 97<sup>th</sup> plenary meeting, UN Doc. A/63/PV.97 (2009), UN Doc. A/63/PV.98 (2009), UN Doc. A/63/PV.99 (2009), UN Doc. A/63/PV.100 (2009) and UN Doc. A/63/PV.101 (2009).

<sup>148</sup> Cf. *besides others* the statements of the United States of America, UN Doc. A/63/PV.97, p. 17 and India, available online at [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org), p. 3.

<sup>149</sup> See e.g. statements of the Democratic People's Republic of Korea, UN Doc. A/63/PV.100, p. 18; Sudan, UN Doc. A/63/PV.101, p. 10; Nicaragua, UN Doc. A/63/PV.100, p.

vention.<sup>150</sup> Also the President of the General Assembly, Mr. D'Escoto Brockmann in his opening speech took a very sceptical approach and admonished the world community that other problems, especially underdevelopment and flawed mechanisms within the Security Council had to be solved first, before attempting to install a general international responsibility to intervene.<sup>151</sup> Moreover, several other states generally supportive of the doctrine warned of double standards.<sup>152</sup>

What seems especially pertinent for the topic of this essay is that several states argued the RtP did not constitute a new legal norm, but that the obligations comprised by it were already existing and rooted in other international instruments.<sup>153</sup> Various advocated that there exists the fundamental responsibility to prevent mass atrocities under current international law.<sup>154</sup> On the other hand, some claimed that the RtP was not a binding commitment,<sup>155</sup> but a political or moral call.<sup>156</sup>

However, a consensus that emerged from within the vast majority of states was that the task for the future was not to renegotiate the outcome of the 2005 World Summit but implementation of the RtP.<sup>157</sup> It was re-

13; Venezuela, A/63/PV.99, p. 3; Cuba, available online at [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org), p. 2.

<sup>150</sup> See statements of Pakistan, UN Doc. A/63/PV.98, p. 4; Sudan, UN Doc. A/63/PV.101, p. 10/11 *even referring to the Treaty of Westphalia and linking the RtP to the 2<sup>nd</sup> World War*.

<sup>151</sup> See UN Doc. A/63/PV.97; p. 3; also statement of Pakistan, UN Doc. A/63/PV.98, p. 3; Sri Lanka, UN Doc. A/63/PV.100, p. 2 and Sudan, UN Doc. A/63/PV.101, p. 11; Venezuela, A/63/PV.99, p. 4/5.

<sup>152</sup> See statements of China, UN Doc. A/63/PV.98, p. 24; Serbia, UN Doc. A/63/PV.101, p. 13; Egypt (on behalf of the Non-Aligned Movement), UN Doc. A/63/PV.97, p. 5.

<sup>153</sup> See statements of Argentina, UN Doc. A/63/PV.101, p. 9; the Philippines, UN Doc. A/63/PV.97, p. 11; New Zealand, UN Doc. A/63/PV.97, p. 25.

<sup>154</sup> *Cf.* Statement of Republic of Korea, UN Doc. A/63/PV.97, p. 20; Jamaica (on behalf of the Caribbean Community), UN Doc. A/63/PV.100, p. 7.

<sup>155</sup> See statements of Singapore, UN Doc. A/63/PV.98, p. 7; Nicaragua, UN Doc. A/63/PV.100, p. 12; Cuba, available online at [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org), p. 1.

<sup>156</sup> See statements of Cameroon, UN Doc. A/63/PV.101, p. 15; Brazil, UN Doc. A/63/PV.97, p. 13; New Zealand, UN Doc. A/63/PV.97, p. 26.

<sup>157</sup> *E.g.* Sweden (speaking on behalf of the EU) UN Doc. A/63/PV.97, p. 4; France, UN Doc. A/63/PV.97, p. 9; New Zealand, UN Doc. A/63/PV.97, p. 24; Morocco, UN Doc. A/63/PV.98, p. 13; Singapore, UN Doc. A/63/PV.98, p. 7; Indonesia, UN Doc. A/63/PV.97, p. 8.

ferred to the fact that one of the obstacles of effective realisation is the lack of exact definition of its prerequisites, scope and means.<sup>158</sup> It therefore seems strongly conducive to implementation that virtually all states saw the scope of the RtP as restricted to the four crimes mentioned in the World Summit.<sup>159</sup> But also some other avenues for putting the doctrine into action were routinely mentioned: besides others accelerated ratification and domestication of ICC Statute as well as improving transparency and the promotion of good governance.<sup>160</sup> For an institution often as deeply divided as the UN this seems as a welcome outcome.<sup>161</sup>

Yet, again, aside from international crimes, no specification concerning the triggers of a RtP were agreed upon. Furthermore, the pivotal question of the role of the Security Council within the concept of RtP and its interrelationship with other organs of the UN did not find a consensual solution. After the debate it is still not clear if the use of force in case of the latter's inaction could ever be justified. In consequence, the final resolution of the General Assembly only recalls the World Summit and "decides to continue its consideration of the responsibility to protect".<sup>162</sup> This outcome might be one of the reasons why the Secretary-General, in his recent report on Human Security, whilst openly referring to the RtP as a commonly known phrase and dedicating a whole paragraph to it, uses

<sup>158</sup> Cf. statements of Morocco, UN Doc. A/63/PV.98, p. 12; Venezuela, UN Doc. A/63/PV.99, p. 5.

<sup>159</sup> See statements of Brazil, UN Doc. A/63/PV.97, p. 12; Morocco, UN Doc. A/63/PV.98, p. 13; China, UN Doc. A/63/PV.98, p. 13; Pakistan, UN Doc. A/63/PV.98, p. 3; Singapore, UN Doc. A/63/PV.98, p. 7; Sweden (speaking on behalf of the EU), UN Doc. A/63/PV.97, p. 4; *lonely voice intending to enlarge the RtP also to cases of natural disasters* - France, UN Doc. A/63/PV.97, p. 9.

<sup>160</sup> See statements of France, UN Doc. A/63/PV.97, p. 10; United Kingdom, UN Doc. A/63/PV.97, p. 7; Argentina, UN Doc. A/63/PV.101, p. 9; Japan, UN Doc. A/63/PV.98, p. 21.

<sup>161</sup> Global Centre for the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment, August 2009, available online at [http://globalr2p.org/media/pdf/GCR2P\\_General\\_Assembly\\_Debate\\_Assessment.pdf](http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf) (last visited 12 May 2010); cf. also Thakur, R., Responsibility to protect is universal, Daily Yomiuri online, 17 November 2009, available at <http://www.yomiuri.co.jp/dy/columns/commentary/20091117dy01.htm> (last visited 12 May 2010).

<sup>162</sup> UN Doc. A/RES/63/308 (2009).

a very cautious language when saying that the “use of force is not envisaged in the application of the human security concept”.<sup>163</sup>

### b. Reaction to International Humanitarian Conflicts

Particularly the situation in Darfur with about 2.7 million refugees,<sup>164</sup> is considered a touch-stone of how the international community lives up to its commitments.<sup>165</sup> S/RES/1706 (2006) on the humanitarian situation in Sudan also recalls paras 138 and 139 of the World Summit Outcome. Finally, hybrid peace missions were sent.<sup>166</sup> These troops, however, are deployed with the consent of the Bashir government, poorly equipped and the security situation has severely deteriorated.<sup>167</sup> On the other hand side, the deployment of UN troops after the turmoil in Kenya in 2008 seems to constitute an example for a successful implementation of the RtP after 2005.<sup>168</sup>

Yet, there exist similar precarious situations in Congo, Cambodia and Uganda, just to name some of them, where the international community has so far not been able to halt the massive human suffering.<sup>169</sup> No matter of how one will judge upon the progress made in these regions, no

<sup>163</sup> Report of the Secretary-General on Human Security, UN Doc. A/64/701 (2010), § 23.

<sup>164</sup> Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2009/83 (2009), § 48.

<sup>165</sup> Cf. Matthews, M., “Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur”, 31 *Boston College International and Comparative Law Review* (2008) 138, p. 138; Delcourt, B., “La Responsabilite de Proteger et L’Interdiction du Recours a la Force: Entre Normativite et Opportunite”, in *Societe Francaise pour le droit international* (ed.), *Colloque de Nanterre. La Responsabilite de Proteger*, Paris, Editions Pedone, 2008, p. 307; Hamilton, *supra* note 93, p. 293.

<sup>166</sup> Cf. UN Doc. S/RES/1769 (2007).

<sup>167</sup> Report of the Secretary-General concerning the Darfur-Operation, *supra* note 164, § 31; cf. also Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2010/50 (2010).

<sup>168</sup> Interview with Edward Luck, UN Special Adviser for the RtP, *Frankfurter Allgemeine Zeitung*, 18 May 2008; Evans, RtP, *supra* note 30, p. 51; Secretary-General Report, Implementing the RtP, *supra* note 140, § 11 (c).

<sup>169</sup> Cf. Clapham, *supra* note 54, p. 190; 5703<sup>rd</sup> Meeting of the Security Council, John Holmes, Under-Secretary-General for Humanitarian Affairs, More and more innocent civilians caught in conflict, UN Doc. SC/9057 (2007).

military intervention has been explicitly based on the RtP since the World Summit.<sup>170</sup>

#### D. RtP and Deductive Reasoning

It has increasingly been called into question if the mere lack of consistent state practice can hinder basic principles, accepted by the vast majority of states, from crystallizing into positive international law. The rules of international humanitarian law were frequently violated during the last years, somehow paradoxically they nevertheless did not loose on their normative strength.<sup>171</sup> They seem to show that there exist basic values of mankind, which are legally authoritative regardless of a completely consistent state practice.<sup>172</sup>

Therefore, according to some scholars, the “old“ way of inductive reasoning nowadays is superposed by a value-led process of evolution of customary international law.<sup>173</sup> As a consequence, since the importance of the element of state practice in comparison to the element of *opinio juris* is diminished,<sup>174</sup> conflicting behaviour of individual states cannot forestall the development of customary international law. This could also hold true for the RtP, as it seeks to protect fundamental human rights and there exists a broad consensus about the abominability of international crimes.

Yet, even rules of international law derived by deductive reasoning cannot completely contradict state practice and evolve in opposition to the will of the majority of states.<sup>175</sup>

<sup>170</sup> Verlage, *supra* note 70, p. 97.

<sup>171</sup> Sur, *supra* note 137, p. 299 *et seq.*

<sup>172</sup> Cf. Tomuschat, *supra* note 90, p. 300; Francioni, *supra* note 4, p. 282.

<sup>173</sup> Tomuschat, *ibid.*, p. 294 *et seq.*; Rensmann, *supra* note 73, p. 115.

<sup>174</sup> Rensmann, *ibid.*, p. 114; Herdegen, M., “Die Dynamik des Völkerrechts als Methodenfrage”, in Dupuy, P.-M. *et al.* (ed.), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat*, Kehl, N.P. Engel Verlag, 2006, p. 909; Tomuschat, *ibidem*, p. 299; *in this direction* ICJ, *Nicaragua*, *supra* note 105, § 186; *with reference to jus cogens* Clapham, *supra* note 54, p. 186.

<sup>175</sup> Tomuschat, *cit.*, p. 307; Herdegen, *ibid.*, p. 911.

### E. *Interim Conclusions*

If a concept is expressly endorsed by 192 states, while it seemed impossible to find even a minimal consensus concerning issues like disarmament and weapons of mass destruction, this represents a significant step, which cannot remain without consequences.<sup>176</sup> Hence, the World Summit can be read as indicative for *opinio juris* in favor of the RtP. Even if states will generally remain reluctant to impose duties upon themselves,<sup>177</sup> they continuously introduced the RtP in their foreign relations, even after 2005. The creation of the post of a Special Advisor on the Prevention of Genocide and the appointment of Edward Luck as United Nations Secretary-General's Special Adviser for the RtP<sup>178</sup> are evidence of its growing implementation into the UN framework.<sup>179</sup> Also four years after, the vast majority of the world community openly approved the principle of RtP and first attempts to put the doctrine into action were considered.

This, however, finds its limit when it comes to the use of force. Taking into account Art. 2 para. 4 UN Charter as an expression of consensus among the nations, the reservations contained in the HLP-Report, the genesis of the Summit Outcome Document as well as the General Assembly debate in 2009 no sufficiently wide *opinio juris* sanctioning an erosion of the Security Council monopoly on the use of force can be discerned.<sup>180</sup>

Moreover, in the highly sensitive area of military intervention a firm and consistent practice is needed in order to supplant the non-interven-

<sup>176</sup> Cf. Report of the Secretary-General, Implementing the RtP, *supra* note 140, § 4; Schaller, *supra* note 11, p. 12; Evans, RtP, *supra* note 30, p. 49; Herdegen, Völkerrechtliche Maßstäbe *supra* note 107, p. 352; Clapham, *supra* note 54, p. 175.

<sup>177</sup> Also Rodin, *supra* note 19, p. 50.

<sup>178</sup> UN Department of Public Information, Secretary-General appoints Edward C. Luck of United States Special Adviser, UN Doc. SG/A/1120 (2008).

<sup>179</sup> Cf. Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/721 (2007); Hamilton, *supra* note 93, p. 295.

<sup>180</sup> Cf. ICJ, *Nicaragua*, *supra* note 105, § 268; Bothe, M., Idee und Funktion eines Argumentationstopos: historische und aktuelle Hintergründe der "humanitären Intervention", in Bruha, Heselhaus & Maruhn (eds.), *Legalität, Legitimität und Moral. Können Gerechtigkeitspostulate Kriege rechtfertigen?*, Tübingen, Mohr Siebeck, 2008, pp. 149, 151, 154.

tion principle.<sup>181</sup> It is admitted that that the RtP forms a fairly young concept lacking attention especially for its preventive component.<sup>182</sup> Its invocation by the Security Council represents an important step into the direction of its implementation, which, however, *de facto* has not taken place. In conclusion, the RtP is not generally accepted as customary international law, yet.<sup>183</sup>

#### 4. *General Principles of International Law, Art. 38 para. 1 lit. c ICJ Statute*

What will be argued here is that the RtP constitutes a general principle of international law pursuant to Art. 38 para. 1 lit. c ICJ Statute.

##### A. *The “Domestic” Approach to General Principles*

What is generally understood by the term of general principles are principles known to the national legal orders of most states.<sup>184</sup> Nowadays, a constitution not providing for core human rights guarantees, is hardly thinkable<sup>185</sup> and protective or positive duties are part of a multitude of legal orders.<sup>186</sup>

##### B. *The “International” Approach to General Principles*

Yet, most importantly, the formation of general principles is not confined to the *foro domestico* any more.<sup>187</sup> As opposed to customary inter-

<sup>181</sup> Schaller, *supra* note 11, p. 14.

<sup>182</sup> Molier, G., Humanitarian Intervention and the Responsibility to Protect after 9/11, 53 *Netherlands International Law Review* (2006) 37, p. 48; Bellamy, *supra* note 34.

<sup>183</sup> Delcourt, *supra* note 165, p. 306.

<sup>184</sup> Herdegen, *Völkerrecht*, *supra* note 91, Chapter 17, § 1.

<sup>185</sup> Thürer, D., *Kosmopolitisches Staatsrecht*, Berlin, Berliner Wissenschaftsverlag, 2005, p. 6.

<sup>186</sup> Cf. Szczekalla, P., *Die sog. Grundrechtlichen Schutzpflichten im deutschen und europäischen Recht. Inhalt und Reichweite einer “gemeineuropäischen Grundrechtsfunktion”*, Berlin, Duncker & Humblot, 2002, p.1148; Rensmann, T., *Wertordnung und Verfassung. Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung*, Tübingen, Mohr Siebeck, 2007, p. 161 *et seqq.*

<sup>187</sup> Simma/Alston, *supra* note 74, p. 102, 105; Petersen, *supra* note 4, p. 513; cf. Kadebach/Kleinlein, *supra* note 29, p. 340.

national law, for the emergence of general principles state practice is not constitutive but only state consent.<sup>188</sup> Since international law has changed from a system of coordination to one of cooperation,<sup>189</sup> today it is possible to discern state consensus by deferring to expressions of consent of the international community such as resolutions of the General Assembly, abstract ideas derived from treaty law<sup>190</sup> as well as judgements of international courts and statements of state representatives.<sup>191</sup> The ICJ repeatedly referred to general principles for anchoring humanitarian protection systems in international law.<sup>192</sup>

In the emerging international community various values have to be reconciled.<sup>193</sup> Operating on the international plane, general principles now transform extra-positive fundamental considerations of reason into positive law<sup>194</sup> thereby granting to states a fair amount of digression of how to weigh them against each other. Due to their norm-connecting character general principles defy easy definition.<sup>195</sup> This is also owed to their permanent development and concretion through application to particular cases,<sup>196</sup> which brings flexibility to the international order.<sup>197</sup>

### 5. *Interim Conclusion – the Positive Legal Status of the RtP*

As seen above, the constituent elements of the principle of RtP can be found in human rights covenants, especially the Genocide Convention, international humanitarian law and the UN Charter and are engrained in basic values of a developing international community. The RtP, as syn-

<sup>188</sup> Simma/Alston, *ibid.*, p. 104; Petersen, *ibid.*, p. 512; Kadelbach/Kleinlein, *ibid.*, p. 341.

<sup>189</sup> Cf. Friedman, W., *The Changing Structure of International Law* (1964); Petersen, *cit.*, p. 521; Kadelbach/Kleinlein, *cit.*

<sup>190</sup> Petersen, *cit.*, p. 512.

<sup>191</sup> Kadelbach/Kleinlein, *supra* note 29, p. 340.

<sup>192</sup> Cf. ICJ, *Corfu Channel Case*, *supra* note 64, p. 22; ICJ, *Reservations Case*, *supra* note 61, p. 23; ICJ, *Barcelona Traction*, *supra* note 72, p. 32, § 34.

<sup>193</sup> Petersen, *supra* note 4, p. 522; Kadelbach/Kleinlein, *supra* note 29, p. 338.

<sup>194</sup> Simma/Alston, *supra* note 74, p. 102, 105; Kolb, R., Principles as Sources of International Law, 53 *Netherlands International Law Review* (2006) 1, p. 29.

<sup>195</sup> Cf. Kolb, *ibid.*, pp. 27, 30.

<sup>196</sup> Cf. *ibid.*, pp. 27, 30.

<sup>197</sup> Petersen, *supra* note 4, pp. 509, 519.

thesis of current developments of the law on the use of force,<sup>198</sup> tries to reconcile these basic values of international law.

Due to its lack of consolidation in customary international law, in particular its only scarce practical implementation, its contours are poorly defined and cannot be assessed in isolation but only be described by additional norms of international law. A conception as merely declaratory,<sup>199</sup> however, fails to acknowledge the RtP's broad acceptance by states and the UN. Several attempts of implementation by the Security Council are remarkable for such an altruistic concept.<sup>200</sup> Exactly this middle position between *lex lata* und *lex ferenda* is distinctive for general principles of international law. Hence, the RtP represents more than a mere political declaration,<sup>201</sup> but can be evaluated as a general principle of international law.

Yet, a responsibility to protect outside the UN Charter mechanism is not part of international law.<sup>202</sup> Due to lack of consensus within the international community, the RtP has not led to a change concerning the monopoly of the Security Council for the authorization of the use of force.<sup>203</sup> Neither when looking to treaty law nor to the opinion or practice of states an erosion of the prohibition of the use of force can be discerned.

#### IV. CONSEQUENCES-ADDITIONAL VALUE OF THE RTP

Even if the principle of RtP is still too vague to entail specific duties,<sup>204</sup> other consequences can flow from it.

On the one hand, the idea of sovereignty as responsibility is fit into a broader concept and transposed to the international plane, potentially

<sup>198</sup> Llorens, *supra* note 90, p. 319; Szurek, *supra* note 79, p. 93; Thakur, *supra* note 10, p. 255.

<sup>199</sup> *As* Matthews, *supra* note 165, p. 137 *argues*.

<sup>200</sup> *Cf.* Von Arnould, *supra* note 8, p. 26.

<sup>201</sup> Winkelmann, *supra* note 18, p. 460; Stahn, *supra* note 80, p. 110; Brunée, *supra* note 80, p. 51.

<sup>202</sup> Clapham, *supra* note 54, p. 185.

<sup>203</sup> *Cf.* Llorens, *supra* note 90, p. 325; Hilpold, *supra* note 18, p. 38; Schaller, *supra* note 11, p. 13; Report of the Secretary-General, Implementing the RtP, *supra* note 140, § 3; Clapham, *supra* note 54, p. 185.

<sup>204</sup> *Also* Bothe, Humanitäre Intervention, *supra* note 180, p. 327; Schaller, *ibid.*; Verlage, *supra* note 70, p. 223; *seemingly of another opinion* Szurek, *supra* note 79, p. 114.

having a catalytic impact on its implementation.<sup>205</sup> Constituting a holistic concept, the RtP puts emphasis on the preventive rather than the reactive answer to conflicts,<sup>206</sup> a component lately neglected within the UN system.<sup>207</sup> Moreover, by endorsing the concept of RtP, all UN member states implicitly accepted the authority of the Security Council to declare grave human rights violations even without trans-boundary effects as a threat to international peace and security.<sup>208</sup>

The main advancement, however, will be a reversal of the burden of proof. After the crystallization of the RtP into a principle of international law the pressure of justification for states in cases of inaction in the face of clear signs of impending atrocities has become stronger.<sup>209</sup> The legal limits of power of the Security Council, which also under the doctrine of RtP holds the sole authority on mandating the use of force, are disputed.<sup>210</sup> A curtailment of the veto power is highly improbable.<sup>211</sup> However, the task to maintain international peace and security also comprises a fiduciary responsibility to protect, from which a factual diminution of discretion can flow.<sup>212</sup> The more its implementation will advance, the more each member state of the Security Council will have to explain under good faith aspects why it did not invoke the RtP in one situation while it brought in this notion in other cases. This could eventually lead to the emergence of firm criteria for intervention under the doctrine of RtP.

## V. THE WAY AHEAD

The outcome of this analysis will be disappointing for those accusing the Security Council of its undemocratic composition, decisions led by pure-

<sup>205</sup> Condorelli, *supra* note 95, p. 316.

<sup>206</sup> ICISS-Report, *supra* note 12, p. 23; HLP-Report, *supra* note 33, § 200; World Summit Outcome, *supra* note 39, §§ 138, 139.

<sup>207</sup> Molier, *supra* note 182, p. 48.

<sup>208</sup> *Cf.* Wheeler, *supra* note 104, p. 101; Verlage, *supra* note 70, p. 227 *et seq.*

<sup>209</sup> Verlage, *ibid.*, p. 250 *et seq.*

<sup>210</sup> *Cf. only* Fassbender, "The Security Council, Its Powers and Legal Control", *EJIL* (2000), 219.

<sup>211</sup> Sur, *supra* note 137, p. 303; *cf.* Franck, Collective Security, *supra* note 117, p. 26; Schaller, *supra* note 11, p. 14.

<sup>212</sup> Herdegen, *Völkerrechtliche Maßstäbe*, *supra* note 181, p. 356; Verlage, *supra* note 70; *cf.* Wheeler, *supra* note 104, p. 107.

ly national interests and paralysis in the face of humanitarian disasters.<sup>213</sup> However, maybe the mistake is to consider the veto-power as the only obstacle to an effective RtP implementation. International law is still formed by states,<sup>214</sup> and no authorization will be issued without states ready to intervene.<sup>215</sup> Much too often, the political will to react and therefore to have to explain one's actions domestically was lacking on behalf of the latter.<sup>216</sup> However, these are the limits of the power of law; the legal quality of the RtP will eventually be gauged by its implementation.<sup>217</sup> If the gap between law and felt justice becomes too wide, international law cannot enforce its protective function.<sup>218</sup> If the international community does not want to face a situation of states attempting to change the law by continuously breaching it,<sup>219</sup> it will have to embrace the moral as well as legal call of the RtP within the system of collective security. Since for all those people suffering from humanitarian crises across this world it will not prove helpful if we will still have to confess:

*“No century has had better norms and worse realities”.*<sup>220</sup>

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<sup>214</sup> Hilpold, *supra* note 18, p. 37.

<sup>215</sup> Heselhaus, *supra* note 10, p. 223.

<sup>216</sup> Carlsson-Report, *supra* note 1, p. 3, 32, 36, 41; cf. Bothe, *supra* note 180, p. 328; Wheeler, *supra* note 104, p. 104; Clapham, *supra* note 54, p. 191; Thakur, *supra* note 10, p. 245.

<sup>217</sup> Report of the Secretary-General, Implementing the RtP, *supra* note 140, § 2; Clapham, *ibid.*

<sup>218</sup> Franck, *Legality and Legitimacy*, *supra* note 90, p. 145; Herdegen, *Völkerrechtliche Maßstäbe*, *supra* note 181, p. 353; HLP-Report, *supra* note 33, p. 64, § 204.

<sup>219</sup> Cf. *the concept of* Cassese, *supra* note 102; Francioni, *supra* note 4, p. 279; Condo-relli, *supra* note 95, p. 316.

<sup>220</sup> Rieff, D., *A Bed for the Night. Humanitarianism in Crisis*, New York, Simon & Schuster, 2002, p. 70.

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