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THE RESPONSIBILITY TO PROTECT

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SUMMARY

The responsibility to protect has succeeded humanitarian intervention as the primary conceptual framework within which to consider international intervention to prevent the commission of mass atrocity crimes. First conceived in 2001, the doctrine has obtained international recognition in a remarkably short time. Its acceptance by the UN World Summit of political leaders in 2005, and later by the UN Security Council, provided the foundation for its further elaboration in international relations theory and political practice. This chapter provides the background to the new doctrine's appearance with a survey of the existing law and practice with respect to humanitarian intervention. It traces the responsibility to protect's subsequent intellectual and political development both before and after the adoption of the World Summit resolutions that embodied it. This analysis discloses that debate about the doctrine has been characterized by significant differences of opinion and interpretation between nations of the North and the South. In that context, the chapter concludes with a detailed consideration of the contemporary standing of the doctrine in international law.

I. INTRODUCTION

The genocide in Rwanda and ethnic cleansing in the Balkans left the international community's political leadership with a formidable dilemma. Plainly, the international community could no longer stand by while mass atrocities were committed. The cost in human rights and human life was simply too great. At the same time, however, the UN Charter's core commitment to national sovereignty seemed an insuperable obstacle to international intervention in conflicts that took place entirely within the boundaries of a State. Non-interference in a nation's domestic affairs remained still the cardinal rule underpinning the global legal order. If, therefore, the call 'never again' were to be made meaningful, new thinking and greater resolve were needed to chart the perilous waters between these apparently irreconcilable legal principles and political commitments.

The dilemma itself was not new. Debates about humanitarian intervention had taken place over centuries (Chesterman, 2001, Ch 1). Nevertheless, the impetus had seemed greater. The scale of recent atrocities, not least in Kigali and Srebrenica, had shocked the world's conscience. And the widespread and rapid acceptance of the understanding that individuals, just as much as States, should be regarded as the subjects of international law and, therefore, that they were deserving of its protection, had elevated human rights concerns to the top table of international political, legal and academic deliberation (Alston and MacDonald, 2008; Fabri, 2008; Peters, 2009).

It was largely by way of cracking that seemingly intractable problem that the idea that nations individually have a responsibility to protect their own citizens and that collectively they may take action to protect those in peril elsewhere has recently been developed and elaborated.[1] As I will argue presently, the 'responsibility to protect' (R2P) has not yet crystallized into a norm of international law. Yet its advance as a widely considered and broadly accepted political doctrine has been remarkably rapid. In the remainder of this chapter I trace this advance and assess the doctrine's contemporary legal and political standing. To do that effectively, however, it may help to contextualize the issue by examining briefly the legal position with respect to its predecessor conception—humanitarian intervention (see Evans, 2006; Janssen, 2008; Evans, 2009).

II. HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

The *prima facie* position with respect to military interventions undertaken for humanitarian reasons appears to be as follows.[2] Pursuant to Article 2(4) of the United Nations (UN) Charter:

> All states shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purpose of the United Nations

This injunction against the use of force is reinforced by the terms of Article 2(7) which declares: 'Nothing in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state'. The principle of non-intervention, together with that of the sovereign equality of States, is designed to ensure that each State respects the prerogatives and entitlements of every other State.

There are only two exceptions in the Charter to the Article 2(4) prohibition. First, Chapter VII of the Charter empowers the Security Council to authorize the use of force in response to threats and breaches of international peace and security. Pursuant to Article 39, therefore, the Security Council may make recommendations as to what measures, including the use of armed force, should be taken to address an identified threat to

[1] See the International Commission on Intervention and State Sovereignty (2001), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa: International Development Research Centre.

[2] See generally, Chesterman, 2001, ch 2; Farer, 2003; Franck, 2003; Wheeler, 2004; Welsh, 2004; Triggs, 2006, p 598; Gray, 2008, p 33.

international peace and security or to any act of aggression. Secondly, in accordance with Article 51, member States of the United Nations may take measures, whether individually or collectively, in pursuit of their inherent right to self-defence should they be subject to armed attack. Such action in self-defence may continue until the Security Council itself has instituted whatever further measures are necessary to maintain international peace and security.

When laid down plainly in this way, it is apparent that the express terms of the Charter do not readily embrace either humanitarian intervention or a responsibility to protect. The principle of non-intervention stands steadfastly in their path. The UN Declaration on Friendly Relations of 1970 states the duty in similar and compelling fashion:[3]

> No State or group of states has the right to intervene directly, or indirectly, for any reason whatsoever in the international external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.

Of course, the Charter's provisions are capable of competing interpretations. These can occupy the full spectrum from the literal to the liberal. International lawyers, for example, have argued that, despite what appear to be the plain words of the Charter text, a doctrine of humanitarian intervention may be insinuated into its interstices (Chesterman, 2001, p 47; Farer, 2003; Holzgrefe, 2003, p 53). One argument that has been made is that Article 2(4) prohibits the use of force only against 'the territorial integrity or political independence of a state'. If, therefore, force is used in the pursuit of some other objective, particularly one that is consistent with the objects of the Charter, it may be permissible. A humanitarian intervention, properly conducted, may pose no long-term threat either to the territorial integrity or political autonomy of a State. Its sole purpose may be said to be to prevent the further commission of atrocities pending the restoration of stability.

Such an interpretation faces great difficulty, however, because it creates the prospect of a damaging ambiguity in the Charter's interpretation. Even a brief look at the *travaux preparatoire*, as a means of resolving such an ambiguity, demonstrates clearly that such an adventurous interpretation of the qualification has little if any plausible foundation. Instead, the original aim of the non-intervention principle appears to have been to protect smaller States and the words 'territorial integrity and political independence' were added as supplements to, not as detractions from, the general prohibition on the use of force (Triggs, 2006, p 569).

Next, it may be suggested that the use of force is permitted so long as it is not, in the terms of Article 2(4), 'in any other manner inconsistent with the purposes of the United Nations'. Clearly, if the objective of the intervention is to prevent gross violations of human rights, it could not be said to be anything other than consistent with the Charter's fundamental purposes. The argument runs into immediate problems, however, not the least of which is that even if the disputed intervention is aimed at protecting and preserving the human rights of the afflicted people of a nation, the Charter's express prohibition of infringements

[3] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, October 1970, Article 1.

upon the territorial integrity and political independence of a sovereign State still stands. It is unlikely that a vague reference to humanitarian purpose is sufficient to displace it.

Alternatively, a right or obligation of humanitarian intervention may arise in consequence of its progressive acceptance as part of customary international law (Cassese, 1999; Chesterman, 2001, Ch 2; Corten, 2008). There are significant methodological and practical problems, however, that stand in the path of humanitarian intervention's recognition as a customary rule. The International Court of Justice, for example, has had only limited opportunity to develop the rules governing the use of force.[4] In so far is the Court has considered the matter, it has come down steadfastly against any broadly applicable doctrine of permissible intervention. Nations themselves are not often clear or straightforward about their motivations for acting and mix legal justifications with political and security concerns in a way that makes the interpretation of State action an uncertain exercise. The UN's norm-creating bodies, in particular the Security Council and General Assembly, may not always be at one in their judgment of events, raising complex questions about the weight to be given to the opinions of each and the relative merits of both.

Such methodological difficulties have plainly been present in the most recent examples of international military interventions claimed to have had an humanitarian foundation. These are worth examining more closely. Two classes of case may be identified: those where the UN Security Council has sanctioned purported humanitarian interventions and those where it has not.

A. INTERVENTION WITH SECURITY COUNCIL AUTHORIZATION

In the first category are the cases of international intervention in Somalia, Rwanda and Bosnia (Weiss, 2007, p 27; Evans, 2008). The Somali operation was justified principally on the basis that the obstacles being placed in the way of urgently required humanitarian assistance to the country's distressed population were, in the opinion of the Security Council, such as to constitute a threat to international peace and security. The Council, therefore, authorized the international community pursuant to Chapter VII to use all necessary means to establish a secure environment for international relief operations.[5] The UN Secretary-General later expressed his opinion that the Somali operation constituted a new precedent for the Council. It had, for the first time, authorized a military intervention for purely humanitarian purposes.[6]

All too late, the Security Council authorized French military intervention to prevent further mass atrocities in Rwanda. It had previously determined that the Rwandan genocide had constituted a threat to international peace and security and therefore that safe-havens were required for those fleeing the genocide. In its primary resolution the Council also referred specifically to the wider disruption to cross-border security that had been created by the mass internal displacement of Rwandan citizens. Again, the Council authorized all necessary means to achieve the primary humanitarian objective. To that end, it instructed the French interveners to create a safe haven in which those fleeing the wider conflict could

[4] See in particular *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, ICJ Reports 1986*, p 14; *Legality of Use of Force (Yugoslavia* v *Belgium), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999*, p 124.

[5] SC Res 794 (3 December 1992). [6] [1993] *UNYB* 51.

find security.[7] The French were also clear that any intervention on their part had to be founded upon the Security Council's mandate, even if delay were the result.[8]

The Security Council's many resolutions in relation to Bosnia and Herzegovina were directed principally at ending civil conflict consequent upon the dissolution of the former Yugoslavia rather than having a primarily humanitarian objective, although the latter remained significant. Resolution 770 (1992), for example, called upon States to take the measures necessary to facilitate the delivery of humanitarian and assistance to Sarajevo and other parts of the country as needed. It went further to authorize the UN intervention force to act in self-defence where necessary in order to reply to bombardments of established safe havens or to armed incursion into them and to take all necessary measures including the use of air power in and around the internationally protected safe areas to support its protective objective.[9] Again these resolutions proceeded from the Council's earlier determination that the conflict in Bosnia-Herzegovina constituted a threat to international peace and security.

These three cases suggest that since 1990, a highly circumscribed recognition of a right of humanitarian intervention may have been developing gradually within customary international law. The legal preconditions for such a nascent right were first that an existing or potential humanitarian catastrophe must be identified. Secondly, the catastrophe and its wider effects must be such as to constitute, in the opinion of the Security Council, a threat to international peace and security. Thirdly, the Security Council must explicitly authorize any subsequent military intervention. Fourthly, and implicitly, the authorization and conduct of the intervention must be an act of last resort (see Gazzini, 2005, p 174; Corten, 2008, p 106).

B. INTERVENTION WITHOUT SECURITY COUNCIL AUTHORIZATION

Following the defeat of the Iraqi army in Kuwait and its subsequent withdrawal from that country, in 1991 the Kurdish peoples in the north of the country sought to assert their right to political independence. This uprising was met with brute military force by troops loyal to the Hussein regime and, after it was put down, the government embarked upon further, genocidal, repression of the Kurdish population. In response, the Security Council adopted Resolution 688. The resolution condemned the repression of the Iraqi civilian population, demanded that Iraq end this oppression and insisted that Iraq allow international humanitarian organizations immediate access to all those in need of assistance. The Council also appealed to all member States and humanitarian organizations to continue their humanitarian relief efforts. Despite its strong language, however, the resolution did not contain any express authorization for military action pursuant to Chapter VII.[10]

Nevertheless, on the same day, the US administration announced that it would commence dropping food and other forms of material aid over Northern Iraq in partnership

[7] SC Res 929 (22 June 1994).

[8] 40 *Annuaire Francais de Droit International Public* (1998) 429–430.

[9] SC Res 770 (13 August 1992) and see further SC Res 814 (26 March 1993); SC Res 816 (31 March 1993); SC Res 844 (19 June 1993); and SC Res 871 (2 October 1993).

[10] SC Res 688 (5 April 1991).

with France and the United Kingdom. Then, 11 days later when it appeared as if the aid effort was being substantially compromised by mountainous and inhospitable terrain into which the aid was being delivered, President Bush announced unilaterally that US troops would enter Northern Iraq in order to establish safe havens for the beleaguered Kurdish population.

When these interventions were challenged by Iraq in the Security Council, the coalition partners contended that their actions were justified on purely humanitarian grounds. They also sought to establish legal legitimacy for their interventions by arguing that Resolution 688 had provided implicit legal authorization for them. The argument that humanitarian intervention might legally be supported by such implicit authorization was difficult to justify. This was because the express terms of the relevant Resolution did not appear to allow for such an expansive interpretation. The Resolution itself was the first of fourteen that had not been adopted under Chapter VII. And in the Council debates that led to its adoption, the prospect of military intervention had never explicitly been contemplated. However strongly founded in humanitarian concern, then, the arguments put in favour of the right of a State or States to engage unilaterally in humanitarian intervention without express Security Council authorization seemed, at least at that stage, to have only the most tenuous foundation.

The question as to the legality of unilateral humanitarian intervention emerged for consideration again in 1999 in relation to the controversial intervention by NATO in defence of the ethnic Albanian people of Kosovo.[11] So as to protect the Kosovar Albanians from violence and ethnic cleansing at the hands of Serbian forces, NATO conducted some thousands of bombing raids on Kosovo and surrounding areas over several months. Prior to this, the Security Council had adopted three resolutions concerning the deteriorating military and humanitarian situation.

Resolution 1160 condemned the use of excessive force by Serbian police, imposed an arms embargo and expressed support for a political solution based on the territorial integrity of the FRY with greater autonomy for the Kosovar Albanians.[12] Resolution 1199 recognized the deteriorating humanitarian situation, one that had already resulted in numerous civilian casualties and the displacement of 230,000 people from their homes. It declared the situation as one constituting a threat to international peace and security and, acting under Chapter VII, demanded a ceasefire and action to improve the humanitarian position.[13] In Resolution 1203, finally, the Council decided that should the concrete measures it had demanded not be taken, and should Serbia not comply with the terms of the agreement reached with NATO and the OSCE to end the hostilities, it would *consider* further action and additional measures to maintain or restore peace and stability in the region.[14] These resolutions fell far short of authorizing any international military intervention to achieve that aim.

Certainly, the Council had determined that the deterioration of the situation in Kosovo threatened regional peace and security. And, in Resolution 1199, the Council had demanded an immediate end to the hostilities and the maintenance of a ceasefire. It had also demanded immediate measures to avert an imminent catastrophe. Not once, however,

[11] See Simma, 1999; Kritsiotis, 2000; Chinkin, 2000; Bilder, 2008; Gray, 2008, p 39.

[12] SC Res 1160 (31 March 1998).

[13] SC Res 1199 (23 September 1998).

[14] SC Res 1203 (24 October 1998).

had the Council authorized the use of force by the international community in order to advance these objectives. Instead, in Kosovo, NATO took upon itself the task of pursuing and achieving them without further reference to the Council.

The bones of NATO's legal argument were straightforward. The Security Council had adopted resolutions under Chapter VII that demanded that the Yugoslavian authorities halt their brutal repression of ethnic Albanians. The authorities had refused to comply with these resolutions and the prior, brokered agreements to which they referred. Consequently, NATO member States presumed unilaterally to act in support of those resolutions by intervening to prevent further violations.

However forcefully legal arguments in favour of the NATO action were put, formidable obstacles remained in the path of their acceptance. The argument that NATO's intervention was implicitly justified as a means of enforcing prior Security Council resolutions again was weak. This was because the wording of the resolutions did not at all appear to authorize any subsequent unilateral military action and it left for the Council's further consideration any decision as what additional measures might be necessary to pursue and enforce its demands (Corten, 2008). Quite apart from this, the idea that a State or group of States could or should act unilaterally to enforce Council resolutions without any subsequent Council involvement or authorization could open the door to opportunistic interventions of any and every kind.[15] Finally, even if it had been accepted prior to Kosovo that the protection of non-derogable human rights had achieved the status of *jus cogens* and therefore obliged the UN to protect them, it by no means followed that the unilateral employment of military force, outside the UN, to secure them had also become part of customary international law (Alston and MacDonald, 2008).

Taking all this into consideration the conclusion of the Independent Commission Report on Kosovo (2000) is apt:

> Far from opening up a new era of humanitarian intervention the Kosovo experience seems, to this Commission at least, to teach a valuable lesson of skepticism and caution. Sometimes, and Kosovo is such an instance, the use of military force may become necessary to defend human rights. But the grounds for its use in international law urgently need clarification and the tactics and rules of engagement for its use needs to be improved. Finally, the legitimacy of such use of force will always be controversial, and will remain so, as long as we intervene to protect some people's lives but not others.

III. THE BIRTH OF THE 'RESPONSIBILITY TO PROTECT'

In the decade following Kosovo, there have been no significant instances of humanitarian military interventions in which the international community has engaged. State practice, therefore, has provided no further guidance as to the doctrine's further development in international law. At the same time, however, conceptual and political developments have been quick. These political developments have focused not upon humanitarian intervention per se, but rather on a bold endeavour, by those concerned to prevent mass atrocity

[15] See to similar effect the statement by the Permanent Representative of India during Security Council debate, SC/1035 (24 March 1999), p 3 at p 10.

crimes, to craft a new, more thoughtful and more measured doctrine to build upon and at the same time differentiate it from its humanitarian predecessor. In just a few years the idea of humanitarian intervention has been displaced by what has come to be known as the 'responsibility to protect'.

Speaking in an address to the UN General Assembly in 1999, the UN Secretary-General challenged member States to resolve what he saw as the conflict between the principle of non-interference with State sovereignty, embodied in Article 2(4) of the Charter, and the responsibility of the international community to respond to massive human rights violations and ethnic cleansing. He posed what he described as a tragic dilemma. Kofi Annan stated the dilemma as follows:

> To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask... in the context of Rwanda: if in those dark days and hours leading up to the genocide a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Security Council authorization, should such a coalition have stood aside and allowed the horror to unfold?
>
> To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?[16]

To steer between the Scylla and Charybdis of the problem, Annan argued that the Security Council must be able to agree on effective action to defend fundamental human rights. He proposed that the core challenge to the Council in the twenty-first century was: 'To forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand.'[17]

The Secretary-General's call to action met with a mixed and in some quarters hostile response in the General Assembly. Nevertheless, it prompted the Canadian Government, in a singular initiative, to form an international panel of experts, the International Commission on Intervention and State Sovereignty (ICISS), to address the problem thus stated. The Commission consulted widely with governments, non-governmental organizations, inter-governmental organizations, universities and think-tanks. On the basis of these extensive consultations, the Commission produced its final report, *The Responsibility to Protect*.[18] The report radically altered the terms of the ensuing political debate. This it did in three inter-related ways.

First, it re-conceptualized forcible international action in defence of peoples at risk of mass atrocity. The international community would no longer engage in 'humanitarian intervention' but would instead exercise a broader 'responsibility to protect' nations at risk of failure and descent into violence. Secondly, the new approach attributed primary

[16] Address by Kofi Annan to the 54th Session of the UN General Assembly, 20 September 1999.

[17] Ibid.

[18] International Commission on Intervention and State Sovereignty (2001), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa, International Development Research Centre.

responsibility for taking action to prevent humanitarian disaster upon the sovereign government of the nation in which might occur. Only if and when that responsibility had not been exercised would the larger global community's parallel responsibility to intervene in the national and international interest be engaged. Thirdly, new rules of engagement should be developed to ensure that any such intervention would have the maximum possible opportunity for success (see Acharya, 2002; Evans and Sahnoun, 2002; Thakur, 2006; Bellamy, 2008a).

The Commission asserted, more in hope than expectation given its novelty, that the 'responsibility to protect' reflected an emerging norm of international law and behaviour:

> Based on our reading of state practice, Security Council precedent, established norms, guiding principles, and evolving customary international law, the Commission believes that the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds.[19]

As to the vexed question of military intervention, ICISS recommended that it should take place pursuant to authorization by the Security Council and only then after the careful consideration of five criteria of legitimacy. These were that:

- The threatened harm must be serious, ie it must involve genocide, war crimes, crimes against humanity, or ethnic cleansing.
- The primary purpose of the intervention must be to halt the threatened humanitarian catastrophe.
- Military intervention must be adopted only as a measure of last resort.
- The proposed military action must be proportionate to the threat.
- The adverse consequences flowing from the military intervention should clearly be less than the consequences of inaction (see Evans 2008, p 139).

Finally, ICISS developed its conceptual framework by proposing that three different forms of responsibility were engaged. The responsibility to protect should best be exercised initially through prevention. This 'responsibility to prevent' spoke to the need to take every reasonable step to ensure that predicted humanitarian catastrophes would not occur. Preventive strategies such as good governance and human rights, together with international aid and development assistance should be the first to be deployed. Next, 'the responsibility to react' emphasized that in the exercise of its preventive role, the international community should always prefer non-forcible measures, such as diplomatic negotiations and economic sanctions, to instigating armed intervention. Once a crisis had been averted, whether militarily or otherwise, a 'responsibility to rebuild' would be assumed. In this, the international community would involve itself in peacekeeping, economic and social reconstruction and other similar developmental initiatives.

The central thrust of the report, then, was upon the prevention of conflict through a range of non-military measures that would likely entail significant transfers of wealth, expertise and opportunity from developed to developing countries. It would involve taking Third World development seriously (see Byers, 2005, p 111). Only once such measures had failed to avert an anticipated humanitarian crisis would more coercive means be considered.

[19] Ibid, p 16.

IV. THE 2005 WORLD SUMMIT

A. TOWARDS THE 2005 WORLD SUMMIT

Three years after ICISS had reported, its recommendations received powerful endorsement from the Secretary-General's High-Level Panel on Threats, Challenges and Change (HLP). The Panel adopted the conceptual framework embodied in the idea of the 'responsibility to protect'. It favoured the ICISS's conclusion that any such responsibility should be exercised only with the endorsement of the Security Council. And it incorporated, with some minor alterations, the legitimacy criteria that had been set down in the original report.[20]

Addressing the relevant legal issues, the Panel observed that the Charter reaffirmed a fundamental faith in human rights but did not do much to protect them. Article 2(7) prohibits intervention in matters which are essentially within the jurisdiction of any State. Nevertheless, the Panel asserted that the principle of non-intervention embodied in that Article could not be used to shield nations from the consequences of state-sponsored genocidal acts or other atrocities. These should properly be considered as threats to international peace and security under Article 24 and, as such, might with legal justification provoke a response from the Security Council.

> 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.[21]

Taking his lead from the Panel, the Secretary-General recommended that the World Leaders' Summit in 2005 adopt the 'responsibility to protect'.[22] Even so, it was unclear whether his recommendation would survive the exhaustive and exhausting negotiations that would occur in six months preceding the Summit. The principal line of objection was clear. Some States would argue strongly in favour of the international community's entitlement to intervene in the face of genocide, crimes against humanity and other mass atrocities committed by a State. Others, however, would maintain that the Security Council was prohibited legally from authorizing coercive action against sovereign nations in relation to any matter that occurred within their borders. As the Permanent Representative of Algeria put the matter in an early discussion on the Secretary-General's report:

> ...interference can occur with the consent of the State concerned... we do not deny that the United Nations has the right and duty to help suffering humanity. But we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last

[20] *A More Secure World: Our Shared Responsibility*, the Report of the High-Level Panel on Threats, Challenges and Change, UN Document A/59/565, 2004.

[21] Ibid; and for an analysis of the assertion see Corten, 2008, p 127.

[22] *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Document A/59/2005, 2005, p 35.

defence against the rules of an unequal world, but because we are not taking part in the decision making process of the Security Council...[23]

Generally speaking, the Western Europe and Others Group (WEOG) nations supported the inclusion of a resolution in favour of the responsibility to protect in the World Summit outcome document. The United States, however, had significant reservations. A powerful bloc in the Non-Aligned Movement (NAM) either opposed its inclusion or sought significant amendments to the basic principles that had been set down. Several Latin American nations also expressed their disquiet. The most interesting and crucial aspect of these pre-summit discussions was the strong support for the doctrine provided by the nations of Africa. In a sense, this was not surprising. It has been in Africa—perhaps more than in any other region of the world—that mass violations of human rights of the kind sought to be prevented here, have occurred. African nations had first-hand, or near-hand, experience of the atrocities and consequent human suffering with which the doctrine was concerned and an intimate and devastating knowledge of the consequences of both State and international failure.[24] In this context, the Tanzanian President had made the case plainly:

We must now stop misusing the principles of sovereignty and non-interference in the internal affairs of states to mark incidences of poor governance and unacceptable human rights abuses...In the aftermath of the genocide in Rwanda, and in light of the massive influx of refugees in the Great Lakes Region, it is inevitable to conclude that the principle of non-intervention in the internal affairs of a state can no longer find unqualified, absolute legitimacy...Governments must first be held responsible for the life and welfare of their people. But, there must also be common agreed rules and benchmarks that would trigger collective action through our regional organizations and the United Nations against governments that commit unacceptable human rights abuses.[25]

B. THE WORLD SUMMIT RESOLUTION

Under heavy pressure to adopt some form of the 'responsibility to protect' formula, diplomatic representatives in New York haggled into the last week before the Summit to try to find the words that might permit a compromise text to go to the world's leaders for endorsement.[26] After frenzied last minute negotiations, the final text was concluded. It was hedged with qualifications and therefore weaker than that which had been proposed in the ICISS and High-Level Panel reports. Nevertheless, the very fact that the concept and principle had been agreed to at the World Summit represented a substantial success. The concluded wording was as follows:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the

[23] Abdallah Baali, Permanent Representative of Algeria, Statement to the Informal Thematic Consultations of the General Assembly to Discuss the Four Clusters Contained in the Secretary-General's Report 'In Larger Freedom', Cluster III: Freedom to Live in Dignity, 19 April 2005.

[24] For that reason the African Union had previously inserted a provision embodying a doctrine resembling the responsibility to protect into its Constitutive Act. See Article 4(h).

[25] President of Tanzania, Benjamin Mkapa, Address to the First Summit of the International Conference of the Great Lakes, Dar-es-Salaam, November 2004.

[26] As to the General Assembly Debate prior to the World Summit see Bellamy, 2008a; Zifcak 2009, Ch 6.

prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it...

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be ineffective...We stress the need for the General Assembly to continue considerations of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[27]

Despite this success, a close look at the Summit resolution makes it plain that several of the doctrine's underlying principles are likely to be qualified heavily in practice. In the process of negotiating the final text, victory went to those favouring the acceptance of the new doctrine. However, those opposing it, whether absolutely or conditionally, managed to extract substantial concessions. A close reading of the text reveals the following qualifications:

- The crimes in relation to which a responsibility to protect may arise are limited to genocide, war crimes, ethnic cleansing and crimes against humanity. A suggestion from the United States that an additional phrase 'or other major atrocities' be added to avoid further definitional argument was not adopted (see Scheffer, 2009).
- The international community is enjoined in the first instance to exercise its responsibility by using all appropriate diplomatic, humanitarian and other peaceful means in accordance with the Charter. Collective action will be triggered only when such peaceful means are considered to have been inadequate.
- The international community, in its Summit embodiment, has indicated that it is 'prepared to take collective action'. Following from an American recommendation, the words 'we recognize our shared responsibility to take collective action' were removed.
- Collective action by the international community must be authorized by the Security Council in accordance with the terms of Chapter VII of the Charter. The idea, referred to briefly by the High-Level Panel, that there may be certain circumstances in which intervention may be countenanced without such authorization did not make its way into the text.
- No criteria of legitimacy are set down. Instead, the international community, through the United Nations, will determine on a 'case-by-case' basis whether collective action to defend populations from criminal activities is required. This was a late insertion, at the behest of the United States and China.

[27] 2005 World Summit Outcome, UN Doc. A/60/L.1.

- Collective action under Chapter VII will be considered only where national authorities 'manifestly fail to protect their populations' from the relevant crimes. This is a standard considerably higher than that initially suggested.
- A recommended constraint—that the permanent members of the Security Council should refrain from exercising the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity—was rejected.

There is no doubt that the formal recognition of the new doctrine of the responsibility to protect by the world's political leadership stood as one of the principal achievements of the World Summit. And for such a doctrine to achieve consensus agreement within five years of its first formulation is almost unprecedented. However, as is plain from this analysis of the resolution's text, there remains ample room for argument as to its meaning, standing, and exercise (Focarelli, 2008).

V. POST WORLD SUMMIT RECOGNITION OF THE DOCTRINE

Since the World Summit, the most significant development with respect to the responsibility to protect has been its recognition by the Security Council. In the context of a debate upon the protection of civilians in armed conflict, the Security Council approved Resolution 1674 dealing with all aspects of that question, including the promotion of economic growth, poverty eradication, national reconciliation, good governance, democracy, the rule of law and the protection of fundamental human rights.[28] This resolution reaffirmed 'the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. Apart from the normative importance of this reaffirmation, the adoption of the resolution marked the first occasion upon which the Security Council acknowledged expressly that its role may extend not just to the prevention of threats to international peace and security but also to the cessation of mass atrocities taking place within State borders.[29]

Soon after, without any further elaboration of the doctrine, the Security Council invoked the new norm for the first time—in relation to the situation in Darfur. In Resolution 1706, the Council resolved, among other things, to deploy a UN peacekeeping force in Darfur and sought the consent of the Sudanese Government to do so.[30] In its preliminaries, the Resolution recalled Resolution 1674 and its endorsement of the terms of the World Summit Outcome in this respect. It reaffirmed the Council's strong commitment to the sovereignty, unity, independence and territorial integrity of Sudan but made clear its view that the nation's sovereignty would not be adversely affected by the transition to a UN force devoted to the cause of peace.

[28] SC Res 1674 (28 April 2006).

[29] The Security Council recognized and approved the 'responsibility to protect', again in a more recent resolution with respect to the protection of civilians in armed conflict: see SC Res 1894 (11 November 2009).

[30] SC Res 1704 (25 August 2006).

A. THE SECRETARY-GENERAL'S ELABORATION OF THE RESPONSIBILITY TO PROTECT

The resolutions with respect to the responsibility to protect, although adopted by consensus, were highly general in nature and much work remained to be done to put flesh on their bones. To assist with this task Ban Ki-moon appointed Professor Edward Luck to be his special adviser on the subject and Luck went to work to make the doctrine comprehensible and concrete. The product was the Secretary-General's report to the General Assembly on the implementation of the responsibility to protect which was tabled in January 2009.[31]

The report was a detailed encapsulation and explication of the new doctrine's principal parameters. It drew heavily on the work of ICISS and the High-Level Panel but its cast was much more pragmatic. The report made clear that Kofi Annan's successor was also committed to the doctrine. In elaborating upon it, a three-pillar approach to its implementation was proposed.

In the first, the nation in which a humanitarian catastrophe is in prospect must assume responsibility for taking timely and appropriate preventative measures. These may include intensive diplomatic steps to mediate impending conflict, the adoption of anti-corruption strategies, the early prosecution of those engaging in violent activity, the promotion of human rights and efforts to establish more effective governance.[32] The second pillar involves a calibrated reaction by the international community. Here, concerted and directed assistance in the form of development aid, foreign investment, technical assistance, economic incentives, rapid police responsiveness, and more general capacity building will be crucial. Under the third pillar, these measures may be supplemented initially by 'soft' coercion which may include international fact finding, the deployment of peacekeepers, the imposition of arms embargoes, the application of diplomatic and economic sanctions and the creation of safe-havens and no-fly zones. Then, when all else has failed, the Security Council may authorize military intervention as the measure of last resort.

The Secretary-General sought to clarify certain issues about which there had been considerable confusion or dissension since the World Summit. He made clear that the responsibility to protect applies only in relation cases of genocide, war crimes, crimes against humanity and ethnic cleansing. It does not detract from existing international commitments under international humanitarian law, human rights law or refugee law. Collective action in the use of force must be undertaken with the authority of the Security Council and in accordance with Chapter VII of the Charter. The responsibility to protect provides no support, therefore, for unilateral military interventions. The doctrine is to be distinguished from 'humanitarian intervention'. Humanitarian intervention, the report said, posed a false choice between either standing by in the face of catastrophe or deploying coercive military force to protect populations that were threatened. The responsibility to protect seeks to overcome this binary divide by recasting sovereignty as responsibility and then defining in some detail what the respective duties and obligations of nations and the international community to prevent humanitarian disaster should be.

[31] Report of the Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677; and see further Luck, 2009.

[32] On prevention, see Bellamy, 2008b.

B. THE GENERAL ASSEMBLY'S 2009 DEBATE

In his report, the Secretary-General had urged the UN General Assembly to consider and endorse his report. This was a course not without risk. In the four years between the World Summit and the report, there had been strongly conflicting opinions expressed by UN member States as to the doctrine's standing, relevance, and acceptability.[33] Among nations that supported it, there had been widespread anxiety that its reintroduction into discussion in the General Assembly might well result in its substantial dilution or even abandonment. After six months of wrangling, however, the President of the General Assembly finally agreed to hold an informal interactive dialogue on the Secretary-General's report in late July 2009.

The proceedings began controversially when the Assembly President distributed a concept note to member States prior to the dialogue outlining his reservations with respect to R2P.[34] In this note, the President argued that it had no binding status in international law, that there had been no genuine agreement as to its terms, and that it was not the absence of such a doctrine that had impeded necessary intervention to prevent humanitarian disaster. Instead it had been the unrepresentative composition of the Security Council, the inappropriate use of the veto and a lack of political will that had impeded action. National sovereignty, he concluded, demanded that no external military intervention into the exclusively domestic affairs of a State should be either contemplated or permitted.

Soon after this faltering start, however, it became apparent that the President's intervention had been neither appreciated nor influential. To the surprise of most observers, member States expressed substantial concordance with the Secretary-General's report. Ninety-four States took part in the dialogue and their views were representative of approximately 180 of the Assembly's 192 members. A very clear majority supported the terms of the World Summit resolutions and backed the Secretary-General's three-pillar approach to their implementation. It was highly significant that many powerful States outside the P-5, which had previously expressed substantial doubt about the merits of the doctrine, now chose to provide cautious support for it. Nations such as Brazil, South Africa, Chile, India, Egypt, and Algeria each moderated their previously skeptical positions.[35] Clear dissentients numbered only four of those nations that took part.[36] The most important matters that emerged from the Assembly's deliberations may be summarized as follows.[37]

1. Matters on which nations agreed

Most member States stated unequivocally that the dialogue should not be devoted to a renegotiation of the World Summit Outcome resolutions. They made plain their intention

[33] See for example, in the General Assembly debate on the 'Protection of Civilians in Conflict', S/PV.6066, 14 January 2009.

[34] Office of the President of the General Assembly, *Concept Note on the Responsibility to Protect Populations from Genocide, War Crimes, Crimes against Humanity and Ethnic Cleansing*, 16 July 2009.

[35] See for example, Statement by H.E. Hardeep Singh Puri, Permanent Representative of India to the United Nations at the General Assembly Plenary Meeting on Implementing the Responsibility to Protect, 24 July 2009.

[36] These were Venezuala, Cuba, Sudan, and Nicaragua.

[37] See also The Global Centre for the Responsibility to Protect (2009), *Implementing the Responsibility to Protect: the 2009 General Assembly Debate, an Assessment*, August 2009; The International Coalition for the Responsibility to Protect (2009), *Report on the General Assembly Plenary Debate on the Responsibility to Protect*, September 2009.

to move forward to a practical understanding of the resolutions rather than to re-open the debate on whether or not the responsibility to protect should be recognized or acted upon. The member States' re-affirmation of the resolutions made plain, however, that they regarded them as expressly limited by their terms. All agreed, therefore, that the responsibility to protect would apply only in situations that involved the commission of genocide, war crimes, crimes against humanity, or ethnic cleansing. Any expansion of the doctrine to cover the consequences of climate change, cyclones, counter-terrorism, external aggression, or internal repression was roundly rejected.

Member States almost without exception welcomed the three-pillar conception outlined in the Secretary-General's report. In this respect, there was concordance with the general principle that sovereignty should be defined as responsibility and that the first responsibility of sovereign States should be to protect the rights and interests of their peoples. Pillar 1 encapsulated that understanding. Member States regarded Pillar 2 as the most novel part of the doctrine. The idea that the international community should and would provide early assistance to States at risk of failure was one that was greeted with approval. Unsurprisingly, Pillar 3 was the subject of most contention. Nevertheless, even here there appeared to be agreement that where one of the four defined crimes was either in prospect or in the course of commission, the international community had a responsibility to intervene, but, in the case of military intervention, only if Security Council authorization had been previously been obtained.

A substantial body of member States seemed willing to endorse the idea that the commission of mass atrocities within a single member State may nevertheless, and depending on the specific circumstances, be regarded as constituting a threat to international peace and security.[38] In such a case, the operation of Chapters VI and VII of the UN Charter could be attracted.

2. Matters in relation to which there was continuing concern

The position of State sovereignty in relation to the responsibility to protect was the subject of continuing contention. Several States declared that sovereignty was inviolable and that nothing in the new doctrine should be permitted to undermine that inviolability.[39] Even in relation to the four crimes specified, therefore, they argued that international intervention should be countenanced only if requested by the State concerned. At the other end of the spectrum were member States which strongly supported the doctrine and who, therefore, were willing to countenance some compromise to sovereignty in the interests of avoiding atrocity. None, however, endorsed unilateral intervention and all agreed that military intercession could proceed only if the Security Council authorized it.[40]

Developing nations forcefully expressed their concern that the doctrine may be used selectively and in particular by more powerful States as a means to interfere with the rights and interests of the less powerful. To counter that possibility many developing countries insisted that decisions as to whether a nation had failed in its responsibility to protect its

[38] See Statement on behalf of the European Union by H.E. Mr Anders Liden, Permanent Representative of Sweden to the United Nations, at the General Assembly Dialogue on the Responsibility to Protect, 23 July, 2009.

[39] These States included, for example, Cuba, Iran, Sudan, North Korea, Pakistan, and Nicaragua.

[40] These States included the Netherlands, Austria, Australia, New Zealand, Canada, Denmark, and Costa Rica.

own people had to be taken without fear or favour and with the application of identifiable and identical standards.[41] The Security Council's manifest failure to take action with respect to the Israeli invasion of Gaza in January 2009 was commonly cited as an example of the double standards that may and can apply.

Member States put competing views with respect to the Security Council's recommended role as the arbiter of Pillar 3 interventions. There was agreement that the Council should exercise that role but disagreement about the extent to which, if at all, the General Assembly should also play some part. Many nations, including especially those who aspired to permanent membership of the Council, conditioned their support on comprehensive Security Council reform. Still more expressed the view that the P-5 should agree voluntarily to refrain from the use of the veto in situations in which action with respect to genocide, war crimes, crimes against humanity, and ethnic cleansing was the subject of Council consideration. The P-5 made no contribution as to the question.

3. Matters in relation to which further clarification was required

Many States expressed uncertainty as to the circumstances in which international aid, assistance, or intervention should be triggered. The World Summit resolutions stated, for example that the international community was committed to helping States build capacity to protect their populations from the commission of mass atrocities, as necessary and appropriate. At what stage, then, and under what circumstances would the criteria of necessity and appropriateness properly be engaged? Similarly, the international community had stated its preparedness to take collective action through the Security Council should peaceful means be inadequate and national authorities manifestly fail to protect their populations. Member States expressed the view that the phrase 'manifestly fail to protect their populations' was vague and therefore provided very uncertain guidance as to when the Security Council should consider any consequential action.

Several nations observed that the World Summit resolutions referred to mass atrocities consequent upon State failure. Nothing there appeared referable, however, to crises which had been caused by the actions of non-State actors. In what circumstances the international community might intervene to prevent atrocities at the hands of such actors, therefore, was a matter placed on the table for further deliberation.

Finally, member States seemed quite unclear as to the standing of the responsibility to protect in international law. In line with the opinions expressed by the High-Level Panel and the former Secretary-General in his report to the World Summit, some member States were sufficiently confident to declare the doctrine either as a norm of international law or at least as a principle that was near to maturing into such a norm. Others, however, regarded the doctrine not as legal but as political. It represented a political commitment by most nations to take steps to prevent mass atrocities but brought with it no specific legal content or obligation. Still others maintained that the responsibility to protect could more than adequately be contained within and elaborated from the existing law of the United Nations Charter. Those opposed to the advance of the doctrine made clear their view that it had no legal standing whatever. In the final section of this chapter, therefore, I take a closer look at the legal standing of the doctrine by way of further clarification.

[41] See for example, the Statement by Vanu Gopala Menon, Permanent Representative of Singapore at the General Assembly Dialogue on the Responsibility to Protect, 24 July 2009.

VI. THE RESPONSIBILITY TO PROTECT AS INTERNATIONAL LAW

Politically speaking, it is fair to say that there has been a progressive convergence of opinion amongst member States of the United Nations that they bear a responsibility individually and collectively to protect their peoples from the commission of mass atrocity crimes. Concentrating in particular on those elements of the doctrine that appear to have achieved the support of most UN member States, its present parameters as elaborated in debate prior to the World Summit and at the 2009 General Assembly Debate may be summarized in the following terms. It appears to be agreed that:

1. The primary responsibility for protecting its peoples from the commission of mass atrocity crimes rests with the sovereign nation within which such crimes are at risk of being committed.
2. The mass atrocity crimes with which the responsibility is concerned are limited to genocide, war crimes, crimes against humanity, and ethnic cleansing.
3. The responsibility of the international community with respect to the prevention of and protection against such crimes is engaged only when it appears that the sovereign nation concerned may be unable to prevent the escalation of civil strife so as to avert the danger of the defined international crimes being committed.
4. In that instance, the international community's primary and preventative responsibility is to provide aid, expertise, resources and other similar forms of assistance so as to build the affected nation's capacity to deal with an impending humanitarian crisis.
5. Where, however, it becomes apparent that a State has manifestly failed to exercise its sovereign obligations, and where the international community's assistance has proven ineffective, the primary responsibility to prevent or protect against the commission of the international crimes shifts from the State to the international community.
6. The international community in exercising this responsibility may, on a case-by-case basis, take coercive measures to achieve the objective of maintaining or restoring peace and security. Such measures may, as a last resort, include internationally mandated military intervention.
7. These coercive measures, however, may be adopted and authorized only by the UN Security Council acting in accordance with its powers under Chapter VI and Chapter VII of the UN Charter. Unilateral humanitarian intervention is impermissible.
8. Where the international community has intervened in the domestic affairs of a nation whether militarily or in some other coercive manner, it assumes a further responsibility upon the restoration of peace and security to facilitate and assist with peacekeeping, peacebuilding, and other forms of national reconstruction.

It should be apparent that these heads of agreement are in the nature of a joint *political* commitment. The question remains, then, as to whether any segment of this common

acknowledgment and understanding has become part of or is reflected in international law. With one or two minor caveats, the answer would appear to be no.

The responsibility to protect is not embodied in any treaty.[42] Consequently, the most likely way that it could be considered as a norm of international law would be by way of its acceptance as part of customary international law. A doctrine or principle will form part of customary law if two broad conditions are met. First, it must be a matter of State practice and that practice must be recurrent and widely observed. Secondly, there must be a conviction among nations that the practice is sufficiently consistent and of sufficiently general application as to be regarded as a compulsory rule.[43] In other words, it should come to be understood that the practice is dictated by international law (*opinio juris*).

Applying these conditions to the responsibility to protect it is evident immediately that State practice in conformity with the doctrine is almost non-existent. The doctrine was conceived only in 2002 and no nation or international organization has legitimately claimed to have acted in accordance with its terms since that time.[44] It could be argued that relevant State practice occurred in the context of humanitarian intervention that preceded that concept's recent reconceptualization as the responsibility to protect. Given, however, that the new doctrine's sponsors have been at great pains to distinguish it from humanitarian intervention, and that many in the General Assembly have repudiated the latter, the argument cannot be accorded much weight.[45]

Still, there is one current of thought that suggests that the existence of well-settled State practice may not be absolutely critical in the formation of customary rules. So for example, within the framework of international humanitarian law, an imperative of moral behaviour and the dangers attendant upon its abuse may be such as to make the observance of a particular rule of war absolutely necessary even prior to recurrent State practice having been established. In this case, 'the laws of humanity' and the 'dictates of public conscience' are put on the same footing as State practice in the formation of international law (Cassese, 2005, pp 160–161). In that context it might reasonably be accepted that the principle that States have an individual and collective responsibility to protect their peoples from genocide, war crimes, crimes against humanity and ethnic cleansing is a 'law of humanity' of a similar kind and standing. But that is still far from confirming that every one of the core elements of the doctrine has similar force and effect. Quite apart from anything else, the principle is capable of achievement by very diverse means of which the key components comprising the responsibility to protect are but one.

The second condition to be met is that there should be a mutual conviction among nations that the doctrine or principle in question should have the character of a binding

[42] The doctrine, however, is closely related to the objectives and provisions of of existing international treaties including for example, the International Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Geneva Conventions (1949), and the Rome Statute of the International Criminal Court (2002). See further Barbour and Gorlick, 2008.

[43] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, para 77.

[44] It has been claimed that Kofi Annan's mediation in the tribal conflict following Kenya's recent election is an example of R2P at work. It seems no different, however, to traditional international mediation of a kind that has been known and exercised many times before.

[45] See Ban Ki-Moon, 'Responsible Sovereignty: International Co-operation for a Changed World', Speech delivered in Berlin, 15 July 2008; Sahnoun, M, 'Africa: Uphold Continent's Contribution to Human Rights', *AllAfrica.com*, 21 July 2009; Evans, G, Statement delivered to the UN General Assembly Interactive Thematic Dialogue on the Responsibility to Protect, 23 July 2009.

rule of law. In the present case, the existence of this '*opinio juris*' is difficult to discern or to justify. Certainly, the responsibility to protect has been the subject of consideration, elaboration, and recommendation by international commissions of stature. It has been embodied, though not without considerable prior political division, in the resolutions of the most important Summit of World leaders held in the past decade. It has been referred to and endorsed in general terms in subsequent Security Council resolutions. And at least in relation to its core components, it generated a surprising measure of acceptance at the most recent General Assembly debate.

Yet the idea that it might constitute a legal rule that binds nations to it by common consent is not a position that has yet been reached. This point is illustrated clearly when one considers the content of the recent General Assembly debate. As previously noted member States in the debate had significantly differing views as to the legal standing of the doctrine. Such diverse conceptions do not inspire confidence that a customary rule accepted in common as binding is anywhere near maturity. It is also the case, regrettably, that many nations participating in the debate and addressing international law had but a thin conception of its nature and requirements. Among those that did, the most considered view expressed was that the responsibility to protect was a doctrine primarily of a political rather than legal character. The Brazilian position is illustrative:

> In Brazil's view, (the responsibility to protect) is not a principle proper, much less a novel legal prescription. Rather it is a powerful political call for all States to abide by legal obligations already set forth in the Charter, in relevant human rights conventions and international humanitarian law...[46]

It is clear, further, that although the doctrine's core elements as enumerated above are the subject of substantial political agreement, there remain significant areas of concern with respect to its operational scope and important matters as to its meaning and effect that require much further clarification. Until these doubts and concerns have been satisfactorily addressed, it is difficult to contend that in this instance some new, generally accepted legal norm governing the conduct of nations has come to fruition.

Finally, it should be noted that the recent General Assembly deliberation was in the form of an informal interactive dialogue. In other words, it was a session designed to encourage States to express their views with respect to the responsibility to protect without any necessary anticipation that there would be any concrete outcome. As to an outcome, some nations argued that a resolution providing a firm re-endorsement of the doctrine as expressed in the World Summit Outcome document would be appropriate and constructive. Others argued that neither an endorsement nor a resolution should be put. In the end, a weak procedural resolution went forward noting (amended from welcoming) the Secretary-General's report and recommending that the General Assembly continue to consider the matter.[47] Plainly, then, the thought that the interactive dialogue may produce some confirmation of the existence of a new binding rule of international law was far from most delegates' minds.

[46] Statement by H.E. Maria Luiza Ribiero Viotti, Permanent Representative of Brazil, at the General Assembly informal dialogue on the Responsibility to Protect, 23 July 2009.

[47] A/Res/63/608.

On this basis the best that can be said is that core of the doctrine previously delineated constitutes but a fledgling rule of international customary law. It has quite some considerable way to go, however, before it can be regarded as having been adopted in practice and obtained the requisite international acceptance to be considered as fully formed.

One final legal matter should be considered. As explained at the commencement of this chapter, the UN Charter's provisions, and in particular the terms of Articles 2(4) and 2(7), have proven exceptionally difficult to reconcile with any doctrine of external intervention in a nation's domestic affairs. Article 2(7) relevantly provides however that this principle of non-interference is not to prejudice the application of enforcement measures under Chapter VII. Chapter VII enforcement measures may be pursued where the Security Council has determined the existence of any threat to the peace, breach of the peace or act of aggression. It has generally been assumed that any such threat must be to international peace and security as Chapter VII measures are authorized in accordance with Articles 41 and 42 only to restore international peace and security.

However, the sole arbiter of whether there exists a threat to international peace and security remains the Security Council itself. And in recent years it has become apparent that the Council is now more willing than it has been previously to determine the existence of such a threat even where conflict or strife is taking place entirely within the boundaries of one State. Generally speaking the Council has made such a determination only where, for example, the 'international dimension' is constituted by some cross-boundary ramification of the primary conflict, such as massive consequential refugee flows. In the past two decades or so, however, it has seemed prepared to go one step further where a humanitarian disaster is in prospect and declare a threat even where cross-boundary consequences have not plainly been in evidence. The Council's resolutions in relation to Somalia, Bosnia-Herzegovina, and Rwanda provide relevant examples.[48] In the absence of a power of judicial review of Security Council decision-making, the Council will continue to have very considerable flexibility when determining whether threats to international peace and security are present. And, further, it does not need to give reasons for its decisions.

The broad exercise of Security Council discretion in humanitarian cases suggests that there may be one further, legally recognized way in which the competing demands of sovereignty and the prevention of atrocity may eventually be capable of reconciliation within the framework of the UN Charter itself. On the basis of the emerging trend, it could over time become standard Security Council practice to interpret the threshold requirement of a threat to peace and security as existent in situations of humanitarian crisis, even where the crisis is contained entirely within a State. Were this practice to become recurrent and internationally recognized as necessary and appropriate, a new customary rule, as embodied in Council practice, may eventually crystallize as part of international law.[49] This rule would allow for an exception to Article 2(4) by sanctioning intervention by the international community to prevent a humanitarian catastrophe occurring entirely within the boundaries of one State pursuant, first, to a preliminary determination by the Security Council under Article 39 of a threat to international peace and security followed, secondly, by authorized international intervention in accordance with Articles 41 and 42.

This is not to suggest that international law has arrived at such a normative recognition yet. Security Council practice in the relevant respect has neither solidified nor attained a requisite measure of consistency (see McClean, 2008). And to achieve recognition as institutional custom, an enormous stretch in the interpretation of the language of the Charter would still be required. It is apparent, however, from the General Assembly dialogue that many more nations than previously have seemed willing to countenance wider Security Council discretion in cases of humanitarian need. And it is not too great a leap to suggest that in an increasingly interconnected and interdependent world, few conflicts or catastrophes remain entirely local in their ramifications.

Consequently, the promise of eventual legal recognition is there and with it the foundation so necessary for accepting the international legitimacy of the responsibility to protect may in time become more firmly established.

[48] See SC Res. 794 (3 December 1992: Somalia); SC Res 770 (13 August 1992: Bosnia-Herzegovina); SC Res 929 (22 June 1994: Rwanda). See also Chesterman, 2001, pp 140–151.

[49] In an analogous case, the International Court of Justice determined in an Advisory Opinion that the United Nations had international legal personality partly based on the practice of the United Nations in concluding international conventions. *See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 174.

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