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NOTES AND COMMENTS

RESPONSIBILITY TO PROTECT: POLITICAL RHETORIC OR EMERGING LEGAL NORM?

By Carsten Stahn*

The history of the concept of “responsibility to protect”¹ sounds almost like a fairy tale. The International Commission on Intervention and State Sovereignty developed this concept in its 2001 report The Responsibility to Protect. The central theme was “the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”²

In December 2004, this idea was taken up in the context of the debate on United Nations reform. Pointing to international responses to the “successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan,” the High-Level Panel on Threats, Challenges and Change stated in its report A More Secure World: Our Shared Responsibility that

there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international

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community—with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.\(^3\)

The UN high-level panel even went so far as to speak of an “emerging norm of a collective international responsibility to protect,” which encompasses not only “the ‘right to intervene’ of any State, but the ‘responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe.”\(^4\)

In March 2005, this finding was endorsed by the report of the UN secretary-general entitled “In Larger Freedom: Towards Development, Security and Human Rights for All,” which fostered the idea that the security of states and that of humanity are indivisible and that threats facing humanity can be solved only through collective action.\(^5\) In this report, the secretary-general made express reference to a paragraph of the High-Level Panel Report that refers to an emerging norm of a collective responsibility to protect, and reaffirmed that the idea of a “responsibility to protect” must be “embraced,” and, “when necessary, . . . act[ed] on.”\(^6\)

In September 2005, the concept of the responsibility to protect was incorporated into the outcome document of the high-level meeting of the General Assembly (Outcome Document).\(^7\) The Outcome Document contains two paragraphs (paras. 138 and 139) on the responsibility to protect. The assembled heads of state and government recognized the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity,\(^8\) including the responsibility of each individual state to protect its populations from such crimes, and a corresponding responsibility of the international community.\(^9\) This document was subsequently adopted by the General Assembly in its Resolution 60/1, 2005 World Summit Outcome.

The Security Council made its first express reference to the concept in Resolution 1674 on the protection of civilians in armed conflict.\(^10\) Not long ago, the notion of “responsibility to protect” was added as a key word to the Wikipedia Free Encyclopedia, where it is defined as a recently developed concept in international relations that aims at “provid[ing] a legal and ethical basis for ‘humanitarian intervention.’”\(^11\)

The articulation of the concept of responsibility to protect is a remarkable achievement. The inclusion of the concept in the Outcome Document not only marks one of the most important results of the 2005 World Summit, but is testimony to a broader systemic shift in international

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\(^4\) Id., paras. 202, 201.


\(^6\) Id., para. 135 (citing High-Level Panel Report, supra note 3, para. 203).

\(^7\) 2005 World Summit Outcome, GA Res. 60/1, paras. 138–39 (Oct. 24, 2005) [hereinafter Outcome Document].

\(^8\) Id., para. 138.

\(^9\) Id., para. 139.

\(^10\) See SC Res. 1674, para. 4 (Apr. 28, 2006) (“reaffirm[ing] 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”).

law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of “human security.”\textsuperscript{12} Under the concept of responsibility to protect, matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader international community (e.g., third states, multilateral institutions, and nonstate actors). This development is part and parcel of a growing transformation of international law from a state- and governing-elite-based system of rules into a normative framework designed to protect certain human and community interests.

Yet the quick rise of the concept of responsibility to protect from an idea into an alleged emerging legal norm raises some suspicions from a positivist perspective. How can a concept that is labeled as a “new approach”\textsuperscript{13} and a “re-characterization” of sovereignty\textsuperscript{14} in 2001 turn into an emerging legal norm within the course of four years, and into an organizing principle for peace and security in the UN system one year later? None of the four main documents in which responsibility to protect has been treated in depth can be regarded as generating binding international law under the classic sources of international law set forth in Article 38 of the Statute of the International Court of Justice (ICJ) (e.g., “international conventions,” “international custom, as evidence of a general practice accepted as law,” and “general principles of law”).\textsuperscript{15} Contemporary understanding lends some weight to resolutions adopted by the General Assembly\textsuperscript{16} and occasionally even to reports issued by the UN secretary-general and certain expert bodies, in particular when combined with more traditional sources (treaties or state practice).\textsuperscript{17} However, even this broader conception of the formation of law, which takes into account the provenance and conditions of adoption of certain documents (e.g., adoption by consensus, the composition of the respective body), fails to offer conclusive guidance in this regard. A closer study of the relevant reports and documents reveals considerable divergences in opinion. Different bodies have employed the same notion to describe partly different paradigms. The text of the Outcome Document of the World Summit, which is arguably the most authoritative of the four documents in terms of its legal value,\textsuperscript{18} leaves considerable doubt concerning whether and to what extent states intended to create a legal norm.

\textsuperscript{12} The Outcome Document is qualified by some as a “milestone in the relationship between sovereignty and human rights.” See the abstract dated July 28, 2006, of the online version of Alex J. Bellamy, \textit{Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit}, 20 ETHICS & INT’L AFF. 143 (2006), at <http://www.cceia.org/resources/journal/20_2/articles/5384.html>, in which Bellamy’s article is described as taking a different view.

\textsuperscript{13} RESPONSIBILITY TO PROTECT, supra note 2, ch. 2.

\textsuperscript{14} Id., para. 2.14.

\textsuperscript{15} For a survey of the classic understanding of sources of law, see 1L. OPPENHEIM, INTERNATIONAL LAW 22–23 (Hersch Lauterpacht ed., 6th ed. 1947).

\textsuperscript{16} Law-declaring resolutions of the General Assembly, for example, may assist in the determination or interpretation of international law or even constitute evidence of international custom. Scholars differ, however, as to whether "law-declaring resolutions" of the Assembly can create law beyond their contributory role in the formation of customary international law. See generally GEORGES ABI-SAAB, LÉS RÉSOLUTIONS DANS LA FORMATION DU DROIT INTERNATIONAL DU DÉVELOPPEMENT 9 (1971). For doubts, see Hartmut Hillgenberg, \textit{A Fresh Look at Soft Law}, 10 EUR. J. INT’L L. 499, 514 (1999).

\textsuperscript{17} The assessment of “soft law” may be based on an analysis of such sources. See generally Alan Boyle, \textit{Soft Law in International Law-Making}, in INTERNATIONAL LAW 141 (Malcolm D. Evans ed., 2006).

\textsuperscript{18} The Institute of International Law found that principles and rules proclaimed in law-developing resolutions “may influence State practice, or initiate a new practice that constitutes an ingredient of new customary law,” or “contribute to the consolidation of State practice, or to the formation of the \textit{opinio juris communis}.” Institut de droit international, The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments
These findings suggest that something is wrong here. Either the concept of responsibility to protect is actually not so new and innovative as portrayed, or the qualification is wrong. Maybe the notion itself is so indeterminate that it does not yet meet the requirements of a legal norm.

This essay seeks to clarify the current status of the law and to identify its possible future directions. It argues in part I that the concept of responsibility to protect should be understood partly as a political catchword that gained quick acceptance because it could be interpreted by different actors in different ways, and partly as “old wine in new bottles.” Some of the propositions are not novel, but grounded in established concepts of international law. Other aspects of the concept are seen in part II as deserving of further clarification. It is thus fair to conclude that the concept currently encompasses a spectrum of different normative propositions that vary considerably in their status and degree of legal support.

I. INTERPRETIVE AND NORMATIVE DIVIDES: DIFFERENT BODIES, DIFFERENT MEANINGS

The concept of responsibility to protect is treated differently in the four documents associated with its genesis, namely, the report of the Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit.

The Approach of the Commission on State Sovereignty and Intervention

The most comprehensive treatment of the concept was offered by the Commission on State Sovereignty and Intervention. The commission essentially developed the concept of responsibility to protect to solve the legal and policy dilemmas of humanitarian interventions. The commission focused on the relationship between sovereignty and intervention, specifically on how the international community should “respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that [offend] every precept of our common humanity” if “humanitarian intervention is, indeed, an unacceptable assault on sovereignty.”

The commission proposed dealing with this problem by recharacterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control. The commission thus used a rhetorical trick: it flipped the coin, shifting the emphasis from a politically and legally undesirable right to intervene for humanitarian purposes to the less confrontational idea of a responsibility to protect.

19 See Boisson de Chazournes & Condorelli, supra note 1, at 11–18; Molier, supra note 1, at 47–52.
20 See Molier, supra note 1, at 37–62.
22 Id., para. 2.14.
23 The commission found that the expressions “humanitarian intervention” and “right to intervene,” which had been used in “past debates,” did not “help to carry the debate forward.” Id., para. 2.4.
24 Id., para. 2.29.
The commission tried to distinguish the idea of responsibility to protect from the concept of humanitarian intervention in three ways. The report emphasized, first of all, that responsibility to protect looks at intervention from a different perspective than the doctrine of humanitarian intervention. The commission stressed that responsibility to protect addresses the dilemma of intervention from the perspective of the needs of those who seek or need support (e.g., communities in need of protection from genocide, mass killings, ethnic cleansing, rape, or mass starvation), rather than from the interests and perspectives of those who carry out such action (entities asserting the “right to intervene”).

Second, the commission sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national state and the broader international community. The commission recognized that the main (the primary) responsibility to protect resides with the state whose people are directly affected by conflict or massive human rights abuses, and “that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.”

Third, the commission expanded the conceptual parameters of the notion of intervention, declaring that an effective response to mass atrocities requires not only reaction, but ongoing engagement to prevent conflict and rebuild after the event. The commission developed a multiphased conception of responsibility, based on a distinction between responsibility to prevent and react and responsibility to rebuild. This conception of responsibility “means that if military intervention action is taken—because of a breakdown or abdication of a state’s own capacity and authority in discharging its ‘responsibility to protect’—there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.”


26 RESPONSIBILITY TO PROTECT, supra note 2, para. 2.29. The commission was critical of the notion of “humanitarian intervention.” It believed that the “humanitarian” argument could be used to disguise motives for an intervention and that it would tend “to prejudge the very question in issue—that is, whether the intervention is in fact defensible.” The commission also abandoned the term in response to opposition by humanitarian agencies and organizations to the “militarization” of the word “humanitarian,” which they argued could not be ascribed “to any kind of military action.” Id., para. 1.40.

27 One of the particularities of the report is that it formulated specific “threshold” criteria for “military intervention for human protection purposes.” Id., para. 4.19. Military intervention may be justified in two broad sets of circumstances, namely in order to halt or avert:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Id. (emphasis omitted).

28 Id., para. 1.40.

29 Id., para. 2.30.

30 Id., para. 2.29.

31 Id., para. 5.1.
The move from a right to intervene to a responsibility to protect was justified by the commission on the basis of a distinction between a state’s internal and external responsibility. The commission recognized that states’ authorities are responsible for the safety, life, and welfare of their citizens, and that they are also responsible to citizens internally.\textsuperscript{32} However, the commission stressed that at the same time states bear an external responsibility with regard to the international community through the United Nations.\textsuperscript{33} The commission acknowledged that violations of this dual responsibility could ultimately require “action . . . by the broader community of states to support populations that are in jeopardy or under serious threat.”\textsuperscript{34} It identified three circumstances in which this “residual responsibility” of the broader community of states is activated:

— “when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect”;

— “when a particular state . . . is itself the actual perpetrator of crimes or atrocities”; or

— “where people living outside a particular state are directly threatened by actions taking place there.”\textsuperscript{35}

The report of the commission managed to gather broad support because it avoided taking a final stance on the question of the legality/legitimacy of unauthorized interventions. The invention of the notion of responsibility to protect assisted in this effort by leaving flexible the choice of means (e.g., humanitarian assistance, economic assistance, military engagement) to exercise that responsibility. The commission made it clear that the “Security Council should be the first port of call on any matter relating to military intervention for human protection purposes,”\textsuperscript{36} but it did not categorically exclude the possibility that the responsibility to protect might ultimately be assumed by the General Assembly, regional organizations, or coalitions of states if the Security Council fails to act. The commission left open whether and under what circumstances an “intervention not authorized by the Security Council or [the] General Assembly” would be valid in legal terms.\textsuperscript{37} Nevertheless, it advised that when the Council fails to discharge what the commission would regard as its responsibility to protect, a balancing assessment should be made as to where the most harm lies: “in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered.”\textsuperscript{38} Moreover, the commission developed five criteria of legitimacy for interventions, which were deemed to apply to “both the Security Council and [UN] member states,”\textsuperscript{39} namely, just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success.\textsuperscript{40}

\textsuperscript{32} Id., para. 2.15.
\textsuperscript{33} Id.
\textsuperscript{34} Id., para. 2.31.
\textsuperscript{35} Id.
\textsuperscript{36} Id., para. 6.28.
\textsuperscript{37} Id., para. 6.37.
\textsuperscript{38} Id.
\textsuperscript{39} Id., para. 4.32.
\textsuperscript{40} Id., paras. 4.18, 4.32–48.
The debate about the concept of responsibility to protect took a new turn in the High-Level Panel Report, where it was directly related to institutional reform of the United Nations. The high-level panel saw the idea of responsibility to protect as a means to strengthen the collective security system under the Charter. The panel treated the concept in two parts of its report. It mentioned the nexus between sovereignty and responsibility in the opening pages and subsequently developed the contours of the concept in the context of the “use of force,” in a section entitled “Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect.”

The purported scope of the responsibility to protect remained unclear in the panel’s report. Although the panel recognized that each individual state has a special duty vis-à-vis its citizens, it spoke at the same time of a (collective) “responsibility to protect” of every State when it comes to people suffering from avoidable catastrophe—mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.” The reference to the responsibility of “every State” left room for different interpretations. It could be read as a simple reminder of the \textit{erga omnes} nature of the international obligations (e.g., in cases of genocide, torture, and grave breaches of the Geneva Conventions) that give rise to the responsibility to protect. However, the text also allowed for a broader reading that endorsed a wider concept of “responsibility” under which the responsibility of the host state shifts to every other state in cases where the former is unable or unwilling to act. This reading would significantly extend the existing parameters of the law of state responsibility. It would detach the idea of responsibility of a sovereign from the traditional criteria of nationality or territoriality and establish a multilayered system of responsibility, in which the primary responsibility of the state vis-à-vis its citizens is complemented by a residual responsibility of all sovereign governments vis-à-vis human catastrophes.

One of the particularities of the High-Level Panel Report is the linkage of the panel’s vision of shared responsibility directly to the United Nations. The idea of responsibility to protect became part and parcel of the vocabulary of UN reform. The panel associated the concept of collective responsibility, in particular, with action by the Security Council. It reiterated that

\begin{itemize}
  \item High-Level Panel Report, supra note 3, paras. 29–30.
  \item \textit{Id.}, paras. 199–203.
  \item \textit{Id.}, para. 201 (“[S]overeign Governments have the primary responsibility to protect their own citizens from . . . catastrophes . . . ”).
  \item \textit{Id.}
  \item The ICJ reaffirmed in the \textit{Barcelona Traction} case that obligations \textit{erga omnes} “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” \textit{Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, 1970 ICJ Rep. 3, 32, para. 34 (Feb. 5) [hereinafter Barcelona Traction].}
  \item This understanding was challenged by the United States in the context of the drafting of the Outcome Document. The U.S. representative to the United Nations addressed this point in a letter to the UN member states dated August 30, 2005, noting that “the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we thus want to avoid formulations that suggest that the other countries are inheriting the same responsibility that the host state has.” Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome Document Being Prepared for the High Level Event on Responsibility to Protect, at 2 (Aug. 30, 2005), available at <http://www.responsibilitytoprotect.org/index.php/pages/2>, <http://www.un.int/usa/reform-un-jrb-ltr-protect-8-05.pdf> [hereinafter Bolton Letter].
\end{itemize}
the Security Council has not only the authority, but also a certain responsibility to take action to combat humanitarian crises. The report stated that the Security Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective responsibility to protect, the Council “can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’.” This passage was meant as an incentive for the Council to act responsibly by giving the UN collective security system the wherewithal to work effectively in all cases of humanitarian crises. The panel combined this appeal to responsibility with a plea for a more transparent and responsible use of the right of veto by the five permanent members of the Security Council. The panel urged the permanent members, in particular, “to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.” Both statements reflect the panel’s intention to make the Council both a vehicle for, and an addressee of, the concept of responsibility to protect.

This goal was accompanied by an express effort to channel international intervention through the Security Council. The panel took the position that UN members must resort to the collective security system in all cases of military intervention, including operations carried out by regional organizations. Unlike the Commission on State Sovereignty and Intervention, the panel did not envisage that an international responsibility to protect could be invoked by coalitions of the able and willing or regional organizations in the absence of Security Council authorization. The report stressed that the “emerging norm” of a “collective international responsibility to protect” was only “exercisable by the Security Council” and only if military intervention was at stake. This approach was guided by the ambition of the drafters of the report to reinforce the UN system after the 2003 intervention in Iraq.

The panel’s treatment of collective security culminated in the identification of “five basic criteria of legitimacy” for the use of force (seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences). Interestingly, in establishing these legitimacy criteria, the panel did not contemplate solving the impasse of unauthorized interventions, but intended to enhance “the effectiveness of the global collective security system.”

48 This point was also made in paragraph 198 of the report, where the panel stressed that “[t]he task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.”
49 Id., para. 196. There the panel stated:

It may be that some States will always feel that they have the obligation to [protect] their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher.

51 Id., para. 272. The panel stated that “[a]uthorization from the Security Council should in all cases be sought for regional operations.” However, the panel left a small backdoor open by recognizing that “in some urgent situations” such an “authorization may be sought after such operations have commenced.” Id. (emphasis added).
52 Id., para. 203 (“exercisable by the Security Council authorizing military intervention as a last resort”). As regards the Commission on State Sovereignty and Intervention, see text at notes 36–40.
53 For a full discussion, see the contributions in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT: SELECTIONS FROM THE AMERICAN JOURNAL OF INTERNATIONAL LAW (ASIL 2004).
54 High-Level Panel Report, supra note 3, para. 207.
55 Id., para. 204.
criteria were primarily addressed to the Security Council and formulated to guide the Council in its decision “whether to authorize or endorse the use of military force.” The panel only hinted at the option of a broader application of these criteria by states, noting that “it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them.”

The Report of the Secretary-General

The tensions inherent in the notion of responsibility to protect are reflected in the subsequent report of the secretary-general on larger freedom. The secretary-general did not simply endorse the findings of an emerging norm of a collective responsibility to protect, but stressed that he was “aware of the sensitivities involved in this issue.” The concept was removed from the section on the use of force and placed in the section dealing with freedom to live in dignity, so as to detach the idea of responsibility from an automatic equation to armed force. Accordingly, the thematic focus of the concept changed. Responsibility to protect was no longer exclusively viewed as a surrogate for humanitarian intervention but as a strategy to promote the commitment of all nations to the rule of law and human security. This focus was in line with the general theme of the secretary-general’s report, which sought to combine the “imperative of collective action” with a “shared vision of development.”

Consequently, the secretary-general placed stronger emphasis on the need to implement the responsibility to protect through peaceful means. In the report, the international community’s residual responsibility to protect became a responsibility to “use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.” Use of force was described as an ultima ratio measure that, if taken, ought to be carried out by the Security Council. The notion of responsibility to protect was used to constrain, rather than to enable, the use of force. When associated with armed force, however, the concept of responsibility to protect was not viewed as a means to establish alternatives to the Security Council but as an instrument “to make it work better.” Moreover, the report referred to the five criteria of legitimacy for the use of force mentioned in the High-Level Panel Report as exclusively directed to the Council.

Thus, from a legal point of view there was no substantive change with respect to the treatment of humanitarian interventions. The Report of the Secretary-General did not expressly rule out the possibility of unilateral action in any circumstances (e.g., where the veto is used to block action in a case of genocide). Nevertheless, the general focus of the report on the Council and the silence of the secretary-general on alternative means of carrying out interventions

56 Id., para. 207.
57 Id., para. 209.
58 Report of the Secretary-General, supra note 5, para. 135.
59 Id., para. 133.
60 Id., pts. I(C), II(A), respectively.
61 Id., para. 135 (“[I]f national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community . . . ”).
62 Id., para. 135 (“When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action . . . ”).
63 Id., para. 126.
64 Id.
for purposes of human protection indicated a general reluctance to accept military action without the Security Council’s authorization.

The Outcome Document of the 2005 World Summit

The different conceptions of the notion of responsibility to protect finally became apparent in the drafting process of the Outcome Document of the 2005 World Summit. Both the form and contours of the concept were intensively debated before the high-level plenary meeting. Several states (Algeria, Belarus, Cuba, Egypt, Iran, Pakistan, the Russian Federation, and Venezuela) expressed reservations about including the responsibility to protect in the Outcome Document. Some delegations argued that the concept was too vague and open to abuse. Others doubted that it was compatible with the Charter, noting that there is no shared responsibility in international law outside the responsibility of a state to protect its own citizens and the institutional mandate of the United Nations to safeguard international peace and security. Still others again questioned the legal nature of the responsibility to protect and sought to frame this idea in terms of a moral principle. U.S. ambassador John R. Bolton, for example, stated in a letter dated August 30, 2005, that the United States would “not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.” Accordingly, the U.S. delegation proposed that the idea of an international responsibility to protect be defined in the form of a “moral responsibility” of the international community to “use appropriate diplomatic, economic, humanitarian and other peaceful means, including under Chapters VI and VIII of the Charter to help protect populations from . . . atrocities.”

The final text of the Outcome Document is a compromise solution that seeks to bridge the different positions. States avoided reducing the idea of responsibility to protect to a purely moral concept. However, paragraphs 138 and 139 of the Outcome Document represent a rather curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning of the concept.

The two paragraphs are drafted in a discursive fashion, which is typical of political declarations. The clearest commitment is contained in paragraph 138. It opens with the straightforward statement that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” This sentence reflects the traditional bond of duty between the host state and its citizens. This bond is expressly recognized by the respective heads of state and government by way of a collective affirmation (“We accept that responsibility . . . ”).

The passage on the responsibility of the international community is framed in more cautious terms. The Outcome Document relied implicitly on the distinction between responsibility to prevent, responsibility to react, and responsibility to rebuild made by the Commission on State

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65 For a survey of the statements of Algeria, Cuba, Egypt, Iran, Pakistan, Russia, and Venezuela, see Responsibility to Protect—Engaging Civil Society, Chart on Government Positions (Aug. 11, 2005), at <http://www.responsibilitytoprotect.org/index.php/pages/2>.


67 Id. at 3 (enclosure entitled “United States Proposals: Responsibility to Protect”).

68 Outcome Document, supra note 7, para. 138.

69 Id.
Sovereignty and Intervention. However, each of these concepts is treated in individual terms with varying degrees of support.

The idea of responsibility to prevent is phrased in terms of a general appeal (“should, as appropriate”) to the international community to assist states and the United Nations in the prevention of crimes. Responsibility to react is taken up in paragraph 139, which states plainly and unconditionally that “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” This sentence suggests that the idea of responsibility to react enjoys at least some acceptance with regard to measures falling short of the use of force.

However, the Outcome Document assumes a more reserved stance vis-à-vis responsibility to take collective action through the Security Council under Chapter VII. The second sentence of paragraph 139 places this idea under a double qualifier. First, the heads of state and government merely reaffirm their preparedness to take such action. This language points toward a voluntary, rather than a mandatory, engagement. Moreover, states commit themselves to act only “on a case-by-case basis” through the Council, which again stands in contrast to the assumption of a systematic duty. This dual condition distinguishes the tenor of the Outcome Document from the responsibility-driven approach of the high-level panel toward collective security and appears to reflect the view of those states that questioned the proposition that the Charter creates a legal obligation for Security Council members to support enforcement action in the case of mass atrocities. The idea of guidelines for the authorization or endorsement of the use of force by the Council was dropped entirely.

More fundamentally, the text of the Outcome Document does not firmly state that UN collective security action constitutes the only option for responding to mass atrocities through the use of force. Some states claimed that the concept of collective action under the umbrella of the responsibility to protect should not preclude action absent Security Council authorization. The United States, for example, argued that the Outcome Document should not foreclose the possibility of unauthorized intervention, noting that there “may be cases that involve humanitarian catastrophes but for which there is also a legitimate basis for states to act in self-defense.” The Outcome Document does not exclude this line of reasoning. It leaves the door open to unilateral responses through its “case-by-case” vision of collective security and a qualified commitment to act in cooperation with regional organizations (“as appropriate”).

70 Id.
71 Id., para. 139.
72 Id. (“In this context, we are prepared to take collective action . . . ” (emphasis added)).
73 Id.
74 See text at notes 43–57 supra.
75 See Bolton Letter, supra note 46, at 1.
76 Id. at 2.
77 The Outcome Document states:

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
Importantly, the Outcome Document places the entire concept of responsibility to react under a final, additional proviso. The heads of state and government stressed “the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.” This language was inserted in the text in deference to states that felt that responsibility to protect was not yet sufficiently clear in conceptual terms and needed further consideration in the General Assembly before its implementation. The express reference to the need for conformity with “the principles of the Charter and international law” creates further ambiguity. It almost seems to suggest that the drafters of the Outcome Document had some doubts whether their own proposal was consistent with international law and the Charter.

The concept of responsibility to rebuild received even less explicit support. The heads of state and government merely expressed their intention to commit themselves, “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.” The issue of postintervention engagement was mainly addressed in institutional terms, namely, through the creation of the Peacebuilding Commission, which was specifically established to address the challenge of helping countries make the transition from war to lasting peace.

Altogether, the Outcome Document is rather confusing. The fact that responsibility to protect is treated under a separate heading indicates that the idea as such enjoys basic support. Obviously, the drafters also sought to give the concept a certain legal meaning. However, its individual components remain unclear as a result of obvious differences in opinion.

II. TRADITION VS. INNOVATION

The continuing international division raises some doubts about the status of the concept of responsibility to protect. The High-Level Panel Report qualified this concept as an emerging norm. However, this characterization is misleading, since it is overoptimistic and overpessimistic at the same time. Some of the features of the concept are actually well embedded in contemporary international law, while others are so innovative that it may be premature to speak of a crystallizing practice.

Outcome Document, supra note 7, para. 139 (emphasis added); see also Amerasinghe, supra note 1, at 47 ("[I]t would seem that the resolution does not rule out humanitarian intervention by other States as a means of discharging this responsibility.").

Outcome Document, supra note 7, para. 139.

See, for example, the statement of the delegate of the Russian Federation at the Security Council’s open debate on December 9, 2005, on the protection of civilians in armed conflict:

We all remember well the complex compromise that was required to reflect that issue [responsibility to protect] in the 2005 Summit Outcome document. In that connection—and the outcome document states this—we need to have a detailed discussion in the General Assembly of the issue of the responsibility to protect before we can discuss its implementation.


Outcome Document, supra note 7, para. 139 (emphasis added).

Id., para. 97–105. For a closer survey, see GA Res. 60/180 (Dec. 30, 2005) (Peacebuilding Commission).
Partly “Old Wine in New Bottles”

As mentioned above, the responsibility to protect is not a completely novel idea. Some of the allegedly emerging elements of the concept have surfaced in the past.

Sovereignty as responsibility. The shift from sovereignty as control to sovereignty as responsibility appears to be less radical than suggested by its history. The understanding that a state exercises the functions of an agent and trustee for the human beings who are affected by the consequences of state action is not a twentieth-century principle, but can be traced much further back. It appeared as early as the time of Hugo Grotius, whose conception of law was based on the assumption that the rules governing the organization and behavior of states exist ultimately for the benefit of the actual subjects of the rights and duties concerned, individual human beings. Grotius even maintained that it would be just to resort to war to prevent a state from maltreating its own subjects. A similar understanding of the state is reflected in the work of contract theorists. John Locke viewed the relationship between the state and its citizens in terms of “trust.” In fact, the word “trust” appears more frequently than “contract” in his most famous political work, *The Second Treatise of Civil Government*.

Similarly, in international law the state has never been exclusively considered a self-referential entity. Sovereignty and domestic jurisdiction have traditionally served as forums for the protection of the well-being and interests of human beings. Ever since the seventeenth century, attempts have been made to grant individuals and groups international protection from the arbitrary exercise of state authority. Religious groups were even protected by treaty from their own sovereign. Later, this protection was extended to minorities. In the external relations of

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83 This understanding is reflected in Grotius’s conception of things that are public and common to all men. See HUGO GROTIIUS, DE MARE LIBERUM, ch. V (Ralph Deman Magoffin trans., Oxford Univ. Press 1916) (1609); HUGO GROTIIUS, DE JURE BELLII AC PACIS, bk. II, ch. 2 (Francis W. Kelsey trans., Clarendon Press 1925) (1625); see generally Hersch Lauterpacht, The Grotian Tradition in International Law, 1946 BRIT. Y.B. INT’L L. 1, 27.

84 GROTIIUS, DE JURE BELLII AC PACIS, supra note 83, bk. II, ch. XXV, pt. VIII(2), where Grotius states that if a ruler “should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded.” According to Lauterpacht, “[T]his is the first authoritative statement of the principle of humanitarian intervention—the principle that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins.” Lauterpacht, supra note 83, at 46.

85 See, for example, JOHN LOCKE, The Second Treatise of Government, ch. XIII, §149, in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690), where he states:

Though in a Constituted Commonwealth, standing upon its own Basis, and acting according to its own Nature, that is, acting for the preservation of the Community, there can be but one Supreme Power, which is the Legislative, to which all the rest are and must be subordinate, yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.

86 See 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 273 (3d ed. 1957).

87 A good example is the Peace Treaty of Versailles, in which Poland agreed to “protect the interests of inhabitants of Poland who differ from the majority of the population in race, language or religion.” Treaty of Peace, Art. 93, June 28, 1919, Allied & Associated Powers–Ger., 11 Martens (ser. 3) 323, 225 Consol. TS 188. The Versailles Treaty was complemented by a Treaty of Minorities of June 28, 1919, between the Principal Allied and Associated Powers and Poland, 112 Brit. Foreign & St. Papers 232.
states, citizens and subjects of other states were often perceived as capital assets or extensions of a state’s dignity. However, foreigners were protected by a minimum standard of protection under international law, which came to include guarantees of equality and dignity at the beginning of the twentieth century. Moreover, the classical paradigm of diplomatic protection, which is rooted in customary international law, is at least partly built on the idea of the fusion of private and public (state) interests.

It is also well understood that sovereignty entails duties on the international plane. Sovereignty never meant that a state could act in its territory regardless of the effect of its acts on another state. This point was expressly made in 1928 by the arbitrator Max Huber in the award in the Island of Palmas case. After the end of World War II, the adoption of the UN Charter and the rise of key human rights instruments eroded the classic equation of sovereignty and “power.” Although the Charter was oriented toward protecting the sanctity of sovereignty, it contained important references to human rights protection. The preamble, the last sentence of Article 2(7), and Articles 1(3) and 55 made it clear that the Charter was designed to “protect the sovereignty of peoples” and was “never meant as a licence for governments to trample on human rights and human dignity.” This reading of the Charter was recognized in legal doctrine as early as 1947. It became apparent with the unleashing of Chapter VII after the Cold War. It was accompanied by the recognition of the concept of erga omnes obligations (“obligations of a State towards the international community as a whole”) by the ICJ and was later followed by the establishment of separate rules of state responsibility for “serious breaches of obligations under peremptory norms of general international law” by the International Law Commission (ILC).

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88 At the beginning of the twentieth century, claims commissions invoked the minimum standard as a benchmark in cases where states failed to protect the life, property, or human dignity of foreigners. SCHWARZENBERGER, supra note 86, at 201.

89 This bond was stressed more than half a century ago by the Permanent Court of International Justice in the Mavrommatis case, where the Court held that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting. . . . its right to ensure, in the person of its subjects, respect for the rules of international law.” Mavrommatis Palestine Concessions, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30).

90 In the award, it is pointed out that “[t]erritorial sovereignty . . . has as corollary a duty,” namely, the “obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.” Island of Palmas, 2 R. Int’l Arb. Awards 829, 839 (1928). In 1949 this understanding was reaffirmed in Article 14 of the Draft Declaration on the Rights and Duties of States, which provided that “[e]very State has the duty to conduct its relations with other States in accordance . . . with the principle that the sovereignty of each State is subject to the supremacy of international law.” International Law Commission [ILC], Draft Declaration on Rights and Duties of States, Art. 14, GA Res. 375(IV), annex (Dec. 6, 1949), available at <http://www.un.org/law/ilc/>.

91 The subsequent rise of regional and universal human rights instruments provided evidence that human rights could no longer be considered as “internal affairs” that fall “essentially within the domestic jurisdiction of any State” within the meaning of Article 2(7) of the Charter.


93 See OPPENHEIM, supra note 15, at 280 (“The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society.” (footnote omitted)).

94 Barcelona Traction, 1970 ICJ REP. 3, 32, para. 33 (Feb. 5).

Consequently, it has been argued on numerous occasions over the last several decades that sovereignty cannot be used as a shield against intervention. Some authorities made this point in the immediate aftermath of World War II. Hersch Lauterpacht, for example, in the sixth edition of Oppenheim’s *International Law*, departed from the view of his predecessor, noting that “when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.”

In the 1980s, the concept of a “duty to intervene” was invoked by groups seeking access to victims for the purpose of humanitarian assistance. Humanitarian organizations used the vocabulary of “duty” (devoir d’ingérence) to make the case that nongovernmental organizations should have unrestricted access to victims of humanitarian catastrophes, even without the consent of the territorial state.

In the 1990s, this argument was extended to certain military interventions, specifically those in collapsed states and those styling themselves as “humanitarian interventions.” In the context of Somalia, it was argued that the prohibition of the use of force does not rule out interventions in states that are unable to protect their populations because of a collapse of public authority. Such interventions, so went the argument, would not run counter to the principles of sovereignty and territorial integrity of the host state, which Charter Articles 2(4) and 2(7) are designed to protect.

Later, this reasoning was more frequently applied to humanitarian interventions, and in particular to the case of Kosovo. Proponents of the legality of humanitarian interventions relied on the concept of sovereignty as responsibility to justify a (limited) right to use force for humanitarian purposes. They contended that humanitarian interventions are compatible with the telos of the principle of nonintervention and the prohibition of the use of force under Article 2(4). Both norms, they claimed, were meant to protect the citizens of a state, rather than the state as an entity. This rationale ceases to apply in favor of the state when the domestic sovereign violates the rights of its own population.

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96 OPPENHEIM, supra note 15, at 280. This conclusion is preceded by the following reasoning: “There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion” (and that intervention is permissible when the state denies its nationals their fundamental human rights). *Id.* at 279–80 (footnotes omitted).


99 Note, however, that small and some large states (e.g., China and Russia) have strong reservations about unauthorized humanitarian intervention.

100 For example, FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 217 (3d rev. ed. 2005), states:

> Force used in defense of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations. State sovereignty makes sense only as a shield for persons to organize themselves freely in political communities. A condition for respecting state sovereignty is, therefore, that sovereign governments (minimally) respect human rights. Delinquent governments forfeit the protection afforded by Article 4(2).
Recently, the departure from classic principles of nonintervention was codified in the Constitutive Act of the African Union.\textsuperscript{101} Article 4(h) of the treaty recognizes an express right of intervention of the Union,\textsuperscript{102} the “right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity [as well as a serious threat to legitimate order].”\textsuperscript{103}

The concept of responsibility to protect is rooted in the same school of thought. It relies on the axiom that sovereignty exists essentially for the purpose of protecting people. The state is conceived of as the principal guardian of the rights of its people; however, it loses this status of primacy in cases where it is unable or unwilling to ensure this protection.

\textit{Parameters of intervention.} A similar point may be made with respect to the concept of intervention when used in connection with the notion of responsibility to protect.

The idea of intervention as a continuum (responsibility to prevent, responsibility to protect, responsibility to rebuild) did not come out of the blue. The need for a multiphased vision of international engagement became evident during the multidimensional UN peacekeeping of the 1990s. Secretary-General Boutros Boutros-Ghali developed a tripartite conception of peacemaking in his widely read \textit{Agenda for Peace}, which distinguished peacemaking as preventive diplomacy and “post-conflict peacebuilding.”\textsuperscript{104} Individual aspects of this distinction were then developed in other reports, such as the Brahimi report,\textsuperscript{105} which stressed the importance of the continuity of the process from preventive action to peace building, and the report of the secretary-general “No Exit Without Strategy,” which stressed the idea of responsibility after intervention and the need for a postengagement strategy after elections.\textsuperscript{106}

An even longer historical lineage marks the criteria for the legitimacy of intervention proposed by the Commission on State Sovereignty and the high-level panel. At least four of these criteria (just cause, right intention, last resort, and proportionality of means) hark back to the just war doctrine.


\textsuperscript{103} Constitutive Act of the African Union, supra note 101, Art. 4(h). The bracketed words regarding “a serious threat to legitimate order” are added to this provision by Article 4 of the Protocol on Amendments to the Constitutive Act of the African Union, Feb. 3, 2003, available at AU Web site, supra note 101. This Protocol has not yet entered into force. The modalities of the right to intervene are set forth in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, available at AU Web site, supra. This Protocol balances the principles of “non-interference” and respect “for the sovereignty and territorial integrity of Member States” with “respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law.” \textit{See id.}, Art. 4.


\textsuperscript{106} No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations, Report of the Secretary-General, para. 26, UN Doc. S/2001/394. In this report, the secretary-general emphasized that “[m]ission closure, as a result of the failure of the parties to abide by their agreements, does not represent an end to the responsibility of either the United Nations system or the Security Council, nor need it signal an end to the Council’s involvement.” The report went on to recommend that, in such situations, Council members should “individually and collectively” consider “what forms of leverage are available to address the conflict.” \textit{Id.}
All of these examples illustrate one broader point. Many of the elements of the concept of responsibility to protect are not novel, but rooted in a broader ideological or legal tradition; and it appears to be this link that allowed the concept to gain some acceptance in recent practice.

Partly Progressive Development of the Law

Other elements of the responsibility to protect, in contrast to those just reviewed, are innovative—so innovative, indeed, that it is difficult to ascribe them to the existing acquis of international law.

The concept of responsibility to protect appears to associate the idea of human security with certain duties, that is, a collective responsibility to act in the face of gross human rights violations (e.g., to prevent, to react, to rebuild). This vision is novel. So far, such duties have been derived (if at all) from the (rather vague) concept of solidarity. To link protection to responsibility goes a step further, in particular, if responsibility is understood in the sense of a positive obligation.

The law of state responsibility recognizes that certain violations of international law affect all states, and it authorizes states to respond to such violations through claims for “the cessation of the . . . wrongful act,” demands for the performance of reparation, or countermeasures. However, contemporary international law imposes only limited positive duties on states. The ILC Articles on State Responsibility, for instance, endorse the idea that certain breaches of international law may be so grave as to trigger not only a right, but also a certain obligation of states to foster compliance with the law. But the ILC limited this principle to the particular category of violations designated as serious breaches (“a gross or systematic failure by the responsible State” of “a peremptory norm of general international law.” The Commission specified that such breaches would entail two sets of consequences: (1) a positive obligation of states “to cooperate to bring [the serious breach] to an end through lawful means” (Article 41(1)); and (2) a negative obligation of states not to recognize as lawful a situation created by the serious breach and not to render aid or assistance in maintaining that situation (Article 41(2)).

The duty of cooperation under Article 41(1) comes close to the idea of collective responsibility under the concept of responsibility to protect. The Commission made clear that the obligation to cooperate applies to states whether or not they are individually affected by the serious breach. It associated this duty, in particular, with two forms of action, which are also relevant to the responsibility to protect: “a joint and coordinated effort by all states to counteract the effects of [serious] breaches” of peremptory norms of general international law, and international cooperation, which would be “organised in the framework of a competent international organization, in particular the United Nations.”

107 See Articles on State Responsibility, supra note 95, Arts. 42(b) (“injured State”), 48(1) (“State other than injured State”).
108 Id., Art. 48(2)(a), (b).
109 Id., Arts. 49–53. Countermeasures may be taken by “injured States.”
110 Id., Art. 40(2).
111 Id., Art. 40.
112 Id., Art. 41 Commentary, para. (3).
113 Id., para. (2).
However, the Commission subjected the entire concept of an obligation to cooperate to an express caveat. It acknowledged that it is open to question whether general international law at present prescribes a positive duty of cooperation and conceded that in that respect Article 41(1) “may reflect the progressive development of international law.”

The concept of responsibility to protect takes the idea of responsibility even a step further than the ILC. The Outcome Document of the 2005 World Summit modifies the threshold set by the ILC articles. It does not link the idea of a collective international responsibility to a double qualifier (serious breaches of peremptory norms of general international law, such as genocide), but extends that idea to all forms of “genocide, war crimes, ethnic cleansing and crimes against humanity.” Moreover, the targeted obligation to cooperate to end the breach is transformed into a general responsibility to “use diplomatic, humanitarian or other peaceful means” or collective (security) action to “help protect populations from atrocities.” It is thus clear: if the responsibility to protect as set forth in the Outcome Document is meant to entail positive obligations in the sense of Article 41(1) of the ILC articles, it marks an even more progressive development of international law than the project of the ILC.

III. CONSTRUCTIONAL AMBIGUITIES

These normative ambiguities are complemented by some constructional deficiencies. Some of the implications of the conception of responsibility to protect have not yet been fully contemplated from a legal perspective. Two issues deserve further attention: the concept of complementarity, and the consequences of a violation of the responsibility to protect.

The “Complementarity Trap”

Complementarity has been used as a tool to win the support of states for the concept of responsibility to protect. All of the four documents that refer to the concept rely on complementarity. They make a distinction between the primary responsibility to protect of the host state, and the fallback responsibility of the international community, which is triggered if the host is unable or unwilling to secure protection. This setting of priorities accords with the idea that domestic authorities are often “best placed to take action” on the ground and enjoy the proper legitimacy to make fundamental choices about the future of their constituency.

However, in some cases this scheme may actually turn into a complementarity trap. The complementarity principle may create an additional threshold for collective security action,

114 Id., para. (3).
116 Outcome Document, supra note 7, paras. 138, 139.
117 RESPONSIBILITY TO PROTECT, supra note 2, para. 2.30; High-Level Panel Report, supra note 3, para. 201; Report of the Secretary-General, supra note 5, para. 135; Outcome Document, supra note 7, para. 138.
119 See RESPONSIBILITY TO PROTECT, supra note 2, para. 2.30.
which would burden the Security Council. The argument of states’ primary responsibility may be used to constrain, rather than enable, Council involvement. This risk looms particularly large in the case of paragraph 139 of the Outcome Document, which indicates that, in principle, collective action shall be taken only if national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, or crimes against humanity. The meaning of the term “manifestly fails” is unclear. Moreover, the requirement of manifest failure may be used as an additional means to challenge the legality and timing of collective security action. Nonfailure may be invoked as a defense in a double sense, both prior to international engagement and following any such deployment. Domestic authorities may invoke their primary responsibility to argue that international actors are either not yet competent to assume control or no more entitled to exercise such protection than local actors.

The case of Darfur serves as an example in this regard. In the Security Council, some states used the argument of primacy to prevent the imposition of sanctions against Sudan. They claimed that it was premature to take collective action, since the crisis in Sudan had not yet reached a stage where the domestic government had manifestly failed to exercise its responsibility to protect.\(^{120}\) This experience shows that the concept of complementarity is a double-edged sword. It preserves domestic ownership but may in some instances run counter to the very idea of strengthening collective security. To avoid any incompatibilities with the collective security system, the operation of the complementarity principle should remain subject to the Chapter VII powers of the Security Council under the Charter.

**Implications of Inaction**

All of the four documents examined are silent on the fundamental question of how to deal with violations of the responsibility to protect. This issue has been addressed only in cursory fashion by the architects of the concept.

Some agreement appears to have taken hold on the idea that inaction by the host state can be remedied through collective action. But what if states or international authorities do not live up to their residual responsibility to protect? Should such omissions equally be subject to some sanction; and, if so, how should they be remedied?

The four documents fail to deal with this question. If the responsibility to protect were indeed a primary legal norm of international law, it would be logical to assume that such violations should entail some form of legal sanction in case of noncompliance. But it is uncertain on what basis and under which rules such violations could be remedied. This specific type of violation, the breach of a positive duty, is not addressed as such by the regime of the law of state responsibility.\(^{121}\) Nor has it been conclusively determined whether and under what conditions inaction by an international organization may entail international legal responsibility.\(^{122}\) One

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120 Responsibility to protect was invoked in particular in the context of the adoption of Security Council Resolution 1556 on July 30, 2004. For a survey of statements following its adoption, see UN Doc. S/PV.5015 (July 30, 2004). See generally Alex J. Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq, 19 ETHICS & INT’L AFF. 31 (2005).

121 The ILC Articles on State Responsibility deal with omissions only briefly in the context of breaches of a “composite act.” Articles on State Responsibility, supra note 95, Art. 15. No specific consequences are attached to a failure to act under chapter I of Part II: Content of the International Responsibility of a State.

might argue that a state’s noncompliance with a duty “to protect” might trigger a certain right, or even duty, of third parties to protest against this inaction. Yet it is difficult to imagine what legal consequences noncompliance by a political body like the Security Council should entail. It is highly questionable whether the architects of the responsibility to protect wanted to attach any direct legal consequence to such inaction.

The uncertainty surrounding the consequences of noncompliance raises a broader question of principle. It sheds doubt on the notion that responsibility to protect was meant to be an emerging hard norm of international law at all, instead of “soft law” or a political principle.

IV. CONCLUSION

A comparative analysis of the report of the International Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit indicates that responsibility to protect is a multifaceted concept with various elements. The core tenet of the concept (sovereignty entails responsibility) enjoys broad support among states, and in the United Nations and civil society. However, each of the four documents examined here embodies a slightly different vision of responsibility to protect. This divergence explains part of its success. The notion became popular because it could be used by different bodies to promote different goals.

The guiding theme of the concept is a sharing of responsibility by the territorial state (primary responsibility) and other actors in matters of human security. The main components of this division of responsibility may be described in five propositions that enjoy different levels of support, ranging from the most accepted to the least.

Proposition No. 1: The Host State Has a Duty to Protect Citizens on Its Territory

The most commonly accepted proposition is that the host state has a responsibility to protect citizens on its territory from large-scale atrocities. This duty is recognized in an equal fashion by all four documents and has been articulated in contemporary statements by state representatives. It is rooted in the traditional obligation of the state to safeguard the well-being and security of persons under its jurisdiction, which is reflected, inter alia, in universal and regional human rights conventions, and reinforced by the growing commitment to criminalizing genocide, crimes against humanity, and war crimes under domestic law.

123 See, for example, the statements by the UK representative and the representative of the Philippines after the adoption of Security Council Resolution 1556 (2004). UN Doc. S/PV.5015, supra note 120, at 5, 10.
124 See, for example, Article 2, in conjunction with Article 6 (right to life) and Article 9 (liberty and security of persons), of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; and Article 1, in conjunction with Article 2 (right to life), and Article 5 (liberty and security of persons), of the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 221.
125 This process is fostered by the enactment of implementation legislation under the Rome Statute of the International Criminal Court, supra note 118. See generally Jann K. Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, 1 J. INT’L CRIM. JUST. 86 (2003), Paragraph 138 of the Outcome Document, supra note 7, makes reference to this commitment (“This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”).
Proposition No. 2: States Failing the Duty to Protect Have a Weak Sovereignty Defense

Second, the documents in question reflect an emerging consensus on what one may call the negative dimension of responsibility to protect: the limited ability of the host state to invoke sovereignty against external interference. Responsibility to protect is based on the assumption that the host state has a duty to accept aid, assistance, or even the use of force from the outside. This idea may be found in the final clause of Article 2(7) of the Charter. It gains a broader dimension in the context of responsibility to protect, which makes it harder for states to invoke sovereignty as a shield when they are failing to protect their populations. State sovereignty and territorial integrity are no longer a blanket defense against intervention. States will be forced to substantiate the claim that they are upholding certain norms and standards of governance vis-à-vis their own population when they invoke sovereignty as a defense against external interference.

Proposition No. 3: Foreign Entities May Intervene Nonforcibly

Third, there is growing support for the idea that both the United Nations and third states may intervene nonforcibly (i.e., through diplomatic, humanitarian, and peaceful means) in cases where the host state fails to protect citizens on its territory from genocide, war crimes, ethnic cleansing, and crimes against humanity. The Outcome Document strongly emphasizes a collective response “through the United Nations.” However, none of the four documents excludes state-based responses. Under the ILC Articles on State Responsibility, this option finds support in the right of “injured State[s]” to take countermeasures under Article 49 and the entitlement of “[a]ny state” to claim “cessation of the internationally wrongful act, and assurances and guarantees of non-repetition” when the “obligation breached is owed to the international community as a whole.”

Proposition No. 4: Foreign States May Intervene Forcibly

It is far more controversial whether and under what circumstances states may use force to put an end to large-scale atrocities. The use of military force is expressly excluded from the realm of possible countermeasures under the ILC articles. In the context of the responsibility to protect, the approach to unauthorized uses of force varies from document to document. The High-Level Panel Report (“exercisable by the Security Council”) and the Report of the Secretary-General reflect continuing reservations about responses outside the collective security

127 Outcome Document, supra note 7, para. 139.
128 This option is contemplated, inter alia, in RESPONSIBILITY TO PROTECT, supra note 2, paras. 4.3–4.9.
129 Note that several states may be “injured” in case of a violation of an erga omnes obligation. Articles on State Responsibility, supra note 95, Art. 42(b). In its commentary on Article 42, the Commission noted expressly that a broader range of states may have a legal interest in ensuring compliance with such obligations, even though none of them is individually or specially affected by the breach.
130 Id., Art. 48(1), (2).
131 Countermeasures shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” Id., Art. 50(1)(a).
132 High-Level Panel Report, supra note 3, para. 203.
system. At the same time, states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future.133 However, all four documents subscribe to one common qualifier: they make clear that the collective security system shall remain the primary forum for military action. Unilateral responses (if contemplated at all134) are envisaged only as a last resort.

Proposition No. 5: Foreign Entities Have a Positive Duty to Act

Finally, there is even less agreement on the last proposition, that the United Nations or states have a positive obligation to intervene under the concept of responsibility to protect. The potential addressee of such an obligation is a matter of some confusion. All four documents adhere to the core idea of the Commission on State Sovereignty and Intervention to shift the focus from the right to intervene to a responsibility to protect. However, the consensus becomes very thin when it comes to defining to whom this responsibility shifts if a state fails to live up to its (primary) duty to protect citizens living on its territory.

The Commission on State Sovereignty and Intervention avoided taking a clear stance on this issue. It simply referred to the residual responsibility of the broader community of states135—a notion that lacks any legal specificity. The High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document postulate that coercive collective action is to be undertaken through the Security Council.136 This assumption, however, fails to answer the fundamental question: What if the international community, through the Security Council, fails to exercise its responsibility to protect? Does the burden then shift back to individual states, groups of states, or regional organizations; and, if so, to which states and organizations?

In addition, one finds hardly any evidence that states understand the three substantive components of responsibility to protect (responsibility to prevent, responsibility to react, responsibility to rebuild) in the sense of a positive duty to act under international law. The cautious phrasing of paragraph 139 of the Outcome Document (“[W]e are prepared to take collective action . . . on a case-by-case basis”) resulted partly from the unwillingness of Security Council members to concede that the Council has a firm duty to act. States are even less inclined to accept this proposition. Under current international law, their obligations encompass at best the duties identified by the ILC in Article 41 of the 2001 Articles on State Responsibility.

The concept of responsibility to protect may gradually replace the doctrine of humanitarian intervention in the course of the twenty-first century. However, at present, many of the propositions of this concept remain uncertain from a normative point of view or lack support. Responsibility to protect is thus in many ways still a political catchword rather than a legal norm. Further fine-tuning and commitment by states will be required for it to develop into an organizing principle for international society.

133 See in this sense Amerasinghe, supra note 1, at 47.
134 See RESPONSIBILITY TO PROTECT, supra note 2, paras. 6.36, 6.37.
135 Id., para. 2.31.
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**[Footnotes]**

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