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Preface

Rüdiger Wolfrum celebrated his 65th birthday on 13 December 2006. On this special occasion, current and former members of the large circle of his PhD and post-doctorate students (Doktoranden und Habilitanden) organized a symposium on the subject of "International Law Today: New Challenges and the Need for Reform?" to honour him and his academic work as a teacher and researcher. The symposium took place at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg on 15 and 16 December 2006.

Since Rüdiger Wolfrum is a renowned scholar in many different fields of public national and international law, the subjects covered by the speakers and commentators reflect the wide variety of issues he worked on in his long and impressive academic career. They extend from a critical evaluation of the new responsibility to protect and the role of the UN Security Council in post-conflict management, thoughts on the proliferation of international tribunals with regard to the unity or fragmentation of international law, marine genetic resources in the deep sea and environmental protection in Antarctica to human rights issues relating to intellectual property rights and the protection of minorities. All the presentations focused on new trends in international law and thus followed the lead of Rüdiger Wolfrum who has always been at the forefront of innovative legal developments.

The symposium and the publication of its proceedings would not have been possible without the support and commitment of many whom I want to thank *in toto*. Special thanks go to *Tono Eitel*, *Thomas Mensah* and *Fred Morrison* who did not hesitate to come to Heidelberg a week before Christmas to chair the sessions of the symposium. In addition, a great deal of gratitude is owed to *Dr. Anja Seibert-Fohr* and to *Yvonne Klein* who shouldered the major part of organizing the symposium in Heidelberg, as well as to *Dr. Nele Matz-Lück* who took on the task of collecting and preparing the papers for timely publication. The linguistic quality of the contributions profited enormously from the proficiency of *Kate Elliott* who performed the native speaker check.

Hamburg, July 2007

Doris König

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Tobias Stoll

I. Introduction

The international system and its legal structures are the subject of a broad discussion that probably dates back to the times of the fall of the Berlin wall. The turn of the millennium, the catastrophic terrorist attacks of September 11, 2001 and the attempts to reform the United Nations in 2005 have each furthered the debate. It takes place at political, diplomatic and academic level, and even includes concepts of a constitutionalisation. Due to its basic perspective, this discussion relates to a number of very fundamental concepts of international law. Among these are responsibility, sovereignty and cooperation.

Most observers agree that the 2005 UN reform attempt produced only some fairly limited results. The establishment of the Human Rights

Council and the Peacebuilding-Commission may be regarded as the most visible institutional outcome. In terms of concepts, the idea of a "responsibility to protect"[1] seems to be one of the few results. Although the set of arguments and observations which in total represent the concept of a "responsibility to protect" have not resulted in significant changes in existing or the explicit creation of new rules, the discussion is still relevant. It may importantly influence views on some fundamentals of the international legal order and have implications far beyond the issue of humanitarian intervention, which was originally the focus of the development of that concept.[2]

After a brief explanation of its origin and contents (II.), the concept of a responsibility to protect will be analysed in the light of three fundamental issues of international law, namely: responsibility (III.), sovereignty (IV.) and cooperation (V.). It will be submitted that the "responsibility to protect" in explicitly appealing to the notion of responsibility is dubious, whereas its implications for the concept of sovereignty are quite helpful. However, as will be shown, the "responsibility to protect" somehow fails adequately to take into account the dimension of cooperation.

II. "Responsibility to Protect" – The Career of a Concept

The notion of "responsibility to protect" was initially developed by an "International Commission for Intervention and State Sovereignty"

[1] See P. Hilpold, "The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?", *Max Planck UNYB* 10 (2006), p. 35 et seq.; I. Winkelmann, "'Responsibility to Protect': Die Verantwortung der Internationalen Gemeinschaft zur Gewährung von Schutz", in: P.M. Dupuy/B. Fassbender/M.N. Shaw/K-P. Sommermann (eds.), *Völkerrecht als Wertordnung. Common Values in International Law – Essays in Honour of Christian Tomuschat*, 2006, p. 449 et seq.; A.M. Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform", *AJIL* 99 (2005), 619 et seq.; L. Feinstein/A.M. Slaughter, "A Duty to Prevent", *Foreign Affairs* 83 (2004), 136 et seq.; G. Molier, "Humanitarian Intervention and the Responsibility to Protect After 9/11", *NILR* 2006, 37 et seq.

[2] See below, text preceding footnote 4.

(ICISS) established by the Canadian Government.[3] The latter thereby responded to an initiative of the UN Secretary General, who had asked the international community to clarify the issue of humanitarian intervention. He stated:

> "... if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"[4]

As is well known, the ICISS came back with the concept of "responsibility to protect". It basically envisages that

> "[s]tate sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself ..."[5]

and that

> "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."[6]

Furthermore, the Commission has voiced a responsibility to prevent,[7] to react[8] and to rebuild,[9] and has specifically attributed duties in this regard to states and the international community.

[3] International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, Ottawa, 2001, www.iciss.ca.

[4] Report of the Secretary-General on the Work of the Organization, A/55/1 para. 37.

[5] ICISS report (footnote 3), at XI – "Principles" under A.

[6] *Ibid.* under B.

[7] According to the Commission report, Basic Principles, (3)(A) this includes "... to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk."

[8] 'The responsibility to react is defined as follows: "... to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.", *ibid.*, (3)(B).

[9] C. According to the Commission, the "responsibility to rebuild" means: "... to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.", *ibid.*, (3)(C).

At this stage, it has already become clear that the "responsibility to protect" is a two-tiered concept. It first reiterates that it is the most fundamental and genuine function of States to protect their citizens.[10] Secondly, in the sense of an "*international* responsibility to protect"[11] some sort of joint action is envisaged, which may include an international intervention. More or less explicitly, under specific circumstances, the ICISS envisaged the justification of intervention even in cases where there is no authorization by the United Nations Security Council.[12]

With some differences in wording and formulation, this responsibility to protect was endorsed by the so-called "High-level Panel on Threats, Challenges and Change" set up by the Secretary General later to develop concepts and ideas for the reform of the United Nations. The Panel stated:

> "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."[13]

As this statement may indicate, the Panel has importantly developed and altered the concept. It endorsed the concept by referring to an "emerging norm". However, it considerably diverged from the ICISS by emphasizing a "collective international responsibility" to be exercised by the Security Council.

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[10] See for details below, text accompanying footnote 41.

[11] Emphasis added.

[12] The ICISS states: "If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are: I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council." It goes on in emphasizing: "The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby."

[13] A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, para. 203. For a general analysis of the report see, Slaughter (footnote 1), *passim*.

Finally, the Secretary General himself, in his 2005 report "On larger freedom", – although in somewhat more cautious words – endorsed those views by stating:

> "I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d'être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."[14]

Finally, the Heads of States attending the High level meeting of the General Assembly in 2005 addressed the issue in their closing document, the so-called 2005 World Summit Outcome as follows:[15]

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

The document goes on to state:

> "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in coop-

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[14] In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, A/59/2005, 21 March 2005, para. 135.

[15] 2005 World Summit Outcome, A/Res. 60/1, para. 138 et seq. The title of that section of the paper reads: "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

> cration with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. ... We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[16]

In its resolution 1674 of 28 April 2006, the Security Council endorsed this statement.[17]

Taking all these statements together the concept of a "responsibility to protect" in substance deals with issues of humanitarian intervention. It spells out a responsibility of States to be backed up by an "international" responsibility, which – according to the more recent documents – will be exercised through the Security Council. The concept takes a broader view, which touches upon the fundamentals of the international legal order in the same way as responsibility and sovereignty. "Responsibility to protect" has been qualified as an "emerging norm of international law" by the High-level Panel[18] and the Secretary General.[19] Thus, it has some legal status.[20]

III. Taking a Closer Look at Responsibilities

As the "responsibility to protect" expressly incorporates it, an analysis may start with the notion of "responsibility". Responsibility is a term

[16] *Ibid.*, at para 139.

[17] Preambular para. 4 of the resolution states: "Reaffirms 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; ...".

[18] See above, text preceding footnote 13.

[19] Report of the Secretary General (footnote 14) at para. 135: "... recently the High-level Panel on Threats, Challenges and Change, with its 16 members from all around the world, endorsed what they described as an "emerging norm that there is a collective responsibility to protect" (see A/59/565, para. 203). While I am well aware of the sensitivities involved in this issue, I strongly agree with this approach. ..."

[20] See Winkelmann (footnote 1), 459 et seq.

frequently used, for instance, in political debate.[21] It also has clear legal meaning, which is relevant here, as the "responsibility to protect" is considered to be a legal concept.

1. "Responsibility to Protect" and State Responsibility?

As all the statements referred to above highlight, the responsibility to protect is first considered a responsibility of the relevant State. It is thus open to comparison with the well-established and long-standing law of state responsibility, which has recently been incorporated into Draft Articles by the International Law Commission.[22]

One of the cornerstones of the law of State responsibility is a two-tiered structure, where responsibility relates to an underlying obligation and arises where the latter is breached.[23] As is often observed, state responsibility at this point comes close to the concept of a law of torts. This structure aims at defining obligations and the consequences that their breach may entail. It thereby serves an important function within a legal system, the fundamental objective of which is clearly to delineate rights and duties and to provide for their enforceability.[24]

The concept of a "responsibility to protect" hardly fits this pattern, as it does not precisely define the kinds of obligations which are at stake and the potential consequences of their breach. Drawing from the debates and documents, one could expect a State to provide for safety, security, well-being, the rule of law, democracy and human rights.[25] However,

[21] The term has also moral and ethical connotation, see P. Cane, *Responsibility in Law and Morality*, 2002; T. Warner, *An Ethic of Responsibility in International Relations*, 1991.

[22] Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), A/56/10; See also GA res. 59/35 of 2 December 2004. See J. Crawford, *The International Law Commission's Articles on State Responsibility*, 2002.

[23] See Draft Articles 1 and 2 and Crawford (footnote 22), 14 et seq.

[24] See K. Zemanek, "Responsibility of States: General Principles", in: R. Bernhardt (*ed.*), *Encyclopedia of Public International Law*, Vol. IV (2000), p. 219; G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, Vol. I/3, 2nd. ed., 2002 at p. 864 et seq. As regards environmental law see R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", *Recueil des Cours*, Vol. 272, 1999, p. 13 et seq.

[25] See text accompanying footnote 45, referring to "Welfare".

there is a critical lack of precision at this point, which raises concerns. Speaking about responsibility without clear reference to obligations may be considered rhetoric amounting to covertly claiming new obligations by implication. It may also, and possibly even worse, make the alarm function of the concept of State responsibility less compelling.

At a first glance, such ambiguities appear to have been eliminated largely by the changes made in the course of the 2005 high level meeting of the General Assembly. In the Summit outcome document, responsibility to protect was clarified and narrowed down by the formulation: "[r]esponsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[26] Now, the "responsibility" can be considered to rest firmly on the basis of peremptory norms of international law. Taken to such narrow confines, however, the disconnect to the existing and proposed rules on state responsibility becomes even more apparent when one looks at Chapter III of the Draft Articles, which specifically addresses the issue of "serious breaches of obligations under peremptory norms of general international law". Such serious breaches are defined as "a gross or systematic failure by the responsible State to fulfil an obligation" (Draft Art. 40 para. 2) "arising under a peremptory norm of general international law" (para. 1).[27] This is not to say that both aspects could not or should not coexist. To the contrary the relevant ILC draft articles even expressly refer to "... further consequences that a breach ... may entail under international law".[28] However, without clarification the interrelationship between these Draft Articles and a "responsibility to protect" remain doubtful. In sum, a responsibility to protect can hardly be considered properly to fit the structures of state responsibility in conceptual terms.

2. "Responsibility to Protect" as an "Institutional" Responsibility?

"Responsibility to protect" might better comply with a distinctly different understanding of responsibility, which can be found in the UN Charter and many other instruments. Art. 24 para. 1 of the UN Charter may be cited as an example, where it refers to "[t]he primary *responsibility*"[29] of the Security Council for the maintenance of international peace and security.[30] Responsibility in this sense comes close to the German "Zuständigkeit" and basically is supposed to attribute and distribute power and authority within institutions and organizations. Apparently, this sort of responsibility differs importantly from the aforementioned understanding of state responsibility. Responsibility in such institutional terms does not carry with it the judgment of the breach of an international obligation in the way that state responsibility does. Moreover, it is debatable whether it carries any substantial legal authority at all.

"Responsibility" in this institutional sense has an important meaning regarding the attribution of functions within the United Nations. The famous 1950 "uniting for peace" resolution already referred to the notion in order to emphasize the role and explicitly: the responsibility of the General Assembly in the case of a "blockade" of the Security Council by the veto powers of the permanent members.[31] Thus, the notion of "responsibility" in our case might have been used to signify a proposal for some institutional or procedural change. Indeed, initially, the ICISS understood the concept of "responsibility to protect" as embracing an option for action even without the explicit consent of the Security Council.[32] However, neither the Panel nor the Secretary General nor the Summit Outcome document endorsed the proposal, but on the contrary pointed out the exclusive powers of the Security Council.[33] If the use of the term "responsibility" was ever intended to signify a proposal for change of the institutional setting, this purpose has become obsolete.

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[26] See above, text accompanying footnote 15.

[27] See Crawford (footnote 22), at p. 242 et seq.

[28] Draft Art. 41 para. 3, see Crawford, *ibid.*, at p. 252 et seq.

[29] Emphasis added.

[30] See J. Delbrück, Art. 24 in: B. Simma (ed.), *The Charter of the United Nations*, 2nd. ed., Vol. I, 2002, p. 442.

[31] A/RES/377(V) of 3 November 1950. Preambular para. 9 reads: "Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security, ...". It has to be emphasised, that the wording refers to "responsibilities" in view of the UN and their organs, whereas it uses the term "obligations" to mark the commitment of States.

[32] See above, at footnote 12.

[33] See above, at footnote 16.

Moreover, the use of the term "responsibility" raises concerns even if considered to be used in "institutional" mode. The "responsibility to protect" addresses States and institutions alike without much explanation regarding the proper delineation between such "responsibilities" and without stating, whether a member State's responsibility arises out of its sovereignty or its membership of the UN.

3. Responsibility to Protect and the International Criminal Responsibility

A closer look reveals that such a narrow understanding of a "responsibility to protect" would basically mirror international individual criminal responsibility under the Rome Statute.[34] It may be recalled that under Art. 5 of its statute the International Criminal Court has jurisdiction with respect to the "... crime of genocide, ... crimes against humanity, ... war crimes and the crime of aggression ...". In view of the state of development of the international legal order, it is quite telling that individual responsibility can be secured, while the respect of States for these fundamental values is so difficult to achieve.[35]

IV. Taking Sovereignty Seriously

Apparently, putting forward a "responsibility to protect" has earned some merits in the context of sovereignty.[36] Interestingly, the two commissions as well as the report of the Secretary General begin with an appraisal of sovereignty and its place within international law and the

[34] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entry into force: July 1, 2002.

[35] As for the interrelationship between state responsibility and international criminal responsibility see H. Gros Espiell, "International responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights", in: M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, 2005, p. 151 et seq. and A. A. Concado Trindade, "Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", *ibid.*, at 253 et seq.; see also N. Jørgensen, *The Responsibility of States for International Crimes*, 2000 at p. 151 et seq.

[36] See Slaughter (footnote 1), 627 et seq.

United Nations.[37] Two achievements can be seen in this regard. First: the discussion helped to find ways to define an inherent limitation of sovereignty in the context of UN membership. Secondly, the discussion supported an understanding where sovereignty relates to people living in a State and their well-being.

1. Promotion and Inherent Limitation of Sovereignty in the United Nations

For a long time, sovereignty has been referred to as some sort of pre-constitutional autonomy status of an absolute nature. This kind of sovereignty defence has been extensively and successfully used within the UN, although it often neglected the state of international commitments of States.

The discussion on "responsibility to protect" has brought about a decisive turnaround in this regard. The ICISS is especially explicit in pointing out that the United Nations is not an institution for reducing or limiting sovereignty but that it, on the contrary, contributes to its promotion. Such promotion, it is understood, rests on the appreciation and acknowledgement of sovereign States through their membership and also includes a guarantee of security and non-intervention. In the words of the ICISS: "Membership of the United Nations was a final symbol of independent sovereign states and thus the seal of acceptance into the community of nations".[38] It goes on to state that the UN is the "main arena for the jealous protection, not the casual abrogation of State sovereignty".[39]

On the understanding that the United Nations importantly serves the interest in sovereignty, the ICISS concludes that it is a legitimate right of the United Nations to ask that such sovereignty be exercised in accordance with the general objectives and needs of that organization.

In its own words, the high-level panel indeed uses a similar line of argument:

> "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibili-

[37] See above, text accompanying footnote 5 and 13.

[38] See report of the ICISS (footnote 3), Para. 2.11.

[39] *Ibid.*

ties. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.

2. Linking Sovereignty to the People

Even more far reaching than the concept outlined above, a second line of argument addresses the link between a State and its people. The ICISS highlighted that providing security is the most fundament task of sovereign States,[40] and the panel noted that the UN protects sovereign nation states because of what they do for their people:

> "What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens."[41]

Similarly, the Secretary General stated in his report:

> "I believe that we must embrace the responsibility to protect ... This responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population."[42]

In this statement, he appealed to what has been considered a core function of States ever since Thomas Hobbes' writings.[43] Of course, this kind of protection includes effective protection against other groups or individuals as well as against unlawful acts of the State authorities themselves. Security for individuals always comprises both: security against threats from others as well as from the State and its forces. In this vein, the High-level Panel used an even more imaginative formula in stating:

> "State sovereignty ... clearly carries with it the obligation of a State to protect the welfare of its own peoples ...".[44]

[40] See above, text accompanying footnote 5, see also below, at footnote 44.

[41] *Ibid.*, at para. 30.

[42] "In larger freedom", footnote 14 at para. 135.

[43] See Stoll, *Sicherheit als Aufgabe von Staat und Gesellschaft*, 2003, at 2 et seq.

[44] Footnote 13, at para. 29.

It has to be emphasised that the task of providing for security and well-being is not just derived from existing human-rights obligations but understood to be related to security: As has been stressed more than once, international security under the United Nations relies on its sovereign Member States and their contribution, and thus represents a sort of a shared responsibility. In this regard, it is stated that States whose stability is put into question cannot always readily fulfil their commitments and duties. It is further pointed out that this can best be prevented if progress, welfare, security, stability and justice are effectively furthered and maintained by the government in question.

Asking what States do to their people automatically implies addressing the issue of governance. Indeed, governments and responsible officials are addressed in particular in the High-level Panel's document. In this regard, one needs to stress that the responsibility of States has been given considerable backing by the individual criminal responsibility brought about by the establishment of the International Criminal Court.[45]

3. Conclusion

In sum, these developments have had an enormous impact on our view of sovereignty, which can basically be understood to be based on an understanding whereby firstly, the United Nations system is regarded as an important device for noting and securing sovereignty, secondly, sovereignty is linked via the internal order of a State to the needs and interests of its people, and thirdly, the responsibility of individuals comes into play.

V. Cooperation

An assessment of the responsibility to protect and its conceptual implications would be incomplete without addressing the issue of cooperation. That issue has not played much of a role in the debate. However, the kind of changes implied by the concept of a responsibility to protect can hardly be considered without reference to cooperation. Indeed, assuming responsibilities on the part of particular States and the State

[45] See above, text accompanying footnote 34 et seq.

community and heading for an understanding of sovereignty as just outlined imply and require a state of the international order, which includes an element of cooperation.

Cooperation can basically be understood to mean an "effort of states to accomplish an object by joint action".[6] It is an inherent element of the United Nations system, as, for instance, Arts. 55 and 56 of the Charter may show.[7]

Also, cooperation is said to be key to altering the quality of the international legal order. As is often stated, the international legal order was initially structured in a way which has been referred to as "the law of coordination".[8] The rules of international law at that time, it is stated, served as a means of bringing into accordance the interests and concerns of States in particular areas. In contrast, the "international law of cooperation" has sought to delineate an advanced stage of development, where States define common interests and determine ways and means of achieving them. Cooperation also involves an element of solidarity.[9]

Obviously, it has become clear over the last few years that international security is importantly and seriously put into question and that contributions from a wide range of different States are urgently required to maintain it. Thus, cooperation is key in responding to such new challenges. Developing new legal concepts to cope with such challenges obviously has to take this aspect into account.

Furthermore, the development of structures and means of cooperation may facilitate the attribution of more meaningful obligations and – eventually – of elements of responsibility, as, for instance, the emergence of international environmental law may show.

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[6] R. Wolfrum, "International Law of Cooperation", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II, 1995, p. 1242

[7] R. Wolfrum, "Art. 55 (a) and (b)", "Art. 56", in: B. Simma (ed.), *The Charter of the United Nations*, 2nd. ed., Vol. I, 2002, p. 759 et seq.

[8] R. Wolfrum, "Entwicklung des Völkerrechts von einem Koordinations- zu einem Kooperationsrecht", in: P. C. Müller-Graff/H. Roth (eds.), *Recht und Staatswissenschaft. Signaturen und Herausforderungen zum Jahrtausendbeginn*, 2001, p. 421 et seq.

[9] See R. Wolfrum, "Solidarity amongst States: An Emerging Structural Principle in International Law", in: P.M. Dupuy et. al. (eds), *Essays in Honor of Christian Tomuschat*, 2006, 1087 at p. 1090 et seq. and Slaughter (footnote 1) 623.

In sum, it appears that a meaningful debate on "responsibility to protect" would have duly to consider the aspect of cooperation. It is well understood that such consideration does not automatically imply a claim for more resources and particularly financial contributions. Also, it should not be allowed to result in an excuse for failure to act. However, a concept which altogether neglects the issue of cooperation can hardly be considered to be conclusive.

VI. Outlook

The merits of the emerging "responsibility to protect" as a norm of international law are few at the moment. The concept lacks precision and substance. It is highly questionable whether it can contribute to a new understanding of the legality of interventions – which have hitherto been called "humanitarian" ones. According to the Report of the Secretary General and the Summit Outcome, the concept implies hardly any change. Also, it has to be emphasised that there is a considerable disconnect between "responsibility to protect" and other developments in international law. The international legal order has recently seen encouraging developments concerning the promotion of an effective responsibility of States and individuals. Both the 2004 ILC Draft Articles and the establishment of the International Criminal Court can be considered important steps in this direction. There is a need to uphold the clear-cut structure of a responsibility based on obligations and their breach. Such structure is the basis for important achievements in the direction of a rule-based international order that we fortunately see developing in other areas of international law, including, for instance, the law of the sea and trade. It has to be emphasised that for international security to be provided for by law requires legal certainty and thus a legal order which effectively attributes responsibility to others and likewise precisely delineates the limits of such responsibility.

Establishing a "responsibility to protect" without a clear message is not helpful in this regard. The damage done to the normative value of fundamental international law principles in order to promote the laudable and urgent endeavour to provide for safe legal grounds for humanitarian interventions is considerable. Also, it does not seem to be required, as a number of other political and normative concepts, including inter

alia the *ius cogens* and *erga-omnes* approaches, are available to achieve the same result.[39]

The "responsibility to protect" has had its merits in initiating an important debate heading for a more differentiated understanding of sovereignty. It has become clear that such status has inherent limits and derives its justification from the protection that is provided to the people by a sovereign State.

Voicing a responsibility to protect can be read as a claim to make progress with a view to a more accountable international order. In order to make this claim a sound one, it will very likely be necessary to complement it by elements taking account of the necessary cooperation between States with different strengths, capabilities and resources.

[39] See Molier (footnote 1), at 47 et seq: "Old Wine in New Bottles?" at 44, who also discusses a justification of a humanitarian intervention by reference to the principle of necessity, p. 52 et seq.

Sovereignty and the Responsibility to Protect in International Criminal Law

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