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The responsibility to protect – much ado about nothing?

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Abstract. Despite its newness, the concept of the responsibility to protect (R2P) looks back at a stellar career. It has been the subject of numerous conferences and academic publications and has been affirmed by the major UN bodies. Indeed, if one were to assess the development of an international norm by the amount of academic attention and general rhetorical support it enjoys, one could be inclined to believe that the responsibility to protect is rapidly evolving into a norm of customary international law.

This article subjects the R2P hype to critical scrutiny and asks probing questions about R2P's viability as a norm. Beneath the thin veneer of rhetorical acceptance of R2P lies a range of hotly disputed issues – in particular but not exclusively regarding the concept's implications for the use of force – which are unlikely to be resolved in the near future. In this article I examine R2P's potential to 'ripen' into an international norm. I argue that in the absence of an intersubjective consensus about what R2P actually *means*, the concept's chances to 'harden' into a norm of customary international law are remote. I posit that R2P cannot be considered a 'new norm' or an 'emerging norm' as it is frequently called, because the vast majority of states simply does not want to be legally bound to save strangers in remote regions of the world.

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Which landmark event did the international community commemorate on 9 December 2008? Anybody? Anybody? Few people would probably recollect that on 9 December 1948 the Genocide Convention[1] was adopted, which represented a (futile) attempt to save succeeding generations from the scourge of the most odious crime of all odious crimes. Six decades after the signing of the Genocide Convention we must ask ourselves how far the international community has come in preventing massive human rights violations since 1948. The responsibility to protect (R2P) is the modern variant of the duty to prevent which the Genocide Convention posited (somewhat vaguely) sixty years ago. Despite its newness, the

[1] Convention on the Prevention and Punishment of the Crime of Genocide, {http://www.unhchr.ch/html/menu3/b/p_genoci.htm}.

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concept of R2P looks back at a stellar career. It has been the subject of numerous conferences and academic publications[2] and has been affirmed by the major UN bodies. Indeed, if one were to assess the development of an international norm by the amount of academic attention and general rhetorical support it enjoys, one could be inclined to believe that the responsibility to protect is rapidly evolving into a norm of customary international law.

This article subjects the R2P hype to critical scrutiny and asks probing questions about R2P's viability as a norm. The devil is in the details: beneath the thin veneer of rhetorical acceptance of R2P lies a range of hotly disputed issues – in particular but not exclusively[3] regarding the concept's implications for the use of force – which are unlikely to be resolved in the near future. While R2P encompasses three dimensions – the responsibility to prevent, to react, and to rebuild[4] – an examination of all of these dimensions would exceed the scope of this article, which focuses solely on the thorny issue of military intervention. At issue here is R2P's potential to ripen into an international norm – that is, an intersubjectively shared standard of appropriate behaviour. I argue that in the absence of an intersubjective consensus about what R2P actually *means*, the concept's chances to harden into a norm of customary international law are remote. The recent crisis in Burma following cyclone Nargis exposed the starkly diverging interpretations that states attach to the concept of R2P. The Burmese junta's deliberate obstruction of international relief efforts triggered a debate over whether this constitutes an R2P situation. To be sure, the Burmese junta is a despicable dictatorship, yet does its obstruction of relief efforts amount to crimes

[2] See, for example, Alicia L. Bannon, 'The Responsibility to Protect: The UN World Summit and the Question of Unilateralism', *Yale Law Journal*, 115:5 (March 2006), pp. 1157–65; Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics & International Affairs*, 20:2 (Summer 2006), pp. 143–69; Alex J. Bellamy and Paul D. Williams, 'The Responsibility to Protect and the Crisis in Darfur', *Security Dialogue*, 36:1 (2005), pp. 27–47; David Chandler, 'The Responsibility to Protect? Imposing the 'Liberal Peace', *International Peacekeeping*, 11:1 (Spring 2004), pp. 59–81; Graham Day and Christopher Freeman, 'Operationalizing the Responsibility to Protect – the Policekeeping Approach', *Global Governance*, 11:2 (April–June 2005), pp. 139–46; Amitai Etzioni, 'Sovereignty as Responsibility', *Orbis*, 50:1 (Winter 2006), pp. 71–85; Rebecca J. Hamilton, 'The Responsibility to Protect: From Document to Doctrine – But What of Implementation?', *Harvard Human Rights Journal*, 19 (Spring 2006), pp. 289–97; Victoria K. Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (Washington, D.C.: The Henry L. Stimson Center, 2006); Jeremy L. Levitt, 'The Responsibility to Protect: A Beaver Without a Dam?', *Michigan Journal of International Law*, 25:1 (2003), pp. 153–77; William R. Pace and Nicole Deller, 'Preventing Future Genocides: An International Responsibility to Protect', *World Order*, 36:4 (2005), pp. 15–32; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law*, 101:1 (2007), pp. 99–120; Ramesh Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', *Security Dialogue*, 33:3 (September 2002), pp. 323–40; Thomas G. Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era', *Security Dialogue*, 35:2 (June 2004), pp. 135–53; Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), pp. 29–51.

[3] On the issue of legal liability and reparation, see Jose Alvarez, 'The Schizophrenias of R2P', panel presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague (30 June 2007), pp. 11f, {http://www.asil.org/pdfs/r2pPanel.pdf}.

[4] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. xi,{http://www.iciss.ca/pdf/Commission-Report.pdf}.

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against humanity, which would then trigger the international community's responsibility to protect? French Foreign Minister Bernard Kouchner called for an activation of R2P and lobbied for a Security Council resolution forcing the Burmese government to accept outside aid.[5] Kouchner's rallying cry met with fierce opposition not only from China and other sovereigntist countries,[6] but also from NGO representatives, including some of the founders of the concept of R2P.[7] The criticism centered around questions of doctrine (is this really an R2P situation?) and feasibility (even if it is, would it be politically wise to enforce the delivery of aid against the will of the Burmese regime?).

The crisis in Burma has obviously thrown into sharp relief the lack of international consensus on the concept of R2P. In light of such dissent, I posit that R2P cannot be considered a 'new norm' or an 'emerging norm' as it is frequently called,[8] because the vast majority of states simply does not want to be legally bound to save strangers[9] in remote regions of the world. Despite the high-sounding rhetoric about R2P, sovereignty's constitutive norms – especially the non-use of force – have in fact not been replaced by a norm of responsibility (to be enforced militarily as a last resort) – therefore the international community has not moved 'beyond Westphalia'.[10]

Understanding institutional transformation – approaches from international relations and international law

Sovereignty is an institution which aggregates interrelated norms such as non-interference, domestic jurisdiction, diplomatic immunity, etc.[11] – norms which are produced, reproduced, and possibly transformed through the practices of states and other agents. Institutional change occurs when an institution's component norms are being transformed or replaced by new norms. The question that is at issue here is whether the rise of R2P has qualified the norms of non-interference and non-use of force, which in turn would signal a radical transformation of the institution of sovereignty. In order to conceptualise institutional transformation theoretically, we need to open the toolboxes of constructivist IR-theory and approaches to the formation of customary international law, which display striking similarities in their respective accounts of norm development.

[5] Jonathan Marcus, 'World Wrestles With Burma Aid Issue', *BBC News* (9 May 2008), {http://news.bbc.co.uk/2/hi/asia-pacific/7392662.stm}.

[6] Louis Charbonneau, 'China, Indonesia Reject France's Myanmar Push', Reuters.com (8 May 2008), {http://www.reuters.com/article/asiaCrisis/idUSN08518240}.

[7] See, for example, Ramesh Thakur, 'Should the UN Invoke the Responsibility to Protect?', *The Globe and Mail* (8 May 2008).

[8] See, for example, the report of the High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* (New York: UN, 2004), p. 57.

[9] Nicholas J. Wheeler, *Saving Strangers. Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

[10] Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: Johns Hopkins University Press, 1995).

[11] Henning Boekle, Volker Rittberger, Wolfgang Wagner, *Norms and Foreign Policy: Constructivist Foreign Policy Theory* (Tübingen: Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung, 1999), p. 21.

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The agent-structure nexus provides the natural starting point for an analysis of international norm dynamics. Constructivists maintain that agents, through their discourses and practices, contribute to the production of international structure (international law being one element of this structure), while at the same time international structure shapes the identities and practices of agents.[12] The institution of sovereignty is therefore not a natural given but exists only in virtue of certain intersubjective understandings and in virtue of states acting in conformity with the rules it prescribes – sovereignty is an 'ongoing artifact of practice'.[13] Practices of (non-)recognition, of wars and interventions, as well as the language of justification contribute to the reproduction (and possibly, transformation) of sovereignty. In order to grasp institutional change, one must therefore not only study state practice, but also the discourses that form the conceptual universe in which state practice takes place. In discourses, actors debate how legitimate states should or should not act. States refer to particular norms or concepts to mobilise joint action, to explain unilateral action or to justify their abstention from or opposition to a certain course of action.[14]

The precise mechanism through which new international norms emerge from the practices and discourses of states and non-state actors is explored in Finnemore's and Sikkink's essay on 'International Norm Dynamics and Political Change'.[15] Finnemore and Sikkink model the 'life-cycle' of norms as a three-stage process. The first stage of norm emergence is characterised by the agenda-setting activities of norm entrepreneurs (NGOs, epistemic communities, states, etc.) who play a crucial role in raising the public profile of a particular grievance and in persuading a critical mass of states (norm leaders) that something needs to be done about it. When a critical mass of states has been convinced to embrace the norm candidate, a tipping point is reached, which triggers a 'norm cascade' (stage two). In many cases, transition from stage one to stage two is facilitated by the emergent norm's institutionalisation in specific sets of international rules or organisations. Upon successful completion of stage two, the norm acquires a taken-for-granted quality – 'norm internalization' occurs in the third and final stage of the process.[16]

Practices and discourses are crucial categories not only for constructivist researchers; they are equally indispensable for international legal scholars attempting to discern the formation of a rule of customary international law. In the Statute of the International Court of Justice, custom is defined as 'evidence of a general practice accepted as law'.[17] The formation of a customary norm thus requires two elements, state practice and a corresponding *opinio juris:* states must not only behave in a particular way, they must also believe that the practice is required by law. This definition of custom is problematic, however, because it implies that

[12] On the agent-structure nexus see David Dessler, 'What's at Stake in the Agent-Structure Debate?', *International Organization*, 43:3 (August 1989), pp. 441–73 (p. 452).
[13] Alexander Wendt, 'Anarchy is What States Make of It: the Social Construction of Power Politics', *International Organization*, 46:2 (April 1992), pp. 391–425 (p. 413).
[14] On the role of discourses see Albert S. Yee, 'The Causal Effects of Ideas on Policies', *International Organization*, 50:1 (February 1996), pp. 69–108 (pp. 95–8); and Jennifer Milliken, 'The Study of Discourse in International Relations: A Critique of Research and Methods', *European Journal of International Relations*, 5:2 (1999), pp. 225–54 (p. 229ff).
[15] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, 52:4 (November 1998), pp. 887–917.
[16] Ibid., pp. 895–904.
[17] Art. 38 of the ICJ-Statute, {http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0}.

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states must believe that something already *is* law before it can become law. This formula in fact precludes normative change, because customary norms are transformed through *deviant* practice, that is, behaviour that is *not* in conformity with existing legal rules. D'Amato therefore defends a conception of customary law that allows for the transformation of *opinio juris* – or intersubjective understandings of proper behaviour, to use constructivist phraseology – triggered by states violating existing rules, which then eventually leads to a revision of existing normative beliefs: '[. . .] an "illegal" act by a state contains the seed of a new legality. When a state violates an existing rule of customary international law, it undoubtedly is "guilty" of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule.'[18]

This does not mean that the 'seed' sown by a law-violating state will always lead to the 'blossoming' of a new rule. If this were indeed the case, international law would cease to perform its stabilising function, that is, to guarantee a modicum of predictability in an otherwise very unpredictable world, which is the very basis of international law's compliance pull. Depending on the circumstances, rule-breaking may even ultimately lead to a strengthening of the rule in question, as the ICJ asserted in the *Nicaragua Case*, in which the customary rule of non-intervention was at issue. The Court held that whether states have successfully created a customary exception to the general norm of non-intervention depends partly on whether they 'justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition'.[19] If the norm-violating states appeal to exceptions or justifications contained within the rule itself, the Court ruled, this will lead to a strengthening of this rule rather than to its erosion.[20] The ICJ Statute posits that state practice and its acceptance must be 'general'[21] – hence the reactions of other states (explicit support, tacit acquiescence, or outright condemnation) are an important determinant of whether law-breaking results in law-making: Only if an intersubjective consensus on the desirability of legal change exists will a new norm emerge. Methodologically speaking, the analysis of discourses which are constitutive of intersubjective meanings is therefore essential for the researcher wishing to understand how change in customary law occurs.[22]

Overall then, constructivism and theories of custom formation converge on a number of crucial points: Both accept that international legal rules are socially constructed, and both emphasise the significance of state practices and intersubjective beliefs, or *opinio juris*, respectively. Both IR and IL moreover share the assumption of a co-constitution of agents and structures: Whereas international legal scholars conceive of states as being simultaneously creators and subjects of

[18] Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971), p. 97.
[19] International Court of Justice, *ICJ Reports 1986* ('s-Gravenhage: Sijthoff), p. 109.
[20] Ibid., p. 98.
[21] Supra note 17.
[22] On law as a 'linguistic affair' see Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, re-issue with new epilogue (Cambridge: Cambridge University Press, 2005), p. 529.

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the law,[23] this phenomenon has been discussed for quite some time under the heading of the agent-structure nexus in constructivist circles. Further, law is conceptualised as a dynamic social process, and not a static set of rules.[24] Finally, as explained above, both disciplines not only share fundamental premises but also employ similar research tools, that is, both delve into the study of discourses, in which the role of legal precedent and analogy – or normative fit, to use constructivist vocabulary – looms large.

The responsibility to protect – genesis of a concept

Although the International Commission on Intervention and State Sovereignty (ICISS) is usually credited for kicking off the debate over sovereignty as responsibility with the publication of its widely cited report *The Responsibility to Protect*,[25] it was in fact Francis Deng who introduced a broader audience to the notion of sovereignty as responsibility.[26] Deng *et al.* base their argument on the idea of a dual social contract – between each government and its citizens, and between nation states and the international community as a whole: 'The sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and international order. Such a normative code is anchored in the assumption that in order to be legitimate, sovereignty must demonstrate responsibility.'[27] If a government manifestly fails to fulfil its part of the social contract, its claim to sovereign immunity becomes void. Consequently, discharging the responsibilities of sovereignty is in effect the best guarantee for sovereignty.[28] This notion of conditional sovereignty was reiterated in the ICISS report, which argued that 'state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself'.[29] However, if a state proves unwilling or unable to live up to its responsibilities, that is, if it violates basic human rights or does not prevent such violations, the international community has a residual responsibility to act. The principle of non-intervention thus yields to the international responsibility to protect.[30] This reflects a tendency in international law to view individuals, rather than states, as the primary beneficiaries of its protection, and to shift the focus of the debate from what the international community owes to sovereign states to the question of what nation-states owe to their own citizens.

[23] See Michael Byers, *Custom, Power, and the Power of Rules. International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), p. 5.
[24] See, for example, Martha Finnemore's and Stephen Toope's interdisciplinary piece on 'Alternatives to "Legalization": Richer Views of Law and Politics', *International Organization*, 55:3 (August 2001), pp. 743–58 (p. 750), in which they describe international law as a dynamic social process.
[25] ICISS, supra note 4.
[26] Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and William I. Zartman, *Sovereignty as Responsibility. Conflict Management in Africa* (Washington D.C.: Brookings, 1996).
[27] Ibid., p. xvii.
[28] Ibid., pp. 1, 15.
[29] ICISS, supra note 4, p. xi.
[30] Ibid., p. xi.

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Borrowing from just war theory,[31] the ICISS report listed a number of legitimacy criteria that should guide intervention on behalf of endangered civilians: just cause (gross violations of fundamental human rights), right intention (putting an end to these violations), last resort (military means as *ultima ratio*, after all non-military measures have been exhausted), proportional means (minimal duration and intensity of military strikes), and, lastly, reasonable prospects of success.[32] To its credit, the ICISS report did not duck the difficult issue of just authority. While emphasising the Security Council's primary responsibility for the maintenance of international peace and security, it tentatively suggested possibilities for action outside of the Security Council. The commissioners made the following propositions: first, states must in all cases seek Security Council authorisation prior to carrying out any military action; second, in cases of massive human rights violations, the Council's permanent members should agree not to use their veto power, unless vital national interests are at stake; and third, should the P-5 exercise their veto nonetheless, recourse may be made to the General Assembly under the Uniting for Peace procedure and to regional arrangements, subject to their seeking subsequent authorisation from the Security Council.[33] The Commission also reminded the P-5 that in the case of failure to discharge its primary responsibility for the maintenance of international peace and security, states may not rule out unilateral means to address 'conscience-shocking situations', which in turn would adversely affect the credibility of the Security Council.[34]

The concept of R2P was subsequently endorsed in the report of the High-level Panel on Threats, Challenges, and Change[35] and in Kofi Annan's report *In Larger Freedom*,[36] yet each of these documents introduced its own qualifications: Whereas the High-level Panel insisted on the Security Council's exclusive prerogative to authorise enforcement action – thus dodging the question of Security Council paralysis[37] – the Secretary-General avoided discussing R2P's consequences for the rules on the use of force altogether by thematically separating the normative aspects of R2P from the question of the use of force. Annan also urged UN member states to embrace this new concept.[38] As a result of his recommendation, the General Assembly debated the responsibility to protect for the first time during the 2005 World Summit deliberations. The inclusion of R2P language in the Outcome Document proved to be an arduous task but was ultimately hailed as one of the few successes of the Summit. That it happened was anything but inevitable, given the dogged resistance of many – especially developing – countries.[39] In the

[31] Theories of just war originated in Roman philosophy and typically comprise a set of criteria that determine the justness of a war, such as just cause, proper authority, right intention, etc. For a contemporary discussion of the concept of just war see Mark Evans (ed.), *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press, 2005).
[32] ICISS, supra note 4, p. xii.
[33] Ibid., pp. xii, xiii.
[34] Ibid., pp. xii, xiii.
[35] High-level Panel, supra note 8.
[36] Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York: UN, 2005).
[37] High-level Panel, supra note 8, p. 57.
[38] Kofi Annan, supra note 36, pp. 35, 59.
[39] See Gareth Evans, 'The International Responsibility to Protect: The Tasks Ahead', presentation at the seminar on 'Africa's Responsibility to Protect', Centre for Conflict Resolution, Cape Town (23 April 2007), {http://www.crisisgroup.org/home/index.cfm?id=4801&l=1}.

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end, a pragmatic rather than doctrinal reading of the concept prevailed: while stressing the international community's 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' the General Assembly also implicitly rejected the idea of a generalised duty to intervene by emphasising that each case should be treated on its own merits: '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.'[40]

The Outcome Document obviously left critical elements of R2P unaddressed. The idea of a set of general legitimacy criteria did not survive the negotiations. While earlier drafts did call for the discussion of such criteria, this idea was dropped in the final version.[41] The omission was a concession to developing states that were uneasy about consenting to a set of criteria that would possibly legitimise hegemonic intervention into their internal affairs.[42] China and Russia also worried that the adoption of such guidelines would undermine the principle of non-intervention while the US did not want to include language in the Outcome Document that would limit its freedom of action in any way.[43] Unsurprisingly, another thorny aspect of R2P raised by the ICISS – the problem of just authority and Security Council deadlock – was not carried forward during the deliberations.

The Outcome Document was certainly helpful as an initial affirmation of R2P on the declaratory level, but the Security Council is the organ that matters when it comes to implementing rhetoric into action. It was therefore significant that in 2006 the Security Council adopted resolution 1674 on the protection of civilians in armed conflict.[44] In it, the Council emphasised its commitment to the sovereign equality and territorial integrity of all states, recalled the provisions in paragraphs 138 and 139 of the Outcome Document, highlighted the primary responsibility of the parties to an armed conflict for the protection of civilians, and reaffirmed its willingness to 'consider such situations' (of human rights violations against civilians in armed conflict), and 'where necessary, to adopt appropriate steps'. That same year the Security Council invoked R2P for the first time in a country-specific resolution where UN peacekeepers were to be deployed under Chapter VII: In resolution 1706 on Darfur the Council reaffirmed the responsibility to protect,

[40] A/RES/60/1 (24 October 2005).
[41] Draft Outcome Document, para. 47 (3 June 2005), {http://www.reformtheun.org/index.php/united_nations/991}.
[42] Nicholas Wheeler, 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit', paper presented at the conference 'The UN at Sixty: Celebration or Wake?' University of Toronto (6–7 October 2005), {http://www.una.org.uk/humanrights/R2P%5B1%5D.pdf}, p. 3.
[43] Ibid., p. 7.
[44] S/RES/1674 (28 April 2006).

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declared that the situation in Sudan constitutes a threat to international peace and security, and authorised the deployment of an international peacekeeping presence in Darfur with a mandate to use force for civilian protection purposes.[45]

The history of R2P, Stahn writes, 'sounds almost like a fairy tale'.[46] Rejecting the concept altogether has become politically untenable, and few governments would openly dispute the idea that sovereignty implies the obligation to govern responsibly. An intersubjective consensus on R2P seemed to have been achieved at the 2005 World Summit. In just four years, R2P came to be rhetorically endorsed by states around the world, including such strange bedfellows as the US, which has consistently sought to prevent the development of a general duty to intervene,[47] and the Non-Aligned Movement, which has vehemently opposed humanitarian intervention in the internal affairs of states.[48] Such unusual unanimity is suspicious – and indeed, the 'consensus' achieved at the 2005 World Summit proved shallow and has been undermined by America's interventions in Iraq and Afghanistan, which were partly justified in humanitarian terms.[49] The global War on Terror had a deleterious impact on the development of the responsibility to protect: Attention is a scarce resource in international politics, and US military engagement in Iraq and Afghanistan has diminished Washington's political will, military capability, but also diplomatic credibility to conduct humanitarian interventions,[50] and has reinforced developing states' suspicion of R2P.[51] The discussions over R2P following the World Summit revealed much need for conceptual clarification, as we shall see below. It has become fashionable to speak of R2P as a 'new norm'. However, we learned earlier that new norms emerge from a combination of consistent state practice and enunciated legal convictions. In the following I will show that neither the psychological (*opinio juris*) nor the material (state practice) criterion of custom formation is fulfilled, and that R2P thus does not possess the intersubjective qualities that would justify calling it a norm.

[45] S/RES/1706 (31 August 2006).
[46] Stahn, supra note 2, p. 99.
[47] In its interventions in Iraq 1991, Kosovo, and elsewhere the US – mindful of precedent – never expressly endorsed a right to humanitarian intervention. However, US officials have occasionally referred to humanitarian motives as a *policy* justification for the use of force, without, however, making a statement of general legal principle. See John F. Murphy, *The US and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004), pp. 151f; see also Stewart Patrick of the US State Department's Policy Planning Staff, 'The Role of the US Government in Humanitarian Intervention', Remarks to the 43rd Annual International Affairs Symposium (5 April 2004), {http://www.state.gov/s/p/rem/31299.htm}.
[48] See, for example, paras. 15 and 16 of the Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur (24/25 February 2003), {http://www.nam.gov.za/media/030227e.htm}.
[49] Jim Hoagland, 'Tony Blair, Reflecting', *Washington Post* (6 March 2005).
[50] Lee Feinstein, *Darfur and Beyond. What is Needed to Prevent Mass Atrocities* (Washington, D.C.: Council on Foreign Relations, 2007), {http://www.cfr.org/content/publications/attachments/DarfurCSR22.pdf}, p. 28.
[51] For an insightful discussion of this issue see Alex J. Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq', *Ethics & International Affairs*, 19:2 (Summer 2005), pp. 31–53.

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Is there a unified opinio juris *regarding the responsibility to protect?*

The short answer to this question is no. The long answer is that one must read the fine-print of the discourse over sovereignty as responsibility which reveals that good governance rhetoric notwithstanding, the large majority of states does not accept the substantial obligations that the concept of R2P – at least in its original version – would impose on states. R2P's conceptual history shows that all subsequent interpretations of the idea articulated by the ICISS – in the High-level Panel's report, Kofi Annan's report and finally, in the World Summit Outcome Document – put a different spin on it. While this vagueness obviously facilitated consensus-building at the World Summit, it raises considerable difficulties now that R2P's proponents seek to move beyond high-sounding rhetoric and push for its institutionalisation in the UN machinery, as NGO representatives involved in the deliberations over R2P told me. 'There is a general pattern of remorse', ICG's Donald Steinberg observed, with countries that acceded to the Outcome Document now beginning to wonder 'whether this is really what they intended to do, primarily regarding the military aspect'.[52] Sapna Chhatpar from the World Federalist Movement (WFM), which maintains a website that documents the positions of states on R2P[53] and regularly consults with government officials and civil society representatives on R2P issues agreed: 'Many governments viewed the language in the Outcome Document as a lofty phrase, they did not buy into the R2P principle as articulated in the ICISS report.'[54] Sudan expert William O'Neill put it even more bluntly: 'I get the feeling a lot of countries did not read the Outcome Document before they signed onto it.'[55] Despite the ICISS' attempt at changing the terms of the debate, R2P – just like the concept of humanitarian intervention – is obviously viewed as a hegemonic tool to legitimise aggressive intervention in the internal affairs of states.[56] Yet in the absence of a consensus on what the responsibility to protect actually means, no *opinio juris* can emerge. Currently unresolved issues include:

- Does the international community inherit the same responsibility that the host state has?
- Is R2P a legal duty or merely an option to intervene?
- Can states enforce R2P even in the absence of a Security Council mandate?

The positions of the major diplomatic players on these issues will be considered in turn.

Russia and China share the conviction that R2P should leave sovereignty's traditional principles such as non-interference and domestic jurisdiction unaltered.

[52] Interview (7 December 2007).
[53] {http://www.responsibilitytoprotect.org/}.
[54] Interview (27 November 2007).
[55] Interview (20 December 2007).
[56] At their Kuala Lumpur Summit NAM-governments highlighted the 'inherent dangers in the emerging trends toward a unipolar world', a world in which powerful states could trample upon the principles held dear by developing states such as non-interference and sovereign equality. NAM-governments reiterated their criticism of the 'so-called right to humanitarian intervention' and voiced suspicion that the concept of the responsibility to protect was merely the doctrine of humanitarian intervention in disguise. They therefore requested their Coordinating Bureau to carefully study the concept and its implications for the principle of non-interference. See supra note 48.

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During the biannual debates on the protection of civilians in the Security Council, China has consistently stressed that the international community's responsibility to protect should be exercised without infringing upon the sovereignty and territorial integrity of member states, thus effectively denying the possibility of forcible measures that are not carried out with the consent of the host state.[57] China leads a group of countries who continue to stress that the responsibility to protect should be exercised in accord with traditional notions of non-interference and host state consent,[58] which of course would render the idea of R2P entirely meaningless.

R2P's normative development thus critically depends on the norm entrepreneurship of Western states. However, European governments have been wavering in their commitment to R2P. ICISS co-chair Gareth Evans notes that although Europeans were instrumental in the inclusion of the R2P paragraphs in the Outcome Document, they have not displayed much propensity to further the concept's institutionalisation at the regional level.[59] Evans observes that EU officials seem 'deeply reluctant' to invoke the concept in any relevant context, citing hollow statements made by the EU Commission such as 'While the Commission welcomes the development of this norm, it is for the UN member states to act upon it' or 'Where it can the Commission will seek to raise the importance of the Responsibility to Protect in its bilateral relations'.[60] The EU is obviously unwilling to adopt a principled approach and prefers to pass the buck of norm development on to the UN.

The UN in turn has become the primary forum for deliberations on the responsibility to protect, with the Security Council holding biannual open debates on the protection of civilians in armed conflict. These debates have helped to raise the public profile of civilian protection issues and provide states with a forum in which they can clarify their interpretations of R2P. Aside from these regular debates in the Security Council, further steps towards R2P's institutionalisation in the UN machinery have been taken by Secretary-General Ban Ki-moon, who appointed Prof. Edward Luck as his first Special Adviser for the Responsibility to Protect. Luck described his duties as threefold: First, to achieve conceptual clarity, that is, to work towards a coherent understanding of what the responsibility to protect means; second, to promote the concept's institutionalisation in the UN context; and third, to further dialogue about R2P with member states.[61] To promote R2P's translation into a programme of action, the Secretary-General moreover suggested the establishment of a Security Council expert-level working group on the protection of civilians tasked with facilitating 'the systematic and sustained consideration and analysis of protection concerns, and ensuring consistent application of the aide-memoire for the consideration of issues pertaining to the protection of civilians in Council deliberations on the mandates of UN peacekeeping and other relevant missions, draft resolutions and Presidential Statements, and

[57] S/PV.5781 (20 November 2007).
[58] Chu Shulong, 'China, Asia and Issues of Sovereignty and Intervention', *Pugwash Occasional Papers*, 2:1 (January 2001), {http://www.pugwash.org/reports/rc/como_china.htm}.
[59] Gareth Evans, 'The Unfinished Responsibility to Protect Agenda: Europe's Role", panel presentation at the EPC/IPPR/Oxfam Policy Dialogue on Europe's Responsibility to Protect: What Role for the EU?, Brussels (5 July 2007), {http://www.crisisgroup.org/home/index.cfm?id=4936&l=1}.
[60] Quoted in Ibid.
[61] Interview (27 November 2007).

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in Council missions'.[62] The establishment of such a working group would aim at ensuring a systematic consideration of civilian protection issues and at mainstreaming R2P into the decision-making processes of the Security Council. Civilian protection, I was told by a research analyst familiar with Security Council dynamics, is currently the most difficult thematic debate in the Council.[63] The envisaged working group could increase the time the Council devotes to the issue of civilian protection and increase the quality of the analysis behind Council decisions. 'The subtext is to smooth out that allergy that some Council members have to the issue of civilian protection', the analyst explained to me. Reactions to the working group proposal were mixed. When the Secretary-General's report was discussed in the Security Council,[64] many smaller states such as Panama, Ghana, Slovakia, Peru, Switzerland, etc. welcomed the suggestion in principle (although many stressed the need for further consultation and clarification). Russia and China, by contrast, expressed strong reservations. The Russian representative spoke out against undertaking a 'very bureaucratized action' like the establishment of a formal working group. The Chinese delegate equally refuted the idea, emphasising that the country-specific consideration mechanism of the Council is functioning smoothly and that therefore there is no need to create a thematic working group.[65]

China's and Russia's lack of enthusiasm is mirrored by US attempts at downgrading R2P from an obligation to an *option* to intervene. This interpretation of R2P would in fact add nothing to the current state of affairs – the US has always reserved the right to intervene in the internal affairs of other states, unilaterally, if necessary.[66] The main rationale for US reluctance to accept a duty to intervene in cases of grave human rights abuses is the desire to maintain a free hand and not to be forced to save strangers when such a rescue action is not deemed in its national interest. Of course the US has never flatly rejected R2P. Rather, it has endorsed the concept in a very general and vague sense but has not shown any interest whatsoever in giving substance to its rhetoric. John Bolton, then-US Ambassador to the UN, repeatedly highlighted the *moral* (and thus non-legal) character of the responsibility to protect. In the run-up to the 2005 World Summit, information leaked that Bolton had voiced firm opposition to language in the Outcome Document that would constrain the US in using force and place new obligations on the international community to intervene in the case of serious human rights violations. In the now infamous 'Dear Colleague' letter, Bolton stated US principles relating to the R2P section in the draft Outcome Document. Bolton stressed that the UN Charter 'has never been interpreted as creating a legal obligation for Security Council members to support enforcement

[62] Ban Ki-moon, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, S/2007/643 (28 October 2007, {http://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/573/58/pdf/N0757358.pdf?OpenElement}, p. 19.
[63] Interview (27 November 2007).
[64] S/PV.5781 and S/PV.5781 (Resumption 1), (20 November 2007).
[65] Ibid.
[66] See Brad R. Roth, 'Bending the Law, Breaking It, or Developing It? The US and the Humanitarian Use of Force in the Post-Cold War Era', in Michael Byers and Georg Nolte (eds), *US Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), pp. 232–63.

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action in various cases involving serious breaches of international peace. Accordingly, we believe just as strongly that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but should remain a decision within the purview of the Security Council'.[67] Regarding R2P specifically, the US rejected language indicating that the international community has a legal obligation to intervene to end massive human rights violations. Bolton wanted the Outcome Document to convey that the international community's responsibility is of a 'more general and moral' character: 'We do not accept that either the UN as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.'[68] He therefore suggested to rephrase the section, to the effect that – instead of stipulating a duty to act – the international community would merely assert its 'preparedness' to take action, a formula that was ultimately accepted by other states. Carolyn Wilson of the US Mission to the UN confirmed that the US indeed intends to avoid the emergence of a customary law principle obligating states to intervene in cases of genocide, war crimes, and crimes against humanity: 'We have a rather conservative view of the responsibility to protect and consider it to be a moral rather than a legal obligation.'[69] This naturally begs the question of why we need R2P in the first place. We do not need the notion of the responsibility to protect to understand that it is *morally* objectionable to remain passive while scores of innocent civilians are being slaughtered. We also do not need R2P to understand that the host state has a duty to prevent genocide within its area of jurisdiction – this duty was accepted by states sixty years ago when they signed onto the Genocide Convention. What we do need is an international consensus that the international community's fallback duty to intervene is a *binding* obligation under international law that is applied in a more or less consistent fashion, and this is exactly what the US (and most other states) seek to obstruct. During last year's Security Council debate on the protection of civilians in armed conflict, for example, Ghana was alone in speaking out in favour of the idea that the international community has a *legal* duty to intervene.[70]

Considering Washington's desire to maintain a free hand, it comes as no surprise that the US rejects another element of the ICISS report, namely the proposal of establishing a code of conduct that would prevent the permanent Security Council members from using their veto in cases of grave human rights abuses where their vital national interests are not affected. When asked about the reasons for US opposition to a code of conduct, Wilson stressed the necessity of treating each case 'on its own merits' and avoiding any limitations on the use of the veto: 'We have consistently felt that the use of the veto is a very serious action that any of the permanent members can take. The Charter has given this right to

[67] John R. Bolton, Letter Sent to UN Member States Conveying US Amendments to the Section on the Responsibility to Protect of the Draft Outcome being Prepared for the September 2005 High Level Event (30 August 2005), {http://www.un.int/usa/reform-un-jrb-ltr-protect-8-05}.
[68] Ibid.
[69] Interview (21 November 2007).
[70] S/PV.5781 (20 November 2007).

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the permanent members and we have consistently shied away from imposing restraints on the use of force. It is a responsibility that falls to each permanent member at the time to make a decision based on the specific situation.'[71]

Another leitmotif of US statements on the responsibility to protect is an emphasis on the qualitative difference between the responsibility of the host state on the one hand, and the fallback responsibility of the international community on the other hand. The US has repeatedly emphasised that the international community does not inherit the same responsibility that the host state has, as Bolton pointed out in his 'Dear Colleague' letter. During the biannual Security Council debates on the protection of civilians the US has regularly reiterated this position. In the debate on 9 December 2005, for example, the US representative emphasised that the international community should not assume responsibility for governmental failure to protect.[72] At the debate on 28 June 2006, the US delegate stressed that the effective protection of civilians depends largely not the actions of the international community, but on what governments do to protect their citizens.[73]

The foregoing analysis suggests that no intersubjective consensus on the meaning of R2P and its implications for the use of force exists. A handful of die-hard sovereigntists still refute the idea of limited sovereignty altogether. This in itself is not significant for the formation of *opinio juris*, because acquiescence to an emerging norm does not have to be universal, but merely nearly universal.[74] What is much more significant for the formation of *opinio juris* is the fact that states have been unwilling to adopt a principled approach to implementing R2P. They have expressed support for R2P in very vague terms, but refuse to make a principled commitment. Instead, UN member states stressed in the Outcome Document that they reserve the right to act on a 'case-by-case' basis. Second, the concept's implications for the use of force are far from consensual and the 2005 Outcome Document scrupulously avoids commenting on these. Very few states are ready to admit that the international community's responsibility to protect may be exercised unilaterally, if the Security Council does not live up to its responsibility.[75] The ICISS had suggested the drafting of general legitimacy criteria as a way out of this impasse.[76] However, most states oppose this idea, although for different reasons. Weaker states fear this would legitimise the unilateral use of force in the case of Security Council paralysis. The Non-Aligned Movement in particular views R2P as a potential revitalisation of the disfavoured doctrine of humanitarian intervention.[77] The US, by contrast, opposes the drafting of general guidelines because it

[71] Supra note 69.
[72] S/PV.5319 (Resumption 1), (9 December 2005).
[73] S/PV.5476 (28 June 2006).
[74] Michael Akehurst, 'Custom as a Source of International Law', *British Year Book of International Law 1974–1975* (Oxford: Clarendon Press, 1977), pp. 1–53 (p. 39).
[75] See Gareth Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention', address to the American Society of International Law, Washington D.C., (1 April 2004), {http://www.crisisgroup.org/home/index.cfm/africa/rss/home/index.cfm?id=2561&l=1}. Evans noted that unilateral interventions 'do not – it would be an understatement to say – find wide favour. As a matter of political reality, it would simply be impossible to find consensus around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly'.
[76] ICISS, supra note 4, p. xii.
[77] Supra note 48.

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wants to retain its freedom of action.[78] This is not to deny that progress has been made in building an international consensus on the subject, but this process is still far from complete. The affirmation of the World Summit consensus in binding Security Council resolutions are encouraging developments, but words have yet to be matched by deeds. The real test for the formation of a customary norm is whether lofty ideals are translated into consistent state practice, which leads us directly to the problem of enforcing the Sudanese government's responsibility to protect in the province of Darfur.

R2P in state practice – the case of Darfur

'If Darfur is the first "test case" of the responsibility to protect', Lee Feinstein writes, 'there is not point in denying that the world has failed the entry exam'.[79] Unlike the humanitarian interventions conducted in the 1990s, the crisis in Darfur escalated *after* the publication of the ICISS report and hence provided the international community with a first opportunity to showcase its commitment to R2P. Darfur constitutes an obvious example of governmental failure to live up to its responsibility to protect and as such calls for the activation of the international community's fallback responsibility to protect. Yet the international community's response to the crisis has been painfully slow and ineffective. To be sure, there has been no shortage of public hand-wringing. However, governments around the world have shown little inclination to translate their noble ideals into practice and protect suffering civilians in Darfur. Without going into the details of the conflict,[80] it is patent that Western states and the international community at large have failed on several counts in Darfur: they chose not to strain relations with Khartoum by raising the crisis in Darfur at an early stage; they could not reach agreement in the Security Council on a Darfur resolution until July 2004; they failed to put coordinated pressure on Khartoum to allow for the timely delivery of humanitarian aid; they failed to convey a clear message to Khartoum that it would be held accountable for not meeting its responsibility to protect and rein in the *Janjaweed*; they failed to coerce the Sudanese regime into accepting the unconditional and timely deployment of the hybrid peacekeeping force; they failed to equip UNAMID with the resources it needs to effectively carry out its civilian protection mandate, etc.

The crisis in Darfur began as a local conflict in the area of Jebel Marra between Arab nomadic herders – supported by the central government in Khartoum – and the Fur ethnic group over natural resources and access to land. The Fur in turn accused Khartoum of complicity in Arab raids against Fur villages and began to organise resistance not only against the nomads but also against nearby government garrisons. The government in Khartoum, rather than the Arab militiamen, quickly began to be perceived as the Fur's real enemy. Consequently, the Fur

[78] Supra note 71.
[79] Lee Feinstein, *Darfur and Beyond. What is Needed to Prevent Mass Atrocities* (Washington, D.C.: Council on Foreign Relations, 2007), p. 38.
[80] For a detailed analysis of the conflict in Darfur see for example Gerard Prunier, *Darfur. The Ambiguous Genocide* (Ithaca: Cornell University Press, 2007; rev. and upd. edition).

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decided to package their grievances in more general terms and made the central government's marginalisation of the region of Darfur as a whole their rallying cry.[81] The Fur's demand for equitable wealth – and power sharing resonated with a broad audience and triggered the formation of two rebel movements – the Justice and Equality Movement (JEM) and the Sudan Liberation Movement/Army (SLM/A). Fighting escalated in 2003 when these movements declared an open rebellion against Khartoum. The central government was caught off guard by the intensity and initial success of the rebel campaign and resorted to the infamous *Janjaweed* militia to quell the insurgency. The *Janjaweed* has pursued a scorched-earth policy not only toward the rebels but also toward the civilian population. In concert with the Sudanese government, the *Janjaweed* had effectively turned Darfur into a killing field by the end of 2003.[82]

In the face of Khartoum's manifest failure to protect its citizens from gross human rights violations, the issue of international enforcement action became virulent. The international community initially decided to pass the buck on to the AU, advocating African solutions to African problems.[83] Yet this division of labour underestimated the scale of the humanitarian and security problems plaguing Darfur. The African Union Mission in Sudan (AMIS) suffered from inadequate resources and a limited mandate. As the situation worsened, the AU proposed a plan which envisaged the conversion of AMIS into a fully-fledged peacekeeping force with a robust mandate to effectively protect civilians and neutralise armed militias – a plan which failed, however, due to Khartoum's resistance.[84] After a prolonged period of haggling the Security Council in August 2006 finally agreed upon the replacement of AMIS by a more robust and larger UN force in Darfur. Resolution 1706[85] extended to Darfur the mandate of the existing UN mission in Sudan (UNMIS) which is currently charged with monitoring compliance with the North-South Comprehensive Peace Agreement (CPA).[86] In somewhat ambiguous language, resolution 1706 'invited' the consent of the government of Sudan to the deployment, which Khartoum refused, however. In November 2006, a compromise was struck which envisaged three phases of UN assistance to AMIS – a light support package, a heavy support package, and ultimately transition to a hybrid AU/UN force.[87] In June 2007, the government in Khartoum finally agreed to the deployment of the hybrid force and the Security Council adopted resolution 1769, which established the UN-African Union Mission in Darfur (UNAMID).[88] The hybrid force, which was supposed to take

[81] Adam Azzain Mohamed, 'The Comprehensive Peace Agreement and Darfur', in Alexander de Waal (ed.), *War in Darfur and the Search for Peace* (Cambridge: Global Equity Initiative, Harvard University, 2007), pp. 199–213 (p. 207f).
[82] M. W. Daly, *Darfur's Sorrow. A History of Destruction and Genocide* (Cambridge: Cambridge University Press, 2007), pp. 283f.
[83] Susan E. Rice, 'Why Darfur Can't Be Left to Africa', *Washington Post* (7 August 2005).
[84] Ruth Iyob and Gilbert M. Khadiagala, *Sudan. The Elusive Quest for Peace* (Boulder: Lynne Rienner, 2006), p. 154.
[85] S/RES/1706 (31 August 2006).
[86] The CPA was concluded in 2005 and ended Africa's longest-running civil war. It contains a schedule for political reform and a democratisation process, which is supposed to culminate in the holding of national elections in 2009.
[87] Sudan 'Backs' Darfur Force Plan', *BBC News* (17 November 2006), {http://news.bbc.co.uk/2/hi/africa/6153208.stm}.
[88] S/RES/1769 (31 July 2007).

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over operations from AMIS by the end of 2007, acts under Chapter VII of the Charter to support the 'early and effective implementation' of the DPA as well as to protect civilians and aid workers. Critically important, however, is the change in mandate insisted upon by Khartoum and backed by China: unlike the mandate formulated in resolution 1706, resolution 1769 authorises neither the disarmament of combatants nor the confiscation of weapons introduced into Darfur in violation of resolution 1591, which imposed an arms embargo for the entire region. Moreover, language that would have threatened sanctions in the event of Khartoum's non-compliance was deleted from the draft, apparently at the insistence of China and others.[89]

At the time of writing (October 2008), little progress has been achieved in the deployment of UNAMID. The deployment is hampered by two factors: on the one hand, by the obstruction tactics employed by the government of Sudan, and secondly, by the international community's sluggishness in providing the requisite resources.[90] UNAMID currently lacks helicopters and critical heavy ground transport resources, which are indispensable if the peacekeepers are to carry out their civilian protection mandate effectively. When briefing the Security Council on the status of UNAMID's deployment in November 2007, UN Under Secretary General Jean-Marie Guehenno reported fundamental challenges in the area of force generation, noting a continuing lack of pledges for key mobility assets such as helicopters.[91] Secretary-General Ban Ki-Moon spent months soliciting contributions but has been unable to find countries willing to provide the two dozen helicopters which UNAMID desperately needs to patrol the vast countryside. 'Is there a world helicopter shortage that nobody told us about?' the *Los Angeles Times* asked in disbelief.[92] There is certainly no such shortage, considering that NATO-states alone have 18000 helicopters at their disposal. Apparently, European governments are reluctant to provide helicopters because they do not want to be associated with UNAMID's failure in Darfur, Roberta Cohen, a human rights expert at the Brookings Institution, explained to me after attending a conference with European government officials.[93] If this is true, one must ask: why send in UNAMID in the first place? Considering the shortage of critical capabilities as well as the bureaucratic hurdles to the deployment established by the government of Sudan, Guehenno warned that the international community would soon be faced with a tough choice: '[d]o we move ahead with the deployment of a force that will not make a difference, that will not have the capability to defend itself and that carries the risk of humiliation of the Security Council and the UN and tragic failure for the people of Darfur?'[94]

What does the international response to the crisis in Darfur tell us about R2P? In a caustic *New York Times* op-ed David Brooks observed that the international community's handling of the tragedy in Darfur follows an all-too-familiar pattern of inaction in the face of mass atrocities: the cycle begins with plenty of alarmist

[89] Human Rights Watch, *Darfur 2007: Chaos by Design. Peacekeeping Challenges for AMIS and UNAMID* (New York: Human Rights Watch, 2007), {http://hrw.org/reports/2007/sudan0907/}, p. 58.
[90] Amnesty International, 'Obstruction and Delay. Peacekeepers Needed in Darfur Now' (22 October 2007), {http://www.amnesty.org/en/library/asset/AFR54/006/2007/en/dom-AFR540062007en.pdf}.
[91] S/PV.5784 (27 November 2007).
[92] Los Angeles Times, 'Helicopters for Darfur' (13 December 2007).
[93] Interview (21 December 2007).
[94] S/PV.5784 (27 November 2007).

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rhetoric. This is followed by the (vain) attempt to gather resolve and fruitless diplomatic haggling, which results in pathetic inaction, shame, and humiliation. Once the slaughtering is (conveniently) over, the international community fervently vows to never let this happen again – until the next crisis erupts and the cycle starts over: 'The "never again" always comes. But still, we have all agreed, this sad cycle is better than having some impromptu coalition of nations actually go in "unilaterally" and do something. That would lack legitimacy! Strain alliances! Menace international law! Threaten the multilateral ideal!'[95]

The US government has done more than most other governments to resolve the crisis, yet its efforts have been 'fitful in the extreme and responsive only to pressure'.[96] Washington has unilaterally imposed financial and economic sanctions,[97] it has generously provided aid to the people of Darfur, and, in a remarkable volte-face, decided to abstain from the Security Council vote that referred the situation in Darfur to the International Criminal Court[98] – an institution which the US has fiercely opposed from its very inception onwards. The Bush administration has also been the most outspoken advocate of the genocide-thesis. In a testimony before the Senate Foreign Relations Committee in September of 2004 then-Secretary of State Colin Powell claimed that genocide was taking place in Darfur.[99] To the surprise (and shock) of many, however, he declined any responsibility on the part of the US to take stronger action to end the killings: 'Mr. Chairman, some seem to have been waiting for this determination of genocide to take action. In fact, however, no new action is dictated by this determination. We have been doing everything we can to get the Sudanese Government to act responsibly. So let us not be too preoccupied with this designation of genocide.'[100]

Article 1 of the Genocide Convention reads as follows: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'[101] The Convention thus imposes a (somewhat vague) duty to prevent genocide. Yet the genocide determination made by the Bush administration did not result in forceful action. Instead of keeping all options on the table, US officials effectively eliminated the military option: Assistant Secretary for African Affairs Jendayi Frazer stressed in a press briefing in 2006 that the US is not prepared to deploy international peacekeepers against the will of Khartoum: 'Clearly, we're not going to fight – the force is not going to fight its way in.'[102] The legacy of the Iraq war obviously still looms large: 'No way' was the answer a desk officer at the US State Department gave me when asked about the possibility of unilateral military action. 'I don't think the American people would encourage invading another Muslim

[95] David Brooks, 'Another Triumph for the UN', *New York Times* (25 September 2004).
[96] Daly, supra note 82, p. 293.
[97] 'Bush Toughens Sanctions on Sudan', *BBC News* (29 May 2007, {http://news.bbc.co.uk/2/hi/africa/6699479.stm}.
[98] S/RES/1593 (31 March 2005).
[99] Secretary of State Colin L. Powell, 'The Crisis in Darfur', written remarks, Senate Foreign Relations Committee (9 September 2004), {http://www.whitehouse.gov/interactive/sudan_gen.html}.
[100] Ibid.
[101] Supra note 1.
[102] Assistant Secretary for African Affairs Jendayi Frazer, 'Stopping Genocide in Darfur: Ongoing US Efforts and Working with the UN Security Council' (24 August 2006), {http://www.state.gov/p/af/rls/rm/2006/71515.htm}.

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nation'.[103] A unilateral US intervention (even of a limited nature, for example in the form of targeted air strikes) is obviously not a realistic option at present – on this, all experts I interviewed agreed.

While it is understandable that US officials do not contemplate a full-scale invasion of the Sudan, it is much less obvious why the US and other Western countries have been so reluctant to enforce a no-fly-zone. The idea of a no-fly-zone, which would build on the ban on offensive military flights authorised in resolution 1591,[104] has surfaced repeatedly in the discussions over Darfur.[105] Despite Khartoum's defiance, no effective surveillance system was established, and aerial attacks have continued. In the spring of 2007, reports leaked that Sudan was brazenly violating the UN arms embargo, flying heavy military equipment into Darfur and painting Sudanese aircraft white to disguise them as UN planes.[106] Enforcing a no-fly-zone would be an expensive, asset-intensive operation in a logistically difficult environment. Any aircraft taking off in the zone would have to be shot down and Sudanese airfields in and around Darfur would have to be closed. Yet even if comprehensive patrolling is unrealistic, British and US officials supposedly weighed a more limited enforcement option: punitive air strikes against Sudanese airfields if Khartoum violated the non-fly-zone.[107] This option has not been implemented, however, and it seems rather unlikely that it will be realised in the future, because it seems that the US (and other militarily capable states) simply do not care enough to expend the requisite military resources: 'The US did not want to devote the forces, and the European states did not want to stand out by themselves', ICG's Donald Steinberg explained to me.[108] To be fair, calculations of military prudence, feasibility and prospects of success have also factored into the decision not to enforce a no-fly-zone. There is room for legitimate debate over whether the costs of enforcing a no-fly-zone would actually outweigh its benefits.[109] Yet leaving aside the question of enforcing a no-fly-zone, one could at least expect that the international community would do its utmost possible to enable UNAMID to carry out its civilian mandate effectively, which it has obviously failed to do.

When asked what the international community's response to the crisis in Darfur tells us about the responsibility to protect, Michael Matheson, former Legal Adviser at the US State Department, gave a simple but compelling answer: States, including the US 'obviously do not believe that they have a legal obligation to protect civilians'.[110] According to him, the US could always exert more of its economic and political power, but bilateral interests (relations with China and Russia) and other foreign policy concerns (counter-terrorism, military overstretch, fear of a backlash in the Muslim world) have prevented it from doing so. Matheson dashed hopes that the US would replicate the Kosovo experience in Darfur, pointing out that the US (and Europeans) had a much greater strategic interest in Kosovo than in Darfur. Anthony Lake, National Security Adviser to

[103] Interview (12 December 2007).
[104] S/RES/1591 (29 March 2005).
[105] Julie Flint, 'Darfur's Outdated Script', *International Herald Tribune* (9 July, 2007).
[106] Warren Hoge, 'Sudan Flying Arms to Darfur, Panel Reports', *New York Times* (18 April 2007).
[107] Julian Borger, 'Blair Wants No-Fly-Zone Enforced Over Darfur', *The Guardian*, (28 March 28 2007).
[108] Interview (12 December 2007).
[109] Flint, supra note 105.
[110] Interview (10 December 2007).

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former President Clinton, underlined that the US does have an interest in pacifying Sudan, but also conceded that over the years, 'many people have learned to live with the thought that we haven't done enough in Darfur'.[111] The US has provided humanitarian aid to the people of Darfur, it has unilaterally imposed economic sanctions and it has worked hard to keep the Security Council unified, but that is simply not enough to give teeth to the promise that the responsibility to protect holds out for endangered civilians.

R2P – an emerging norm? Assessing the scope of institutional transformation

If one appraises the development of the responsibility to protect in terms of the norm life-cycle described by Finnemore and Sikkink, one would currently locate R2P in stage two. During the first stage, various non-governmental actors (such as the ICISS, the International Crisis Group, the World Federalist Movement, etc.) played a crucial role in putting R2P on the international agenda and in attempting to change the terms of the discourse over humanitarian intervention. These various actors in turn persuaded a critical mass of mostly Western, but also developing states ('norm leaders') to embrace the responsibility to protect and thus triggered a 'norm cascade' (stage two). At this stage, norm leaders sought to convince other states to become norm followers. As the 2005 World Summit Outcome Document and Security Council resolutions 1674 and 1706 show, these efforts were relatively successful, although the consensus achieved in 2005 proved shaky and there is a danger of backsliding. The transition from stage one to stage two is frequently facilitated by the emerging norm's institutionalisation in specific sets of rules or organisations. R2P's institutionalisation in the UN machinery is progressing, with the appointment of Edward Luck as the Secretary-General's Special Adviser for the Responsibility to Protect and the possible creation of a Security Council working group on civilian protection. Yet despite the progress made on the institutional level, it is very unlikely that stage three of the norm life-cycle ('internalization') will be reached any time soon. What is currently missing is: a) conceptual clarity, and thus an intersubjective consensus on the implications of R2P (in particular regarding the military aspect), and b) consistent application of R2P in state practice. In the absence of these two factors, norm internalisation cannot occur. Thus, from an IR-perspective, the responsibility to protect clearly has not evolved into a norm, that is, an *intersubjectively* shared standard of appropriate behaviour.

If one takes the IL-perspective, the result is even less encouraging. At present, neither the material, nor the psychological element of custom formation is fulfilled. Darfur and other recent cases of humanitarian (non-)intervention (Iraq 1991, Bosnia-Herzegovina, Somalia, Rwanda, Haiti, Liberia, Sierra Leone, East Timor, Kosovo) give rise to two interrelated questions: First, do states – through the Security Council – have an obligation to respond to mass atrocities in areas outside of their jurisdiction, possibly against the will of the host state? And second, if the Security Council fails to act, may states enforce R2P in the absence of a Security

[111] Interview (7 December 2007).

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Council mandate? Whilst the ICISS answered both questions in the affirmative,[112] this certainly does not reflect the state of customary international law on the subject. The Kosovo war has thrown into sharp relief the lack of *opinio juris* on the subject of unilateral humanitarian intervention,[113] and subsequent discussions over R2P have shown that states' views on the difficult question of unilateral enforcement have not changed. This finding is corroborated by the international response to the Darfur crisis, which shows that states clearly do not believe that they have an obligation to use all means at their disposal to protect civilians in areas outside of their jurisdiction. There is thus no consistent practice of applying R2P, nor is there an intersubjective consensus on the obligation of the Security Council to react to mass atrocities (or, in the absence of Security Council action, on the right of states to take unilateral action). Hence no right to unilateral enforcement of R2P can be said to exist in customary international law.

If one adopts a historical perspective one will find it difficult to argue that such a right to unilateral action exists even in *statu nascendi*. A review of humanitarian interventions conducted in the post-Cold War world[114] suggests that the intervening states for the most part did not claim a right to (unilateral) humanitarian intervention but frequently couched their actions in terms of self-defence or simply declined to comment on the strict legality of their operations, hence implicitly affirming the traditional rules on the use of force.[115] With the notable exceptions of Belgium and maybe the UK,[116] Western states have consistently sought to prevent the emergence of a generalised right (let alone duty) of unilateral enforcement of the responsibility to protect. We learned from Professor D'Amato

[112] There may be room for debate over whether the ICISS indeed intended to legitimise unauthorised intervention. In the event of Security Council deadlock the ICISS suggested intervention by regional organisations subject to their *seeking* subsequent authorisation from the Security Council. 'Seeking' authorisation after the fact, however, does not mean that such authorisation is actually granted – a possibility which the ICISS must have been aware of. I therefore interpret the passage in the report to mean that the ICISS accepted the possibility of regional enforcement action which the Security Council refused to authorise *post hoc*.

[113] See Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', *European Journal of International Law*, 12:3 (2001), pp. 437–68 (p. 452).

[114] See, for example, Institut de Droit International – Session de Santiago, *10th Commission. Present Problems of the Use of Force in International Law. B. Sub-group on Humanitarian Intervention*, Rapporteur: W. Michael Reisman (Paris: Edition A. Pedone, 2007).

[115] When justifying the bombing of Serbia in 1999, NATO states – with the exceptions of Belgium and the UK – did not justify the war in legal terms. Instead of making statements of general (legal) principle, the intervening states mainly relied on moral and political arguments, as the case brought by Yugoslavia against NATO before the ICJ shows. Yugoslavia had instituted proceedings against NATO states after the start of the air campaign. Although the Court ultimately declined to exercise jurisdiction on the merits, a hearing on the preliminary measures application took place, in which the respondents had an opportunity to elaborate on the justifications for the bombardments. The vast majority of the intervening states did not seize this opportunity to clarify the legal basis of their action. During the hearings only Belgium justified the air strikes by invoking a legal right to humanitarian intervention. See International Court of Justice, *Legality of Use of Force Case (Provisional Measures)*, CR 1999/15 (10 May 1999), {http://www.icj-cij.org/docket/files/105/4513.pdf} and International Court of Justice, *Legality of Use of Force Case (Provisional Measures)*, CR 1999/24 (11 May 1999), {http://www.icj-cij.org/docket/files/114/4577.pdf}.

[116] Ibid. For the British position, see also Tony Blair's Sedgefield speech (5 March 2004), {http://www.guardian.co.uk/politics/2004/mar/05/iraq.iraq}: Declaring that 'we do not accept [. . .] that others have a right to oppress and brutalise their people', Blair went on to frame the war against Iraq as a logical extension of the R2P doctrine. This, however, was clearly not the intention of the founders of the concept and is one of the reasons why R2P continues to be viewed with suspicion by many developing nations.

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that every illegal act contains the seeds of a new legality. Yet we also learned from the ICJ's *Nicaragua* judgement that if the intervening parties themselves do not justify their behaviour by reference to a new right of humanitarian intervention, law-breaking clearly does not lead to law-making. Isolated humanitarian interventions that are not even qualified as precedents by the intervening parties themselves and that are opposed by the majority of states are thus insufficient to give rise to a customary right to unilateral enforcement of R2P.

Non-acts are as important as acts for the formation of custom.[117] A consistent pattern of non-intervention on humanitarian grounds tells us as much about the status of R2P as humanitarian interventions that were actually conducted. The international reaction to the crisis in Darfur underlines the importance of hegemonic leadership for the translation of R2P into state practice. The US – by virtue of its preponderant resources – could contribute significantly to turning R2P into a programme of action and setting a precedent for R2P enforcement, yet has failed to do so in Darfur. If, by contrast, Washington decided to threaten non-consensual enforcement of Security Council resolutions, this would alter the Sudanese regime's strategic calculations significantly. So far, Khartoum's non-compliance has been largely cost-free. Yet in the absence of US leadership, a consistent practice of R2P enforcement is unlikely to develop. US opposition to R2P as a legal obligation has significant consequences for the further development of the concept. If the responsibility to protect is to ripen into a norm of customary international law, the US must be on board. Why? Washington is likely to shoulder the brunt of the burden when it comes to translating R2P in state practice, which makes it a 'specially affected state'. As the ICJ expounded in the *North Sea Continental Shelf Case*, for a rule of customary law to come into being, the state practice concerned must include that of states whose interests are specially affected.[118] Hence, the US can, by its abstention, prevent R2P from developing into a fully-fledged norm of customary international law. The desire to avoid the emergence of a generalised right to unilateral humanitarian intervention has been a consistent pattern of US foreign policy.[119] Washington's decisions not to act in the face of humanitarian emergencies, and its desire to limit the precedential impact of its interventions when it did act (by using moral and political instead of legal arguments and presenting each intervention as a case *sui generis*) had a significant impact on the development of the law in this area. Matheson put it bluntly: 'The US does not want the responsibility to protect to evolve into a binding legal obligation and that is why the responsibility to protect is not a norm of customary international law.'[120] Yet the US is not the only 'specially affected state'. This designation applies to the other P-5 as well, which are militarily capable actors with a stake in creating a practice of intervention and which are explicitly mentioned in the ICISS report as having a special role in enabling (or obstructing) a consistent practice of atrocity prevention.[121] However, neither Russia nor China has shown much appetite for civilian protection, and European states have declined to take the initiative in transforming R2P rhetoric into a programme of action. Europeans

[117] D'Amato, supra note 18, pp. 61f.
[118] International Court of Justice, *ICJ Reports 1969* ('s-Gravenhage: Sijthoff), p. 43.
[119] See Murphy, supra note 47.
[120] Interview (10 December 2007).
[121] ICISS, supra note 4, pp. 6, 49, 51, 75.

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now have an independent rapid response capability at their disposal – the EU battlegroups reached full operational capacity in 2007 – that could be employed for the protection of civilians in humanitarian emergencies. Moreover, European states have proved their willingness to go ahead even against the opposition of the US when fundamental human rights issues are at stake – witness the negotiations over the International Criminal Court (ICC). If Europeans were thus to exercise determined leadership in pushing for a consistent application of R2P, US obstructionism would cease to be such a consequential factor in R2P's development. However, the problem is that the US is not the only country that wishes to prevent the emergence of a general legal duty to intervene: as I have argued throughout this article, the large majority of states has no interest in creating a binding obligation to save strangers.

Conclusion

Historical experience suggests that caution is in order when assessing R2P's long-term potential for effectuating political change. The duty to prevent enshrined in the Genocide Convention had sixty years to ripen into a strong norm but – considering decades of non-intervention on humanitarian grounds – has obviously not succeeded in compelling states to adopt a more or less consistent practice of atrocity prevention in areas outside of their jurisdiction. The responsibility to protect merely rephrases the wording of the Convention (and extends the duty to prevent to crimes against humanity and war crimes), but does not introduce substantial new obligations – at least as regards the military aspect. The historical perspective hence weakens the argument that R2P is still too young a concept and that using the crisis in Darfur as a yardstick for measuring the concept's effectiveness is unfair, because norm development in international relations is a slow process. Six decades of non-compliance with the Genocide Convention dictate a sober assessment of the future development of R2P.

Despite these obvious implementation deficits, it would be unfair to dismiss R2P out of hand entirely as an abstract academic exercise. What can be said in favour of the concept? First, the main UN bodies have affirmed R2P on several occasions. Moreover, the practice of the Security Council, which in a number of instances characterised intra-state humanitarian emergencies as threats to international peace (Somalia, Iraq 1991), provided *post hoc* endorsements of unauthorised humanitarian interventions (Liberia, Sierra Leone), or failed to condemn NATO's unilateral intervention in Kosovo, signals that indeed a qualitative shift in the understanding of sovereign responsibilities is about to occur. The AU, as the first regional organisation, has incorporated a right to humanitarian intervention in its Constitutive Act.[122] Beliefs about the moral purpose of the state are beginning to change as a result of the agenda-setting activities of non-state actors and the norm entrepreneurship of the US and other (mostly Western) states, who command the military resources – but not always the political will – to back R2P claims through concomitant actions. The discourse over R2P shows that patterns

[122] Art. 4h of the Constitutive Act of the African Union.

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of accepted justifications in the field of human rights promotion have indeed changed, and that those states advocating an absolute right to non-interference clearly represent a minority. One of the great successes of the R2P debate is that nobody denies that the situation in Darfur constitutes a problem that the international community needs to deal with – civilian protection issues have effectively become internationalised, and the political and moral pressure on governments to address mass atrocities has clearly increased. The language of sovereign responsibility introduced by Deng and the ICISS has provided proponents of R2P with a powerful vocabulary to press for tough action against human rights violators. Because of the discussion over the responsibility to protect, the crisis in Darfur has received more attention than any other conflict on the war-torn continent of Africa – it was in fact the first civil war in which the US used the label genocide.[123] All of this indicates that – although a legal duty to intervene does not exist (yet) – a duty to *consider* intervention may be developing as a result of the R2P debate.[124]

Sovereignty's component norms – especially the norm of domestic jurisdiction – are thus being called into question, yet the extent of the transformation of sovereignty is still disputed, and the majority of scholars remain reluctant to make sweeping statements about the emergence of a customary right to unilateral enforcement of R2P, should the Security Council fail to act. Furthermore, even if the existence of a *right* to humanitarian intervention could be established, most states shy away from acknowledging the international community's *duty* to enforce a state's responsibility to protect.[125] Inconsistent practice as well as the lack of *opinio juris* thus pose significant obstacles to the emergence of the responsibility to protect norm. Hence, unless one conceives of R2P as some type of trans-empirical 'supercustom'[126] that does not require demonstration of state practice as proof of its validity one is forced to conclude that the responsibility to protect has not evolved into a binding legal obligation and is unlikely to do so in the near future.

[123] Supra note 99.
[124] I thank an anonymous reviewer for alerting me to this possibility.
[125] Supra note 70.
[126] W. Michael Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention', *European Journal of International Law*, 11:1 (2000), pp. 3–18 (p. 15).

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