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*Humanitarian Intervention and Responsibility to Protect  
Summary*

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## **Introductory Remarks**

In this work we shall analyze the important and influential ways in which the idea of the Responsibility to Protect has added to theoretical studies concerning the use of force within the framework of international law.

The potential normative impact of the Responsibility to Protect upon the cardinal principles of the international law will be analysed in the light of the United Nations' institutional reform, whose main aspect for the implementation of the Responsibility to Protect principle is the appointment of the Special Adviser on the Prevention of Genocide and the creation of the United Nations' Office of the Special Adviser on the Prevention of Genocide.

We shall describe the shift from the ten-year debate on the right of humanitarian intervention, which blossomed throughout the nineties, to the proposal of the idea of the Responsibility to Protect at the end of 2001 by the International Commission on Intervention and State Sovereignty (ICISS).

We shall analyse the evolution of this concept from the 2001 ICISS report to its formal endorsement in the Outcome Document of the 2005 United Nations World Summit.

We shall take into consideration, compare and discuss the theoretical arguments in favour and against the idea of the Responsibility to Protect developed by some of the most important contemporary jurists, political theorists and international actors.

We shall assess the current status of the idea of the Responsibility to Protect (is the Responsibility to Protect a legal norm that has been already created, institutionalised and internationalised?).

We shall distinguish between two possible connotations of the meaning of the idea as a moral principle or as a legal requirement.

By elaborating on the idea of the Responsibility to Protect, we shall prove that this idea represents a challenge for some of the "cardinal principles of the international law" such as the sovereignty of the states that constitute the international community, the equality among states regardless of their dimensions, the non-interference in their internal affairs (Chapter VII of the United Nations' Charter), the non-use of force, the inviolability of the borders of the states, the impossibility for a state to be subjected to the jurisdiction of another state (that it is called 'jurisdictional immunity') and finally, the diplomatic intangibility of the official representatives of the states" (P. Picone, 2005, 893).

We shall assess whether or not the articles 138 and 139 of the Outcome Document of the 2005 United Nations' World Summit represent a weakening notion when compared to the original formulation of the idea of the Responsibility to Protect as proposed within the 2001 ICISS report.

Our investigation shall address the issue whether the idea of the Responsibility to Protect can be considered as a legal obligation that may give a substantive contribution to ensure human security.

The reason behind the choice to analyse the idea of the Responsibility to Protect - along with its legal implications and the opportunities for its concrete implementation - is to be found in the fact that the norm of the Responsibility to Protect would help the international community of sovereign States to reach a consensus on the guidelines that should orient the United Nations' Security Council in its decisions about the

authorization of the use of armed force as a tool “to protect the population of a State from genocide, war crimes, and other serious violations of the basic human rights that the local authorities are not willing or able to prevent and repress” (P. Picone, 2005, 893 and following) or when the governments of the States are manifestly failing to protect their own population from serious human rights’ and humanitarian law’s violations.

The investigation over the nature, the purpose, the foundation, the legality and the legitimacy of the Responsibility to Protect is an issue of great actuality.

Indeed, the Responsibility to Protect is not only an international commitment by 191 sovereign States who agreed to endorse this idea in the Outcome Statement of the United Nations’ World Summit in September 2005<sup>1</sup>, but it is also the subject of the Secretary General’s (Ban Ki Moon) report on the implementation of the Responsibility to Protect appeared on 12 January 2009.

The Responsibility to Protect is an influential idea that dominates the international arena and that can have consequences in the real world, by playing a central role in the decision-making of world leaders and international actors.

As regards the organization of the study, the work is divided into six chapters as follows. Chapter I deals with the period in between 2001 and 2005 and outlines the conceptual evolution of the idea of the Responsibility to Protect from its original formulation in the 2001 report produced by the International Commission on Intervention and State Sovereignty (ICISS) to its formal endorsement within the Outcome Document of the 2005 United Nations’ World Summit.

Chapter II describes the shift from the traditional notion of sovereignty centered on the rights of sovereign states to territorial integrity, political independence and non-intervention, to the notion of sovereignty as responsibility, focused on the need to protect the civilian population of the state from the perpetration of international crimes and the commission of serious human rights’ and humanitarian law’s violations.

Chapter III analyses the main problems that can be identified in the contemporary conflict prevention theory, like the scope of conflict prevention, the role played by conflict analysis and early warning, how to enhance the effectiveness of structural and operational preventive measures and how the United Nations’ institutional reform facilitates the institutionalization of conflict prevention practices.

The chapter outlines the historical evolution of the idea of conflict prevention from the Congress of Vienna to its endorsement in the most recent United Nations’ documents, like the Report of the Secretary General on the Prevention of Armed Conflict, appeared in June 2001.

The conclusion of the chapter is devoted to the assessment of the costs and benefits of the humanitarian intervention occurred before the 9/11, for the local population of the target state, for the international community and for the international and regional organizations involved in the management and resolution of humanitarian crises.

Chapter IV is an assessment of the impact that the United Nations’ institutional reform could have on the implementation of the principle of the Responsibility to Protect.

It includes an analysis of those United Nations’ institutional reforms that are more relevant for the operationalization of the idea of the Responsibility to Protect.

The reforms considered are the institutional reform of the United Nations’ Security Council, with reference to the exercise of veto by the five permanent members; the

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<sup>1</sup> [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org)

creation of the Peace-Building Commission and the definition of its mandate; the appointment of the Special Adviser on the Prevention of Genocide and the specification of his mandate; the 'metamorphosis' (J. Brunnee, S. Thope) of the politicized Human Rights' Commission into the newly established Human Rights' Council and its mandate. Chapter V describes the increasing significant role that regional organizations are assuming in the implementation of the principle of the Responsibility to Protect and the formal recognition of their role in conflict analysis, management and resolution within the Outcome Statement of the 2005 United Nations World Summit.

It includes an analysis of the role played by the African Union in the management of the crisis erupted at the beginning of 2003 in the Darfur region of the Sudan and an analysis of the role played for a decade by the European Union (in the sector of economic reconstruction and development) and the Organization for the Security and Cooperation in Europe (in the sector of institution building), in the aftermath of the NATO-led intervention in the Balkans (particularly in Serbia and in Kosovo). The scope of this analysis is the identification of the comparative advantages of the involvement of regional organizations with the role traditionally played by international agencies like the United Nations in the field of conflict analysis, management and resolution.

The conclusion of this analysis is that in spite of the fact often regional organizations do not receive adequate financial and logistical support from international organizations, international organizations are still willing to recognize the priority of regional agencies in facing humanitarian crises, regardless of their actual capacity.

Chapter VI proposes a comparison between two concrete and contemporary cases: the Implementation of the Responsibility to Protect in the Darfur region of the Sudan and in the former Serbian province of Kosovo during the ten-year UNMIK transitional administration over the province.

Both case studies show the importance of effective coordination in the division of labor between international and regional organizations.

## 1. Summary of the First Chapter: The Evolution of the Idea of the Responsibility to Protect

The purpose of this chapter is to provide a clear definition of the concept of the Responsibility to Protect and assess its current status.

The conceptual analysis of the Responsibility to Protect will be conducted in the last three paragraphs of the chapter.

These last three sections coincide with the main documents where the idea of the Responsibility to Protect was respectively proposed, articulated and formally endorsed between 2001 and 2005.

In December 2001 the idea of the Responsibility to Protect was proposed for the first time by the members of the independent International Commission on Intervention and State Sovereignty within their report on the work carried out by the Commission.

The mandate of the International Commission on Intervention and State Sovereignty was to provide a solution to all the political, moral and legal dilemmas that remained unsolved in the context of the ten-year debate on the right of humanitarian intervention; the integration between the perspectives of developed and developing countries on the use of force to face humanitarian emergencies and the identification of the conditions for successful conflict prevention.

The idea of Responsibility to Protect encompasses three different dimensions: the responsibility to prevent and to react to serious human rights' and humanitarian law's violations and the responsibility to rebuild societies after the conflict.

The meaning of the idea of the Responsibility to Protect is much broader than the previous notion of 'humanitarian intervention', being military intervention only an aspect of the responsibility to react, which is the second dimension of the idea.

The responsibility to prevent was presented by the International Commission on Intervention and State Sovereignty as the most important aspect of the Responsibility to Protect.

Because the objective of the Responsibility to Protect is to underline the duty of single governments and the international community as a whole to protect civilians at risk by saving their lives, the idea should be rather centered on prevention than on reaction.

However the report fails to specify how civilians caught in conflict should be protected.

This consideration leads to question the authenticity of the ICISS' statement according to which the responsibility to prevent has a priority over the other two dimensions of the idea.

The section of the ICISS' report devoted to conflict prevention is unsatisfactory not only in relation to the place that prevention should have in the broader continuum of the Responsibility to Protect, but also in relation to the nature and scope of preventive practices.

The recommendations given by the ICISS in terms of prevention concern the two structural and operational dimensions of conflict prevention.

Given the multiplicity of the potential root causes of conflict and the complexity of their interaction with other key variables that might lead to the outbreak of violence, it is not surprising that the recommendations given by the ICISS in the area of structural prevention are unclear.

The ICISS identifies four dimensions in the structural dimension of conflict prevention.

When the root causes of conflict are political in nature, preventive measures should be aimed at promoting good governance, respect for human rights and confidence building. But when the underlying causes of conflict are economic in nature, conflict prevention tools should be aimed at tackling poverty and inequality and creating economic opportunities.

Among the structural conflict preventive measures, there are also legal tools aimed at promoting respect for the rule of law and guaranteeing the accountability of governments towards their own population and the whole international community.

Political, economic and legal measures are classifiable as peaceful preventive means that figure already in the chapter VI and VIII of the United Nations' Charter.

Military strategies include disarmament, reintegration and the security sector's reform.

The same political, legal, economic and military categories are used to classify operational conflict prevention measures aimed at tackling the proximate causes of conflict.

When the international community is called to respond to imminent crises, one of most powerful political preventive tools at its disposal is preventive diplomacy.

Economic preventive tools are the positive and negative inducements that can be adopted by the United Nations' Security Council.

The preventive toolbox proposed by the commissioners included legal preventive measures as well, comprising a range of measures like the imposition of legal sanctions and conflict mediation.

Also in the case of imminent crises, should peaceful means be ineffective, the last resort is the recourse to military measures, which, in the domain of operational prevention, are preventive deployments.

The International Commission on Intervention and State Sovereignty made only few concrete proposals to enhance the effectiveness of conflict prevention. These proposals can be listed as follows:

- i) the call for centralizing global conflict prevention efforts;
- ii) the call for developing a global and systemic early warning capacity within the United Nations system;
- iii) a set of criteria to guide the decision-making process of the Security Council on the use of force with humanitarian purposes (just cause, right intention, proportional means, reasonable prospects, right authority).

According to the ICISS report, the international community should bear the responsibility to respond to humanitarian crises not only when serious and irreparable harm are occurring to human beings, but also when serious and irreparable harm are imminently likely to occur.

Therefore the international community holds the responsibility and the duty to prevent that serious and irreparable harm (like large scale loss of life or large scale ethnic cleansing) are committed.

This responsibility can be absolved by recurring to peaceful preventive measures (economic, political and legal in nature) or by adopting the use of force as a last resort, when all peaceful means had been already explored and proven to be ineffective

The International Commission on Intervention and State Sovereignty avoided explicitly to face the most urgent dilemma relating to the responsibility to prevent, which is how to translate early warning signs in the commitment of the international community to act

and how to reach the consensus within the Security Council (since its past inaction was mainly due to internal disagreements on how to face the crises, as it happened in the case of Kosovo and Darfur).

After being included in the High Level Panel Report, the idea of the Responsibility to Protect was endorsed as a central element of the Outcome Statement of the 2005 United Nations World Summit.

In the Report of the High Level Panel on Threats, Challenges and Changes, there is already a significant shift in the way of understanding the preventive dimension of the Responsibility to Protect when compared to original formulation of the idea proposed in the ICISS' report.

While, according to the HLP report, the international community has the responsibility to act only when international crimes are committed, crimes as genocide, war crimes, crimes against humanity and ethnic cleansing, according to the ICISS' report, the international community has the responsibility to act whenever serious human rights' violations are committed.

The Outcome Statement of the 2005 United Nations World Summit, as the ICISS report, contains still some references to the responsibility to prevent.

However, according to the Outcome Document, not only the Responsibility to Protect can be exercised only when international crimes are committed, but the requirement for the international community to exercise its responsibility is the actual commission and not simply the threat that such crimes are committed.

The threshold that an international crime had already taken place in order that the international community is allowed to exercise its Responsibility to Protect requires a legal assessment.

The legal assessment of the crimes committed might in its turn give rise to a prolonged debate over the nature of the crime committed, that most probably will delay the response of the international community to the crisis.

In the ICISS report, the triggering events that can lead to authorise and legitimise the use of force by the Security Council were cases of large scale loss of life with genocidal intent or not, or state neglect, or inability to act, or a failed state situations, or large scale ethnic cleaning, or massive human rights' abuses.

The commissioners argued that these crimes should not necessarily be already committed, but, in order to make the military intervention legitimate, it is sufficient that these crimes are imminently likely to occur.

This specification is the way in which the commissioners expressed the predominance of the preventive dimension of the Responsibility to Protect. (J. Brunnèe and S. Thope, 2007).

In 2004 the idea received a second and further articulation within the 2004 High Level Panel report produced by a group of experts appointed by the former Secretary General K. Annan.

The mandate of the commissioner of the High Level Panel was to discuss the options available to carry out an institutional reform of the United Nations, with the aim of improving the effectiveness of the system of multilateral cooperation.

In the light of the failure to prevent genocide in Rwanda and Bosnia, the former Secretary General K. Annan proposed to include the prevention of genocide in the United Nations' agenda, whose pillars were the defence of sovereignty, the maintenance of international



peace and security and the promotion of human rights. The report of the High Level Panel on Threats, Challenges and Changes, titled “A More Secure World: Our Shared Responsibility”, was released in 2004.

In the final report, the principle of the Responsibility to Protect has been included.

In this report, the principle of the Responsibility to Protect assumes the configuration of an “international collective responsibility”. With the adoption of this language the panellists want to transmit the willingness to overcome unilateralism in favour of multilateralism.

The American legal scholars J. Brunnè and S. Thope, have helpfully identified several similarities between the ICISS and the High Level Panel reports, with reference to the Responsibility to Protect.

In their view, the configuration of the idea of the Responsibility to Protect in the High Level Panel report is not very distant from the original formulation proposed in the ICISS.

What is more, there is an overlapping between the recommendations made by the ICISS commissioners and the recommendations formulated by the panellists.

For instance, in both reports, the five permanent members of the Security Council are invited to refrain from the exercise of veto, unless their vital interests are at stake. Again, in both the reports, the Security Council is regarded as the only source of legitimate authority.

Another common point between the documents is the inclusion of the criteria for the legitimacy of the use of force (which are six in the ICISS report and five in the High Level Panel Report).

In the wake of the reasoning developed by the commissioners in 2001, the panellists agree on recognizing that these criteria are useful to “maximise the possibility to reach the Security Council’s consensus and minimize the risk of unilateralism”. (J. Brunnè and S. Thope).

However, both reports “leave open the possibility for unilateral intervention when the Council fails to act”. (J. Brunnè and S. Thope).

The High Level Panel report continues to assign a crucial importance to the preventive component of the Responsibility to Protect. Indeed, also the panellist believe that it is legitimate to intervene to prevent the perpetration of international crimes and the fact the international crimes are imminently likely to occur is a sufficient reason to legitimise the recourse to the use of force.

However, in the High Level Panel report, the idea of the Responsibility to Protect has been subject to a first important restriction.

The triggering events that can legitimise the use of force are only international crimes and no longer massive human rights’ abuses or large scale loss of life.

In 2005 the idea was formally endorsed within the two paragraphs 138 and 139 of the Outcome Document of the United Nations World Summit.

One of the main differences between the Outcome Document and the two previous reports is that in the Outcome Statement the five criteria for the legitimation of the use of force have been completely deleted. In this sense, the Outcome Document reflects the reluctance of the States and of the United States in particular, to support whatever form of codification of precise criteria for intervening in a sovereign state with humanitarian purposes.

Another importance difference is that in the Outcome Document the predominance of the preventive dimension of the Responsibility to Protect is no longer recognised.

The chapter moves to deal with the issue of the assessment of the status of the Responsibility to Protect.

According to Prof. J. Welsh, paragraphs 138 and 139 of the Outcome Document represent a ‘weakening of the original notion’ of the Responsibility to Protect as proposed in the 2001 ICISS report and in the 2004 report of the High Level Panel on Threats, Challenges and Changes. (J. Welsh, 2006).

The status of the Responsibility to Protect depends on the recognition of the articles 138 and 139 of the Outcome Document as sources of law.

However, since the international lawyers continue to deny that these two paragraphs can be considered as sources of law (J. Welsh, 2006), the recognition of the Responsibility to Protect as a legal norm (of the international law) remains controversial.

It still remains unclear if the Responsibility to Protect is a binding legal norm of the international law, endowed with a “constraining power that derives from the social disapproval that breaking them entails”. (N. Wheeler, 2000).

The scholar N. Wheeler laments that there are some authors that arrive to question that international legal norm in general (and not only the Responsibility to Protect) are endowed with a constraining power, since it is not clear who is obliged to guarantee respect for international legal norms. This problem invests the general emerging norm of the Responsibility to Protect as well, since also in its case, it is not clear who is obliged to guarantee respect for it (there is only a general and not very meaningful indication that the Responsibility to Protect should be carried out by the international community when the State is unable or unwilling to protect its own population) and what are the concrete obligations corresponding to this norm.

Indeed, in order for a legal norm to be recognised as such, it should stem from the traditional sources of law, category that does not include United Nations’ statements, resolutions and documents. (J. Welsh, 2006).

The scholar N. Wheeler has observed that “it always happens that when new norms are raised, they are followed by a process of contestation, as the supporters of the old norm (absolute non intervention) seek to resist to the advocates of the new norm (R2P).

The process of contestation can be followed by the defeat or on the contrary by the acceptance of the norm as a legitimate practice” (N. Wheeler, 2000).

The conclusion drawn by Prof. D. Rodin is that there is no defeat nor full acceptance but rather partial acceptance, of the norm of the Responsibility to Protect.

The conclusion drawn by Prof. J. Welsh is that the norm of the Responsibility to Protect has met with resistance in the realm of the international law, and this is sufficient to explain the current ambiguity of its status.

Thereafter (the analysis of the concept and its current status) follows a discussion on the legal implications of the idea of the Responsibility to Protect and its legal impact upon the foundations of the international law.

The cardinal principles of the international law that have a relation of tension with the general emerging norm of the Responsibility to Protect are the following:

- 1) the sovereignty of the State and the inviolability of its borders (the so-called principle of territorial integrity);
- 2) the political independence of the State in international relations;

- 3) the non use of force;
- 4) the principle of the legal equality among states;
- 5) the non-interference in the internal affairs of another State (jurisdictional immunity);
- 6) the diplomatic intangibility of the official representatives of the State.

The crisis of the cardinal principles of the international law is accompanied by the crisis of the international organizations and particularly of the United Nations.

The efficiency and impartiality of the United Nations' Security Council have been questioned.

Its efficiency has been questioned as a consequence of its inaction or its incapability to give timely and adequate responses to genocide in Rwanda, Bosnia and Cambodia, and to crimes against humanity in Kosovo, East Timor and Darfur (however, the fact that genocide has been perpetrated in Darfur remains controversial).

Its impartiality has been questioned as a consequence of the exercise of the veto power by the five permanent members of the Security Council (for instance, the threat to oppose Russian veto led NATO to bypass the authority of the Council and to unilaterally intervene in Kosovo).

Other issues the chapter deals with are the changed nature of armed conflicts after the end of the Cold War (from international disputes to internal violence).

An analysis of the equipment of the international law to punish international crimes that are committed under the domestic jurisdiction of another sovereign State and particularly, the creation of the international criminal tribunals, whose functioning is based upon the principle of personal responsibility for the crimes perpetrated in the context of internal conflicts violence, on the one side and the establishment of the Rome Statute of the International Criminal Court on the other side. Ad hoc International Criminal tribunals and the International Criminal Court of Justice are essential component of conflict prevention because they allow putting an end to the climate of impunity for international crimes or crimes against humanity and genocide perpetrated within the borders of sovereign states.

## 2. Summary of the Second Chapter: Beyond Westphalia? State Sovereignty and the Responsibility to Protect

The purpose of this chapter is to describe the transition from the traditional notion of sovereignty to the introduction of the concept of sovereignty as responsibility.

The traditional notion of sovereignty was introduced between the XVI<sup>th</sup> and the XVII<sup>th</sup> century by the political philosophers J. Bodin and T. Hobbes.

Since their writings were aimed at providing a legitimation of the absolute monarchy, the definition of sovereignty that they provided is very close to the notion of absolutism.

The overlapping between the notion of sovereignty and the notion of absolutism is what led the French philosopher J. Maritain to propose to banish the traditional notion of sovereignty from the dictionary of political philosophy.

The perceived tension between the traditional notion of sovereignty and the system of international law is what led the German theorist of international relations H. Morgenthau to feel the need for a continuous re-thinking of the notion of sovereignty.

The need to re-think the concept of sovereignty stems from the recognition of the existence of a tension between the traditional notion of sovereignty and the international law. This tension has been identified among the others, by the German international relations' theorist H. Morgenthau in an article titled *Sovereignty Reconsidered*, where he suggests that: "...in the last decades the concept of sovereignty has been subject to reinterpretations, revisions and attacks in view of its importance for the development of international law. The source of these doubts and difficulties, apart from the general depreciation of sovereignty in contemporary legal and political theory, lies in the fact that the assumption of international law imposing legal restraints upon the individual states seems to be logically incompatible with the assumption of these states being sovereign, that is, being the supreme law creating and law enforcing authorities, independent of legal restraint". (H. Morgenthau, 1948, 343).

The conclusion that H. Morgenthau draws from this premise is that "sovereignty is incompatible with the system of international law" (H. Morgenthau, 1948, 343).

In his article, H. Morgenthau is referring to the traditional notion of sovereignty.

According to this notion, the sovereignty of the state implies that the state has the primary responsibility to protect the person and the property of its subjects and to discharge its governmental functions effectively within its borders.

In 1648 the definition of sovereignty provided by J. Bodin and T. Hobbes was endorsed in the Treaty of Westphalia.

The traditional notion of sovereignty as it was incorporated in the text of Westphalia Treaty can be summarized in the Latin sentence: "Rex est imperator in regno sue", meaning that the sovereign - who in the XVII<sup>th</sup> century was identified with the absolute monarch - has "the right to rule his own territory". In the framework of the Public International Law, "sovereignty is a "jus cogens" (or peremptory) norm, which can be derogated only in two circumstances: when the sovereignty afforded domestically by citizens dissipates or when the legitimacy afforded internationally by the other sovereign states ceases" (ISIS Europe, 2).

The proponents of the concept of sovereignty as responsibility underline that thanks to this new concept, the protection of the civilian population becomes an essential requirement of sovereignty's legitimacy.

However, also the Westphalian notion of sovereignty was already based on the assumption that the legitimacy is a function of its internal recognition by the citizens of the State and external recognition by the international community.

For three centuries, the traditional notion of sovereignty has remained almost unchanged until its endorsement within the Montevideo Convention on the Right and Duties of States, signed in 1933.

Notoriously the three elements that this Convention identifies as constitutive parts of sovereignty are: "...a permanent population, a defined territory and a functioning government". (Montevideo Convention on the Rights and Duties of States, 1933)

The importance of the traditional notion of sovereignty continues to be recognized by contemporary international actors.

In this regard a significant example is offered by the statement released in 2003 by the US ambassador R. Haass, where he claims that: "sovereignty has been a source of stability for more than two centuries, during which, it established legal protections against external intervention and offered a diplomatic foundation for the negotiation of international treaties, for the formation of international organisations and for the development of international law, provides a stable framework within which representative government and market economies could emerge in many nations, remains an essential component of international peace, security, democracy and prosperity. State sovereignty remains a fundamental principle of interstate relations and for the foundation of the world order, a key constitutional safeguard of international order and a core principle of Customary International Law and of the United Nations' Charter". (R. Haass, 2003).

Regarded as an essential component of international peace and security, sovereignty is at the core of the United Nations Charter and is a key foundation of Customary International Law. (R. Haas, 2003).

According to the Italian lawyer P. Picone, today we are witnessing a crisis of the cardinal principles of the international law.

The crisis of the foundations of international law concerns particularly the concept of sovereignty and its main components (domestic jurisdiction, legal equality and non intervention).

For instance, the concept of domestic jurisdiction, which is a component of sovereignty, is losing ground in favor of the concept of international jurisdiction.

Similarly, the persuasiveness of the principle of the legal equality of states (which is another component of the concept of sovereignty) is undermined by the perception of a huge imbalance in terms of their military and material power.

Finally, the crisis of the principle of non-intervention, which is a corollary of the principle of the legal equality of states, has been recently proved by the US-led military invasion of Iraq.

In the light of the crisis of the main components of the concept of sovereignty and in the aftermath of the introduction of the principle of the Responsibility to Protect, many political theorists felt the need to shift the debate from the concept of sovereignty as control to the concept of sovereignty as responsibility.

The fact that the notion of sovereignty should be broadened to include the protection of the human rights of individuals is a consequence of the evolution of the contemporary international human rights system.

We shall retrace the evolution that international human rights law has known in the course of the last century. By virtue of this evolution, today international law recognises to individuals several human rights, which are guaranteed by the United Nations human rights' legislation (international treaties and conventions, the first of which is the 1948 Genocide Convention).

Despite its evolution, the contemporary international human rights system is not always able to prevent massive human rights' violations, which continue to be perpetrated in different regions of the world. However, this system is being successful in forcing a growing number of states to respect the international human rights' treaties and conventions that they have ratified.

The mainstreaming of the human rights' protection within the concept of sovereignty shall be considered a sign of the deep influence that human rights are able to exercise on the way in which sovereign states perceive their responsibilities both towards their people and towards the international community.

The concept of sovereignty as responsibility stems from the belief that all human beings have the right to be treated with humanity and dignity and therefore states have the primary responsibility to guarantee the promotion and protection of the human rights of their own people.

At the same time the international community has the responsibility and the duty to prevent or react to serious human rights' and humanitarian law's violations like genocide or related crimes.

The concept of sovereignty as responsibility came at the end of a long process of rethinking whose protagonists are the two former Secretary Generals of the United Nations (B.B. Ghali and K. Annan) and the current Special Adviser on the Prevention of Genocide, F. Deng.

The notion of sovereignty, which is the subject of international law and international relation theory, has always been politically sensitive and controversial (Winston, P. Nagan, Craig Hammer, 2003).

The safeguard of the principle of sovereign integrity is at the core of the United Nations system. In the United Nations' Charter, where there is a strong claim to sovereign status, the focus is the external unlawful use of sovereignty by states in committing acts of aggression (C.C Joyner, 2007).

Taking into consideration the considerable impact that the Second World War had on the elaboration of its content, some political theorists believe that the contemporary relevance of the United Nations' Charter should be questioned.

In particular, the claim to sovereign status that inform the content of the United Nations Charter seems to be difficult to conciliate with the current mandate of the United Nations. Besides the maintenance of international peace and security, since 2003, the prevention of genocide in the context of internal conflicts became an integral part of the United Nations agenda, following a request presented to the High Level Panel on Threats, Challenges and Changes by the former Secretary General K. Annan.

Despite the United Nations Charter provides for "a restriction of the sovereignty of United Nations member states to the extent of the obligations assumed by states by virtue of their membership in the United Nations" (C.C Joyner, 2007), nonetheless the difficulty to find a conciliation between the claim to sovereign status and the accomplishment of the United Nations' mandate remains.

The main components of the traditional notion of sovereignty enclosed in the United Nations Charter are 'sovereign competence', (more commonly known as 'domestic jurisdiction'), in the first place; secondly, the 'independence' of the State in international relations, and finally, the legal 'equality' of states.

The principle of the legal equality among states is enclosed in the art 2(1) of the United Nations Charter.

The principle of sovereign competence of the State is enclosed in the art 2 (7) of the United Nations Charter along with the prohibition "to intervene in those matters that are essentially within the domestic jurisdiction of any state" (art 2 (7) of the United Nations' Charter).

Domestic jurisdiction means that "each state is permitted by international law to decide and act without intrusions from other sovereign states and is allowed to choose the political, economic, social and cultural systems along with the formulation of its own foreign policy" (C.C Joyner, 2007, 718).

Domestic jurisdiction is the consequence of the "title to sovereignty".

The title to sovereignty "concerns both the factual and legal terms under which territory is deemed to belong to one particular state only, and embodies the essence of territorial sovereignty in the sense that as a sovereign over territory, the state enjoys a certain type of competence –sovereign competence, which is a consequence of the title" (N. Gal-Or, ILF, 2008, 321).

Within the concept of domestic jurisdiction of the state it is possible to distinguish two fundamental components. The first component is the *prescriptive jurisdiction*, which can be defined as: "The power of a state to make or prescribe law within or outside its territory" (Winston, P. Nagan, Craig Hammer, 2003).

The second component is the *enforcement jurisdiction*, which can be defined as: "The power of the state to implement the law within its territory" (Winston, P. Nagan, Craig Hammer, 2003).

The contemporary literature on the subject of sovereignty proposes the idea of a transition from a domestic to an international jurisdiction.

Indeed, "what were once circumstances and problems solely within the bound of domestic jurisdiction have been elevated to the level of global community concerns" (C.C Joyner, 2007, 718).

For instance "How a state treats its own nationals is no longer a matter exclusively falling within the domestic jurisdiction of the state" (C.C Joyner, 2007, 718).

Human rights were never "a matter exclusively within the domestic jurisdiction of a state" (C.C Joyner, 2007, 718), but they were always "a matter of concern to the international community" (C.C Joyner, 2007, 718).

Indeed, already in the text of the United Nations' Charter, "the solution of economic, social, cultural and humanitarian problems, as well as human rights, is elevated to the international sphere. These matters are not exclusively domestic and solution cannot be located exclusively within the sovereignty of states. In this regard, the United Nations can be considered as a centre for harmonising the actions of states (and their international cooperation, art 1 (2)) in solving problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all, state sovereignty without distinction as to race, sex, language or religion". (C.C Joyner, 2007, 718).

The second component of the principle of sovereignty is the independence of the state: “Possession of sovereignty imbues the government of a state with supremacy over its territory and independence in international relations. In principle, however, such independence is neither absolute nor unlimited”. (C.C Joyner, 2007, 717).

The third component of the principle of sovereignty is the legal equality of states. The legal meaning of the principle of the equality among states is that “according to traditional international law, the world consists of a number of sovereign states, in principle equal: none of them subject to any authority above themselves, the government of each state having complete jurisdiction inside their respective territory. Whatever legal order there is to be among these states has to be achieved through reciprocal self-regulation and coordination, by bilateral agreements and multilateral negotiations. (A. Eide, 1974, 1).

The purpose of this chapter is indeed to rethink the concept of sovereignty in the light of the principle of the Responsibility to Protect, which can be considered as a general emerging norm of the international law.

The tension between the traditional notion of sovereignty and international law, calls for an evolution and a structural modification of the concept of sovereignty.

The re-conceptualisation of the concept of sovereignty is aimed to reach a greater compatibility between the way of understanding sovereignty and the recent evolution of international law.

The change in the way of understanding sovereignty can be described as a broadening of the concept of sovereignty up to encompass not only the rights, privileges and immunities of sovereign states (such as jurisdictional immunity) but also their responsibilities to protect the basic rights of the civilian population and to regulate political and economic affairs.

The concept of sovereignty as responsibility “is increasingly being codified in international human rights instruments and recognised in state practice. Since 1948, the adoption of several salient international human rights’ instruments have established legal benchmarks for state conduct and erected the global legal regime that mandates national and international protection for and promotion of individual human rights”. (C. C. Joyner, 2007, 706).

The doctrine of sovereignty as responsibility has been explicitly proposed for the first time during the nineties by Prof. F. Deng, Special Adviser on the Prevention of Genocide, in a book titled *Sovereignty as Responsibility, Conflict Management in Africa* (1996).

His claim is that “...when states are unable to provide life supporting protection and assistance for their citizens, they are expected to request and accept outside offers of aid. Should they refuse or deliberately obstruct access to their displaced or other affected populations and thereby put large number at risk, there is an international responsibility to respond” (F. Deng, 1996).

In the same book, F. Deng proposed an important distinction between internal and international accountability:

- The sovereign state is internally accountable in the sense that it is responsible towards its own population.
- At the same time, the sovereign state is internationally accountable in the sense that it is responsible of the way in which it treats its own population towards the international



community of states and it should treat them in compliance with the existing human rights' and humanitarian agreements. (F. Deng, 1996).

Prof. F. Deng introduced also the new notion of 'suspended sovereignty'. He believes that: "When a government massively abuses the fundamental rights of its citizens, its sovereignty is temporarily suspended" (F. Deng 1996).

Elaborating on the notion of 'suspended sovereignty', other authors claim that: "The world community has the obligation to rule those territories where the governments fail" (J. H. Jackson, 787).

However, the idea of sovereignty as responsibility is the fruit of a gradual change in the understanding of the concept of sovereignty.

In this regard, the contribution given to the evolution of the concept of sovereignty provided by the two former Secretary Generals of the United Nations has been crucial.

The definition of the notion of sovereignty that they provided while exercising their mandate, reflects a gradual change in the way of conceiving the principle of sovereignty.

According to the former Secretary General B. B. Ghali, sovereignty is a contingent rather than an absolute concept. In his words: "...sovereignty has never been inviolable either in law or in practice. Indeed, sovereignty may be limited by customary and treaty obligations in international relations and law may be violated by the powerful..." (B. B. Ghali, *An Agenda for Peace*, New York: United Nations, 1992).

Similarly, the former Secretary General K. Annan pointed out that the frontiers of the states cannot be considered as shields to defend the criminal behaviors of State's authorities.

Since frontiers are not absolute barriers, State's leaders can no longer rely on the privilege of jurisdictional immunity.

The thought of K. Annan reflects an evolution in the way of understanding sovereignty.

Certain circumstances, like the perpetration of genocide under the jurisdiction of a sovereign state or, generally, the lack of an actual control over the territory by failed states, pose conceptual problems for the traditional way of understanding sovereignty.

In the light of anomaly examples of sovereignty, like fragile, failed and quasi states, the literature on the subject became very critical towards the traditional way of conceiving sovereignty.

K. Annan claimed that the concept of sovereignty implies the responsibility of the states to protect their own populations. When the state is unable or unwilling or is itself the perpetrator of massive human rights' violations, the international community should assume the Responsibility to Protect the citizens of the failed state.

K. Annan is even the author of the famous distinction between two concepts of sovereignty. While the first is centered on the state, the second is focused on the people. In this second instance, the states are considered as instrument at the service of their population.

Conceiving sovereignty as governmental responsibility implies that "government officials are responsible for policies that ensure the protection of their own citizens and the promotion of their welfare; governments are obligated to their own nations and to the international community" (C. C. Joyner, 2007, 706).

On the basis of the last work of the scholar A. Bellamy on the Responsibility to Protect, we shall identify the main differences between the traditional notion of sovereignty and notion of sovereignty as responsibility.

The first difference between the two notions consists in the fact that while the traditional notion of sovereignty would be focused on the right of self-determination, the notion of sovereignty as responsibility would be focused on the human rights of individuals. The second difference consists in the way to conceive international society.

On the one side, the traditional notion of sovereignty is based on the principle of equality among sovereign states. The corollary of this principle is that all the states are seen as equal and there are no states that have the right of oversight the behavior of the others.

On the other side, the notion of sovereignty as responsibility is based on the assumption that the international community can exercise the right to oversee the domestic behavior of the other sovereign states in some specific circumstances, and particularly when these states are manifestly failing to fulfill their responsibilities towards their own people.

### 3. Summary of the Third Chapter: From a Culture of Reaction to a Culture of Prevention

The last paragraph of the present chapter is devoted to the impact of humanitarian interventions occurred during the nineties over the local population, international, regional and sub-regional organizations involved in the process of conflict resolution, and finally over the local population of the target state.

The case studies taken into consideration are the UNOSOM intervention in the Somalia conflict (1992-1995), the UNPROFOR intervention in the Bosnian conflict (1992-1995), and finally the NATO-led intervention in Kosovo in 1999.

Particularly, the case study of Bosnia is analyzed with the aim of proving that the failure to prevent the massacre perpetrated in Srebrenica was rather due to the failure to give an appropriate response than to the lack of a global and systemic early warning system.

Indeed, an effective early warning capacity does already exist within the United Nations system.

In the literature on conflict prevention a consensus has been reached on the fact that “preventive action plans should be based on existing case studies” and should derive on “the generalisation of the lessons learned” (see A. Ackermann, 2003).

From the generalisation of the lessons learned from the case studies considered in the present chapter, several conflict prevention’s experts drawn the conclusion that, in order to be effective, conflict prevention, should not only be country-context specific, but also it requires “the adoption of timely, multilateral, and coordinated preventive measures, supported by a lead actor, by major international donors and by a domestic capacity for conflict regulation. These preventive measures should support indigenous capacities for long-term prevention and should be sensitive to those structural factors that make a country more conflict prone” (see A. Ackermann, 2003).

The importance of reflecting on how to enhance conflict prevention’s effectiveness is useful to avoid “policy errors, failures in prevention and indirect and negative consequences of the preventive action” (see A. Ackermann, 2003).

Conflict analysis can be defined as the diagnosis of the structural and proximate causes of conflict and the identification of potential preventive actors.

In the model of preventive strategy proposed by the scholar Beyna, conflict analysis is followed by prevention analysis, which is the assessment of the accordance between the preventive measures to be adopted and the diagnosis of the causes of conflict.

The third moment of this model is the reflection on how to organise and realise the preventive action; how to monitor and assess the outcomes of this action and modify the preventive strategy accordingly. (see A. Ackermann, 2003).

Both, the debate on the right of humanitarian intervention and the literature on the prevention of armed conflict blossomed throughout the nineties.

Although at the end of the Cold War saw a decrease in the intensity and number of armed ethnic conflicts, “conflicts remain a characteristic feature of the international system” (A. Ackermann, 2003).

From this fact stems the importance of the literature on conflict prevention.

The main problems addressed by the literature on the subject of conflict prevention are “the feasibility, legality, effectiveness and institutionalisation of conflict prevention practice, how to integrate measures aimed at the prevention of armed conflicts in the long-term development assistance post-conflict programs, how international, regional,

sub-regional, non governmental organisations and development agencies may facilitate the implementation of conflict prevention practice, what is the scope of conflict prevention, what is the role played by conflict analysis and early warning in conflict prevention, how it is possible to enhance the institutionalisation of conflict prevention. (see A. Ackermann, 2003).

The idea of conflict prevention, as well as the idea of the Responsibility to Protect, in order to become a norm, should overcome three different stages.

The first stage is the creation of the norm, the second is its institutionalisation and the third is its internationalisation (see A. Ackermann, 2003).

We shall retrace the historical evolution of the idea of conflict prevention from the Congress of Vienna, to its incorporation in the United Nations Charter until its endorsement in recent United Nations documents, like the report on Conflict Prevention produced by K. Annan in 2001.

In the contemporary perspective on conflict prevention there is a growing consensus on the fact that the notion of conflict prevention should rather be limited to the first stages of the conflict rather than including the phase in which the violence has already taken place or encompassing the post-conflict stage.

Moreover, conflict prevention strategies should be directed to address both structural and proximate causes of conflict.

Contemporary conflict prevention theory is based upon the distinction between structural and operational dimensions of conflict prevention.

Operational prevention is aimed at facing imminent crises and includes short-term measures such as “fact finding and monitoring missions, negotiation, mediation, the creation of channels of dialogue among contending groups, coercive diplomacy, preventive deployments, confidence building measures, economic sanctions, trade, humanitarian and financial aid, military measures like deterrence, embargoes and peacekeeping and legal measures” (see A. Ackermann, 2003; A. Bellamy, 2008).

On the contrary structural prevention includes long-term measures like facilitating good governance, adherence to human and minority rights, economic, political and societal stability and civil society building, development promotion, poverty reduction, economic equality promotion, fighting economic underdevelopment, unemployment, economic deprivation, environmental protection’s promotion, fighting the weakness of the institutions by reforming the security sector, the administration and the judiciary (see A. Bellamy, 2008).

We shall take into consideration the main criticisms raised against the idea of conflict prevention.

The first of these criticisms is the consideration that because a state can be in crisis over a prolonged period of time, it is difficult to predict when and where violence may erupt (see A. Ackermann, 2003, A. Bellamy, 2008).

Moreover, prevention requires government to devote resources to regions that are not in conflict yet. In the case in which governments manage to prevent the eruption of the violence, they could be accused to waste precious resources to avoid non-existent crises and without obtaining any tangible benefit (see A. Bellamy 2008).

Since the idea of conflict prevention has been incorporated in the first dimension of the idea of the Responsibility to Protect, the problem of comprehensiveness as well remains unsolved, in the sense that it is not clear whether the idea of prevention should be

associated to early warning, preventive diplomacy and crisis management, and whether it should include both, structural and operational preventive measures along with the responsibility to ending impunity, (especially by submitting the cases to the International Court of Justice created with the Rome Statute in 1998) (see A. Bellamy, 2008).

These difficulties might explain why there is such a huge disparity between the resources devoted to conflict prevention and those destined to conflict management and post-conflict reconstruction.

Indeed, conflict management and post-conflict reconstruction, unlike conflict prevention, are able to generate tangible benefits.

Since a consensus on the exact causal mechanisms that lead to the eruption of conflict has not been reached yet, scholars did not arrive to conceive a unitary theory on the causes of armed conflict.

However, some of the key variables and structural causes of conflict have been identified and on this basis it is possible to build an appropriate strategy of conflict analysis. (see A. Ackermann, 2003)

Given the multiplicity of these variables and the complexity of their interaction, the prediction of the eruption of the conflict remains a difficult task.

In order for the international community to be able to give effective preventive responses, it would be necessary to collect accurate information on the key variables and the structural causes that can lead a country to lapse into violence. Indeed, another feature of an effective conflict prevention strategy is that it should be based on a “country specific approach” (see A. Ackermann, 2003).

Another problem related to conflict prevention that the present chapter deals with is the institutionalisation of conflict prevention practices.

What is important to note is that the main regional agencies that have a preventive capacity - the Organization for Security and Cooperation in Europe, the European Commission and the European Union - have developed their capacity in addressing the structural causes of conflict rather than the capacity to address proximate causes of conflict. (see A. Ackermann, 2003).

The decision to incorporate a chapter devoted to the idea of conflict prevention in a study devoted to the general emerging norm of the Responsibility to Protect is based on the ground that since its original articulation within the report produced by the independent International Commission on Intervention and State Sovereignty (ICISS), a preventive aspect was included in the idea of the Responsibility to Protect.

While the debate on the right of humanitarian intervention blossomed throughout the nineties was centered on the rights of states to intervene in other states where conflict has already caused lost of civilians on a massive scale, the idea of the Responsibility to Protect focuses on the human rights of civilians caught in conflict.

The very fact that a preventive dimension was included in the idea of the Responsibility to Protect proves that the Responsibility to Protect was rather aimed at offering the opportunity to implement conflict prevention measures than at increasing the opportunities for intervention in the internal affairs of the other sovereign states.

However, differences can be identified between the preventive dimension of the Responsibility to Protect and the broader conflict prevention literature.

The literature centered on the subject of conflict prevention indeed, distinguishes between structural and proximate causes of conflict.

In its original articulation the preventive aspect of the Responsibility to Protect was almost coincident with the content of the conflict prevention theory, in the sense that it encompassed both structural and direct conflict prevention strategies.

However, the further evolution of the idea of the Responsibility to Protect in the High Level Panel Report and in the Outcome Document of the 2005 United Nations World Summit suggests a divergence between the Responsibility to Prevent, restricted to the Responsibility to Prevent Genocide and the broader conflict prevention theory, (which includes a structural and an operational dimension).

The gradual weakening of the preventive component of the Responsibility to Protect is reflected at the institutional level by the United Nations reform, which will be discussed more in detail in the next chapter.

However, the very fact that the former United Nations Secretary General refused the proposal of the panelists to assign a preventive mandate to the newly established Peace-Building Commission, should not be interpreted as an evidence of the fact that the United Nations are not moving from a culture of reaction to a culture of prevention.

The reason why the Secretary General preferred to limit the mandate of the Peace-Building Commission to post-conflict activities like reconstruction and institution building, is that these long-term measures can give a substantial contribution to preventing the reoccurrence of the conflict in those countries that have already experienced conflict at least once and therefore, they have high probabilities to relapse into violence, if the structural causes that led to the eruption of the conflict are not effectively addressed.

#### 4. Summary of the Chapter: The Institutionalization of the Responsibility to Protect Principle within the Context of the United Nations' Institutional Reform

In this chapter we shall take into consideration those institutional reforms of the United Nations' system that are relevant for the implementation of the Responsibility to Protect principle. The purpose of this analysis is to demonstrate that the passage from the 2001 International Commission on Intervention and State Sovereignty Report to the Outcome Statement of the 2005 United Nations World Summit determines a weakening of the preventive dimension of the Responsibility to Prevent, also in terms of institutionalization of preventive practices.

This thesis can be demonstrated while considering the fact that the Outcome Statement does not include early warning and early action functions in the mandate of the newly established Peace-building Commission.

Within the Outcome Statement, the mandate of the Commission was explicitly confined to post-conflict activities like reconstruction and institution building.

The chapter clarifies that in the original recommendations of the High Level Panel, the Peace-Building Commission was supposed to have both preventive and peace-building functions.

However, later on the international actors decided to limit the mandate of the Peace-building Commission to post-conflict reconstruction activities.

The chapter explains also the reasons that led to the exclusion of the preventive function from the mandate of the Peace-building Commission.

These reasons can be summarized in two main arguments, entailed in the proceeding of the workshop on *The United Nations Reform* organized by the Yale Centre for the Study of Globalization in 2005.

The first argument is that it would have more sense to spend financial and other resources in the institutional efforts for post-conflict reconstruction activities than in the prevention of state collapse.

Indeed, it is extremely difficult to predict where the next civil war will break out.

By contrast it is well known that conflict-prone countries are more likely to relapse into violence.

The fact that states have recently experienced war is a good indicator to predict the outbreak of future conflicts.

The second argument is that the assignment of a preventive function to the Peace-building Commission can have some serious side effects.

The awareness by the rebel groups of the existence of an international organism in charge of identifying and preventively intervene in states at risk of lapsing into conflict, can encourage them to try to make external intervention more likely by using force or being intransigent in negotiations, like it happened with Kosovo Liberation Army in 1997-98 and with Sudanese Liberation Army in Darfur.

In the light of the failure to include a preventive function in the mandate of the Peace-Building Commission it is not clear in which fashion the preventive aspect of the Responsibility to Protect can and will be implemented.

The creation of the Human Rights Council, which is the key of the United Nations reform, is important for the link that exists between Human Rights defense and Responsibility to Protect.

Preventive functions could be incorporated in the mandate of the Human Rights Council as well, but the delegates that negotiated the Outcome Document were not able to reach an agreement on the mandate of the Human Rights' Council, which remained undefined. The following deliberations clarify that the mandate of the Human Rights Council does not include preventive functions related to the creation of an early warning capacity within the Council. Indeed, the mandate of the Human Rights Council is very general and consists in "the promotion of universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner" (United Nations Task Force, 2005), without including functions explicitly and specifically related to the implementation of the Responsibility to Protect.

With regard to the institutional reform of the United Nations' Security Council, there are no relevant changes in the structure and in the working methods of the Council that can lead to think that conflict prevention will be taken more seriously than in the past.

Past and more recent experiences prove that the Security Council was not always able to prevent humanitarian crises effectively and in many cases its crisis prevention performances had deluded world expectations.

Prof. J. Welsh pointed out that the way in which the ICISS commissioner face the issue of the right authority - which is one of the six criteria for guiding the decision-making process of the Security Council in matters related to the use of force - is quite traditional, in the sense that they do not question the Security Council as the sole source of legitimate authority to approve the use of force. However, when the Security Council is unwilling to act, the commissioners propose a revitalisation of the moribundum Uniting for Peace resolution of the General Assembly or the reference to a regional organisation. (J. Welsh, 2006).

This alternative solution was proposed in the light of the slowness of the Security Council's decision-making process, the under-representation of key regions, the political nature of the five permanent members of the Council, which have the effect to compromise its credibility and impartiality and the fact that the Responsibility to Protect could never be applied against one of the five permanent members. (J. Welsh, 2006).

In spite of its shortfalls, the Council as the only source of legitimate authority for the use of force ought to be preferred to the risk of unilateralism.

Moreover, considering that neither the Human Rights' Council nor the Peace-Building Commission include preventive functions in their own mandates, the only United Nations' institutions that have a mandate relevant for the implementation of the Responsibility to Protect are the United Nations Security Council and the Special Adviser for the Prevention of Genocide and his office.

The Special Adviser on the Prevention of Genocide is responsible, among the other tasks, for "collecting existing information, on serious violations of human rights and international humanitarian law of ethnic and racial origin, for acting as an early warning mechanism to the Secretary General, for making recommendations to the Security Council on action to prevent or halt genocide..."<sup>2</sup>

However, genocide prevention is a concept much narrower than the prevention of armed conflicts and there is only a partial overlapping with conflict prevention since genocide is a crime that can be committed either in time of peace or war (1948, Genocide Convention, art. 1).

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<sup>2</sup> [www.un.org/preventgenocide/adviser](http://www.un.org/preventgenocide/adviser)



The idea of the Responsibility to Protect can not be limited to genocide prevention without risking to flatten the whole meaning of the norm of the Responsibility to Protect to the scope of the 1948 Genocide Convention.

The Chapter tries to highlight the difficulties related to the institutionalization of the preventive dimension of the Responsibility to Protect.

The institutional reform of the United Nations mirrors the restrictions to which the Responsibility to Protect has been progressively subjected in United Nations official documents. In particular, it reflects the neglect of its preventative component.

Indeed, the Special Adviser on the Prevention of Genocide is the only organ of the United Nations which has an explicit preventive dimension.

## 5. Summary of the Chapter: The Increasingly Significant Role of Regional Organizations: Pro and Cons of Regionalism

The increasingly significant role of regional organizations for implementing the Responsibility to Protect principle is one of the main aspects of the Outcome Statement of the 2005 United Nations World Summit.

Article 4 (h) of the African Union's Constitutive Act signed in Lomé in 2000, provides for the right of humanitarian intervention in respect of genocide, war crimes, and crimes against humanity.

From this point of view, there are no particular differences between this provision enshrined in the African Union Constitutive Act and the paragraphs 138 and 139 of the Outcome Document in which the Responsibility to Protect principle was formally endorsed. The difference concerns only the language adopted.

This difference in the terminology adopted is due mainly to the fact that the African Union Constitutive Act was issued before the publication of the 2001 ICISS report, where the commissioners proposed for the first time to abandon the expression "right of humanitarian intervention" in favour of the expression "Responsibility to Protect".

Besides the different terminology adopted in the two documents (provision 4 paragraph h of African Union Constitutive Act and paragraphs 138 and 139 of the Outcome Statement), what it is important to note is that both the provision for legitimising the right of humanitarian intervention enshrined in the article 4 (h) of the African Union Constitutive Act and the Responsibility to Protect endorsed in the two paragraphs of the Outcome Statement, are linked to specific kinds of international crimes, namely, war crimes, genocide, and crimes against humanity.

The 2003 Maputo Protocol on Amendments to the African Union's Constitutive Act provides for the right of humanitarian intervention also in respect of serious threats to legitimate order.

From this point of view, there is a divergence between the amendments to the African Union Constitutive Act and the Outcome Statement of the 2005 United Nations World Summit.

Indeed, in the Outcome Document the exercise of the Responsibility to Protect is linked only with the perpetration of the abovementioned international crimes and there is no mention of the legitimacy to intervene in a sovereign State in respect of unconstitutional changes of regimes, as provided for in the 2003 Maputo Protocol on Amendments to the African Union's Constitutive Act.

The reason why the Maputo Protocol provides for the right to intervene in the sovereign members of the African continent also in respect of serious threats to legitimate order is that in the last sixty years the African continent experienced more than one hundred coups d'état.

Internal armed conflict and coups d'état represent among the biggest challenges to the safety of African people and their communities.

Partly because of the violence of internal armed conflicts and partly as a consequence of the numerous coups d'état, the African continent has the greatest number of refugees and displaced persons in the world.

In the 2001 ICISS report, the recourse to armed intervention is provided for only as a last resort when all the efforts to prevent the outbreak of the war, including preventive

diplomacy and the imposition of financial, diplomatic, political and military sanctions have proven to be ineffective.

In other words, peaceful (economic, political, legal) conflict prevention measures should always be preferred to costly interventions.

According to the two African scholars K. Aning and S. Atuobi, "...the principles and norms enshrined in the African Union Constitutive Act ...mirror responsibility to protect as a concept for conflict prevention and the protection of the people of Africa against crimes against humanity, war crimes, genocide and ethnic cleansing".

However, in the articles of the African Union Constitutive Act devoted to military intervention there is no mention of conflict prevention measures, but these articles provide for a right of military intervention when international crimes such as genocide are already taking place.

While analyzing "how the African Union security architecture responds in practice to the Responsibility to Protect" (K. Aning and S. Atuobi, 2008, 93), the two authors argue that the "African Union responses to current security challenges in Darfur in Sudan, Somalia and Zimbabwe, and especially the International Criminal Court's application for the issuance of arrest warrant for president Al Bashir of Sudan, does not reflect a clear commitment to the Responsibility to Protect" (Kwesi Aning and Samuel Atuobi, 2008, 90).

The same two African authors examine also the African Union collaboration with the United Nations to build its capacity to implement the Responsibility to Protect and to tackle with the peace and security challenges across the African Continent.

The outcome of this assessment is that African institutions lack the necessary capacity to implement the Responsibility to Protect in its preventive dimension.

Nevertheless, 'the regionalization of conflict prevention institutions' (A. Bellamy, 2008), presents positive aspects as well.

Regional agencies have a better knowledge of regional norms and a better understanding of the local dynamics of conflict. Consequently, they might have a better capacity to identify the appropriate responses (in terms of measures to be adopted) that should be given to crises.

The capacity of regional agencies to deal with crises is also a function of their financial resources and institutional capacity.

For this reason, the richest regions of the world, with greater institutional capacity, have also more effective conflict prevention capacities.

However, it is evident that the richest regions of the world are also the ones least in need of improving their conflict prevention capacities.

If the international community decides to give to regional agencies priority over international agencies in dealing with conflict prevention, management and resolution, the outcome will be that international organizations will be called to give financial

support to regional organizations to help them developing their institutional capacities in these areas (conflict prevention, management and resolution).

Another risk inner in the decision to give preeminence to regionalism (over global responses to crises) is the need to effectively coordinate the division of work between international and regional agencies.

Finally, regional approach to conflict prevention, management and resolution could represent an obstacle to reach a global consensus on the measures to be adopted to prevent conflicts, “such as control on the arms trade, natural resources management, and trade reform designed to lessen chronic inequality in conflict-prone areas” (A. Bellamy, 2008, 147).

## 6. Summary of the Sixth Chapter: A Comparison between two Concrete and Contemporary Cases: The Implementation of the Responsibility to Protect in the Darfur Region of the Sudan and in Kosovo

In this chapter the operationalization of the Responsibility to Protect norm is discussed with respect to the Darfur and the Kosovo humanitarian tragedies.

The first part of the chapter is focused on the humanitarian crisis that erupted in the Darfur region of the Sudan in 2003.

It describes the division of labor between international and regional organizations (i.e. the United Nations, the African Union, the European Union and the NATO) in implementing the obligation to react.

The second part of the chapter instead, describes the division of labor between international and regional organizations (i.e. the United Nations, the NATO and the European Union) in preventing the reoccurrence of the conflict in Kosovo during the ten year post-conflict reconstruction phase.

The idea to compare the implementation of the Responsibility to Protect in Darfur and Kosovo stems from the opportunity to identify several analogies between these two conflicts.

First, both of them had their root causes in the violation of minority rights groups; thus, at least partially, they can be qualified as ethnic in nature and grounded on the lack of participation and representation of minority groups in the political decisions made by the central Government.

In particular, Belgrade government - whose representatives belong mostly to Serbian ethnicity – carried out a politics of discrimination against Albanian minority living in Kosovo.

Similarly, the Sudanese government - whose representatives belong mostly to Arab groups – carried out a politics of discrimination against the African sedentary tribes (such as Fur, Masalit and Zaghwa) living in Darfur.

Given the predominant ethnic nature of these conflicts, the likelihood that international crimes such genocide or ethnic cleansing could be perpetrated was extremely high.

However, while NATO-led intervention in Kosovo was aimed at preventing an apprehended genocide, the hybrid AU-UN intervention in Darfur was aimed at putting an end to it.

In virtue of its preventive nature, NATO intervention in Kosovo should be related to the first dimension of the Responsibility to Protect, the obligation to prevent.

The intervention was carried out two years before the introduction of the Responsibility to Protect principle.

In conformity with this principle, the use of armed force should be considered only as a last resort, after all peaceful preventive measures had proven to be ineffective.

However, the question whether all peaceful preventive means had been explored before the military intervention in Kosovo remains controversial.

The aim of this chapter is to consider the implementation of the Responsibility to Prevent in Kosovo during the post-conflict reconstruction phase, rather than focusing on the unsolved controversies about NATO-led intervention in Kosovo.

Indeed, the post-conflict reconstruction phase in Kosovo has been characterized by the effort to mainstream strategies aimed at preventing the reoccurrence of the conflict within the policies directed to re-build Kosovo society.

In virtue of its reactive nature, instead, the intervention in Darfur should be related to the second dimension of the Responsibility to Protect, the obligation to react.

Secondly, Darfur and Kosovo conflicts raise similar questions about the legitimacy and the authority of the intervention for humanitarian purposes.

Finally, both conflicts show that a lot remains to be done to improve the effectiveness of the intervention.

Particularly, while Darfur proved the limits in terms of logistics and military capacity of the regional organization of the African; NATO intervention was not completely successful in protecting Albanian civilian population and preventing its displacement.

The aim of this chapter is to learn from the comparison between Darfur and Kosovo with respect to the implementation of the Responsibility to Protect, and provide insights as to how better operationalise the principle of the Responsibility to Protect in similar circumstances.

The Darfur case study proves on the one side that the African Union intervention mechanism can be used to block collective military intervention by the United Nations and on the other side that the legal relationship between the African Union and the Security Council remains unclear.

However, this lack of clarity is often used to defer the responsibilities of the United Nations' Security Council to regional and sub-regional organizations, especially when the Security Council is internally divided, fails to reach an agreement on how to respond to crises and does not have the political will to act, regardless of the actual financial and logistical capacities of regional agencies to face crises. The case study of Darfur demonstrates that the Security Council alienated its responsibilities to the African Union mission, regardless of the incapacity of this latter to protect Darfurian civilians.

With reference to the serious and irreparable harm inflicted by militia troops to Darfurian civilians, the Security Council agreed that the government of the Sudan had manifestly failed to exercise its primary responsibility to protect its own population.

Nevertheless, the Security Council was not willing to assume the Responsibility to Protect Darfurian civilians at risk and argued the African Union should be held responsible for the protection of civilians in the Darfur region of the Sudan.

The lack of political will of the five permanent members of the Security Council to protect Darfurian civilians was not met with resistance by the African Union, on the ground of the consideration that African problems should be solved at regional and not at global level.

Therefore, the idea that the African Union was the only responsible for facing Darfur conflict, was shared by those African states that are more hostile against international interventions, and particularly by the Sudanese government.

The Sudan, indeed, since the outbreak of the Darfur conflict, announced that it will oppose resistance to the interference in its internal affairs of the United Nations' troops.

For this reason, the Special Adviser on the Prevention of Genocide, Prof. F. Deng, believed that the most suitable solution for Darfur conflict was to encourage the African Union to intervene in the Darfur region of the Sudan, with the consent of the target state.

The outcome of his recommendations was that, in the case of Darfur, regional solutions took precedence over international collective military action, regardless of the capacity of the African Union to act effectively, by ensuring Darfurian population security and protection from the commission of international crimes.

The article 4 (h) of the African Union Constitutive Act provides for intervention where international crimes such as war crimes, genocide and crimes against humanity are committed.

When these serious circumstances occur, under the African Union Constitutive Act, the African Union Peace and Security Council should recommend military action to the African Union Assembly. The African Union Assembly meets only once a year and in order to authorize the intervention, it requires the consensus of the two-third majority of the Assembly, which is very difficult to reach in a continent characterized by a traditional reluctance to authorize external intervention in the internal affairs of sovereign states. These factors together represent serious procedural, political and institutional obstacles to the implementation of the article 4 (h) of the African Union Constitutive Act.

This might explain also why the African Union intervention in Darfur was realized with the consent of the government of the Sudan.

Kosovo's case study is emblematic because on the one side it clarifies how the international community and regional agencies carried out their responsibility to rebuild the society of Kosovo after the end of the conflict; on the other side, it makes clear how international and regional agencies, moving from the analysis of the structural causes that led to the eruption of the conflict (conflict analysis), managed to mainstream conflict prevention measures in post-conflict developmental assistance programs,

Kosovo's case study highlights the need to tackle the root causes that led to the outbreak of the violence by adopting long-term preventive measures.

The adoption of long term preventive strategies can give a substantive contribution in preventing the so called 'conflict trap' phenomenon, which can be described as the high likelihood to relapse into violence for those countries that, at least once, have already experienced war.

Kosovo post-conflict reconstruction process was not successful in facilitating the reconciliation of the two ethnic groups of Albanians and Serbs living in the province.

Their reconciliation remained elusive and drove the majority of Serbs either out of Kosovo or into largely isolated enclaves (2008, United Nations Peace Operations, Year in Review, 21).

On the contrary, the responsibility to rebuild should incorporate effective preventive measures aimed at tackling the root causes that led to the eruption of the conflict, such as the hostility among different ethnic groups, which was one of the underlying causes of Kosovo's conflict.

Kosovo's post-conflict reconstruction implied huge financial costs both for the international community and the European Union (which run the economic reconstruction and development pillar until the end of 2008).

Indeed, UNMIK international administration, which was established with the United Nations Security Council resolution 1244 on 10 June 1999 was "staffed by some 3.300 international police and thousands of international and local civilians" (2008, United Nations Peace Operations, Year in Review, 22).

Due to its large dimension and its ten-year length, UNMIK mission turned to be one of the most costly peacekeeping operations of the whole United Nations' history.

For this reason, Kosovo's case study demonstrates the importance to assign a priority to conflict prevention over post-conflict reconstruction. This conclusion is in contrast with the outcome of the United Nations' institutional reform, which is rather centered on rebuilding than on prevention.

Several conclusions can be drawn from the assessment of international and regional efforts to implement the Responsibility to Protect in Kosovo.

Among the challenges faced by international and regional organisations in the implementation of the third dimension of the Responsibility to Protect (the Responsibility to Rebuild) are the difficulties encountered by the United Nations Mission in Kosovo (UNMIK) and the Organisation for Security and Cooperation in Europe (OSCE) in administering the municipalities of the province of Kosovo, on the one side and building an effective and impartial judiciary, on the other.

However, Kosovo's experience was extremely helpful to produce the Brahimi report of the Panel of the United Nations Peace Operations, which was submitted to the United Nations Secretary General on 17 August 2000.

The Brahimi report provides clear indications on how to establish a transitional administration and how to build and reform the judiciary in post-conflict countries.

On the other side, taking advantage from Kosovo's experience, the Brahimi report stresses the importance of coordinating the division of labor between regional and international organizations to overcome the rigid division in pillars that characterized Kosovo's post-conflict reconstruction, which proved to be unproductive in many respects.

The difficulties experienced in building the capacities of the local population of Kosovo in the field of administration and judiciary were partly related to the failure to involve local population in the first stages of the post-conflict reconstruction process and partly to the lack of expertise and experience of Kosovar people in the field of the judiciary (lack of knowledge in the domain of the rule of law and international human rights' standards), that required the appointment of international judges and prosecutors.

The involvement of the local population is essential also to avoid that the administrative, institutional and economic reforms are perceived by the local population as illiberal solutions imposed from the outside, in contradiction with the right of self-determination.

The imposition of political and economic institutions from the outside can generate a culture of dependence of the local population from interveners.

Consequently, those reforms that interveners had temporarily managed to impose over the local population could result as unsustainable in the long run.

The inner risk of post-conflict reconstruction and institution building efforts that fail to involve the local population is that the state target would become completely dependent in financial, administrative and institutional terms on the international and regional agencies bearers of the responsibility to rebuild.