

The UN Security Council's Responsibility and the "Responsibility to Protect"

*Hitoshi Nasu**

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I. Introduction

The role of the Security Council has been one of the central aspects of the responsibility to protect concept throughout its development. The International Commission on Intervention and State Sovereignty (ICISS), which articulated the idea of the responsibility to protect in 2001, regarded the role of the Security Council as “of paramount importance.”¹ The 2005 World Summit Outcome expressed the preparedness of the international community to take collective action, through the Security Council, to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity on a case by case basis.² The Security Council itself reaffirmed the provisions of the World Summit Outcome regarding this responsibility.³ Nonetheless, during the 39th Seminar of the International Peace Institute and the Diplomatic Academy Vienna on Peacemaking and Peacekeeping, entitled “The UN Security Council and the Responsibility to Protect: Policy, Progress and Practice,” *Christoph Mikulaschek* posed a seemingly innocuous, yet deeply troubling question: “how does the responsibility to protect relate to the United Nations Security Council’s primary responsibility for the maintenance of international peace and security?”⁴

Despite the centrality of the Security Council’s role in the responsibility to protect debate, little attention has been drawn so far to the relationship between the Security Council’s primary responsibility for the maintenance of international peace and security and its role in imple-

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¹ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 2001 (hereinafter ICISS Report), 49.

² A/RES/60/1 of 16 September 2005, para. 139.

³ S/RES/1674 (2006) of 28 April 2006, para. 4.

⁴ C. Mikulaschek, “The United Nations Security Council and the Responsibility to Protect: Policy, Process, and Practice, Report from the 39th International Peace Institute Vienna Seminar on Peacemaking and Peacekeeping”, in: H. Winkler/ T. Rød-Larsen/ C. Mikulaschek (eds), *The UN Security Council and the Responsibility to Protect: Policy, Process, and Practice*, 2010, 20 et seq. (20).

menting the responsibility to protect on behalf of the international community.⁵

As clarified in a Concept Note for the Interactive Thematic Dialogue of the General Assembly on the Responsibility to Protect in July 2009, none of the powers conferred upon the Security Council under the Charter are directed towards the responsibility to protect or an enforcement of international human rights law and international humanitarian law.⁶

Moreover, the discretion given to the Security Council “implies a variable commitment totally different from the consistent alleviation of suffering embodied in the responsibility to protect.”⁷ Why, then, is the Security Council to assume the responsibility to protect on behalf of the international community? And even if the Security Council is to assume the responsibility to protect, to what extent should this relate to its primary responsibility for the maintenance of international peace and security under the Charter? Should the Security Council’s responsibility to protect be engaged only when it coincides with the Security Council’s finding of a threat to the peace under Article 39 of the Charter?

These questions form the topic of this article. It critically examines the Security Council’s responsibility, as envisaged in the responsibility to protect concept, and the way this has influenced the conception of the Security Council’s responsibility among Council members. To that end, Part II. critically examines the meaning of “international community” and the legal nature of its responsibility. Part III. revisits the responsibility of the Security Council under the Charter, outlining three different meanings of its responsibility and examining the scope for accommodating the responsibility to protect concept. Part IV. turns to a more theoretical inquiry into the notion of responsibility itself, highlighting three important conceptions of responsibility relevant to the consideration of the legal nature of the Security Council’s responsibility to protect. Having regard to those relevant conceptions of responsibility, Part V. examines the Security Council’s responsibility practices

⁵ Cf. A. Peters, “The Security Council’s Responsibility to Protect”, *International Organizations Law Review* 8 (2011). See also, literature cited in notes 21-25, below.

⁶ “Concept Note on the Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity”, Doc. A/63/958 of 9 September 2009, 4.

⁷ Ibid.

since the emergence of the responsibility to protect concept. Part VI. then considers the extent to which the legal nature of the Security Council's responsibility has expanded to accommodate the responsibility to protect concept.⁸ The article is concluded with the summary of key findings and their implications.

II. The International Community and the "Responsibility to Protect"

The basic tenet of the responsibility to protect is as follows: national authorities have the primary responsibility to protect their own citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. On the other hand, the international community, through the United Nations, has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help to protect populations from those atrocities.⁹ However, if peaceful means are inadequate and national authorities are manifestly failing to fulfill their responsibility to protect, the international community is prepared to take collective action, through the

⁸ The responsibility to protect concept is considered to have emerged when two independent reports in relation to mass atrocities in Rwanda and Srebrenica were released in late 1999. Although it was first articulated in the 2001 ICISS Report, those reports already implicated the idea of the responsibility to protect and had significant impacts for the development of the concept. See, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, Doc. S/1999/1257 of 16 December 1999, 32, 37-38, 44; *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, Doc. A/54/549 of 15 November 1999, para. 501.

⁹ See A/RES/60/1, see note 2; *Implementing the Responsibility to Protect*, Report of the Secretary-General, Doc. A/63/677 of 23 January 2009 (hereinafter 2009 Report of the Secretary-General), 15-21; *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, Doc. A/59/2005 of 21 March 2005, para. 135; Report of the High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004 (hereinafter High-Level Panel Report), para. 201; ICISS Report, see note 1, 23-25.

Security Council.¹⁰ The idea that the international community has the responsibility to protect is clearly based on the assumption that some form of collective agency exists, which possesses the capacity and willingness to fulfill this responsibility.¹¹ However, it is not self-evident whether the “international community” is merely rhetoric, describing the sum of states without adding substance to a legal argument. It may also be understood as a societal concept to signify that the community is endowed with responsibilities which are distinct from those of individual states, or even in a normative sense as a basis for establishing and justifying new principles.¹²

The text of the 2005 World Summit Outcome distinguishes the international community and the United Nations, regarding the latter as an agent through which the international community fulfills its responsibility.¹³ It may be that it is only natural to regard the international community as rhetoric or “imagined”,¹⁴ and therefore the United Nations, as the most universal body, is expected to provide an institutional

¹⁰ A/RES/60/1, see note 2. See generally, A.J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, 2009; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, 2008.

¹¹ The term “international community” has been variably understood in literature. See generally, R. Buchan, “A Clash of Normativities: International Society and International Community”, *International Community Law Review* 10 (2008), 3 et seq.; G. Abi-Saab, “Whither the International Community?”, *EJIL* 9 (1998), 248 et seq.; B. Simma/ A. Paulus, “The ‘International Community’, Facing the Challenge of Globalization”, *EJIL* 9 (1998), 266 et seq.; B. Simma, “From Bilateralism to Community Interest in International Law”, *RdC* 250 (1994), 217 et seq. (234); H. Mosler, *The International Society as a Legal Community*, revised edition, 1980.

¹² For detailed analysis of different references to the international community in practice, see D. Greig, “‘International Community’, ‘Interdependence’ and All That ... Rhetorical Correctness?”, in: G. Kreijen et al. (eds), *State, Sovereignty, and International Governance*, 2002, 521 et seq.

¹³ “The international community, through the United Nations, also has the responsibility ...” (ibid., para. 139) and “The international community should ... support the United Nations in establishing an early warning capability.” (A/RES/60/1, see note 2, para. 138).

¹⁴ See D. Kritsiotis, “Imagining the International Community”, *EJIL* 13 (2002), 961 et seq. (examining the twin conceptions of “international community” from the reading of Thomas Franck’s two influential books – *Fairness in International Law and Institutions*, 1995 and *The Power of Legitimacy Among Nations*, 1990).

form to deliver the community's will.¹⁵ Yet, this could also be seen as a deliberate political decision to centralize the agency of the international community into the United Nations so that no other actors, such as regional organizations, coalition of states or individual states, can claim international responsibilities on behalf of the international community. In fact, the Secretary-General made it explicit in his 2009 Report on "Implementing the Responsibility to Protect" that "[t]he process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes of the Charter."¹⁶

With regard to collective action, the 2005 World Summit Outcome specifically refers to the Security Council, through which, it is stated, the international community is prepared to act in accordance with the Charter.¹⁷ The ICISS observes that "there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes."¹⁸ As the Security Council has the primary responsibility for the maintenance of international peace and security,¹⁹ and the members have agreed to accept and carry out its decisions,²⁰ it is understandable that this position has been taken.

From a normative point of view, however, the question arises as to whether the Security Council is truly an appropriate organ to be entrusted with the international community's responsibility to protect. The Security Council is a creation of post-World War II politics, reflecting states' preoccupation with the maintenance of international peace and security, not with the protection of people from mass atrocities. The increased activities of the Security Council since the end of the Cold War have been seen as positive development. Yet, the rationale

¹⁵ Of course, doubt can be cast upon whether such a will of the international community can be formed with the conception of common goods and values. See R. Menon, "Pious Words, Puny Deeds: The 'International Community' and Mass Atrocities", *Ethics & International Affairs* 23 (2009), 235 et seq.; J.R. Crawford, "Responsibility to the International Community as a Whole", *Ind. J. Global Legal Stud.* 8 (2001), 303 et seq. (307).

¹⁶ 2009 Report of the Secretary-General, see note 9, 9.

¹⁷ A/RES/60/1, see note 2.

¹⁸ ICISS Report, see note 1, para. 6.14. However, the ICISS Report does not rule out the role of the General Assembly, regional arrangements, and a group of individual states in resorting to the use of armed force by way of discharging the international community's responsibility. *Ibid.*, paras 6.36-6.37.

¹⁹ Article 24 UN Charter.

²⁰ Article 25 UN Charter.

behind the creation of this body, though as sound today as it was then, does not initially support the idea that the Security Council is the agent of the international community in the implementation of the international responsibility to protect.²¹ The inaction and ineffectiveness of this organ in dealing with populations at risk of mass atrocities in the past raise doubt about the extent to which the Security Council, as the authorized body of choice, can represent the international community and implement the responsibility to protect.

There are additional difficulties due to the systemic political constraints on its decision-making process,²² including, in particular, fetters imposed by the veto power. Since the idea of the responsibility to protect emerged, there have been calls for the five permanent members not to exercise their veto on matters of grave humanitarian concern when their vital national interests are not at stake.²³ However, even if these fetters were removed, the decision-making would continue to be dictated by the traditional *realpolitik* interests of the Member States. The responsibility to protect could be seen as an attempt to realize the liberal peace norm based on universal moral and ethical values by linking it to the elements of *realpolitik* in practice.²⁴ Tardy, however critically observes that the responsibility to protect underestimates the gap between the moral principles that are the basis of the concept and the political conditions of institutional decision-making.²⁵

Another issue surrounding the international community's responsibility to protect concerns the question as to what is expected of the international community, or the United Nations and the Security Council acting on its behalf, in fulfilling this responsibility. The idea of the international community's responsibility to protect has not been en-

²¹ C. Brown, "Moral Agency and International Society", *Ethics & International Affairs* 15 (2001), 87 et seq. (92). See also A. Viotti, "In Search of Symbiosis: The Security Council in the Humanitarian Domain", *Int'l Rev. of the Red Cross* 89 (2007), 131 et seq.; P. Hilpold, "The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?", *Max Planck UNYB* 10 (2006), 35 et seq. (66).

²² See, e.g. J.I. Levitt, "Book Review: The Responsibility to Protect: A Beaver without a Dam?", *Mich. J. Int'l L.* 25 (2003), 153 et seq. (169-173, 176).

²³ ICISS Report, see note 1, para. 6.21; High-Level Panel Report, see note 9, para. 256; 2009 Report of the Secretary-General, see note 9, para. 61.

²⁴ D. Chandler, "The Responsibility to Protect? Imposing the 'Liberal Peace'", *International Peacekeeping* 11 (2004), 59 et seq.

²⁵ T. Tardy, "The UN and the Use of Force: A Marriage Against Nature", *Security Dialogue* 38 (2007), 49 et seq. (64).

dorsed without resistance. The wording of the 2005 World Summit Outcome was reportedly watered down because of the reluctance and opposition of the United States to a firmer "obligation" that might have obliged the Security Council to take collective action in particular cases in a particular way.²⁶ It is arguable that the concept of the international community's responsibility is sending a mixed (or even contradictory) message. It requires the international community to respect state sovereignty and the principle of non-intervention unless there are exceptional circumstances that genuinely "shock the conscience of mankind," whilst at the same time urging the international community to commit to early peaceful engagement to prevent mass atrocities.²⁷ Secretary-General Ban Ki-Moon attempts to clarify the relationship between the primary responsibility of national authorities and the role of the international community by emphasizing that there is "no set sequence for moving from one to another, especially in a strategy of early and flexible response."²⁸ However, it is not explained what exactly is expected of the international community in order to fulfill its responsibility, or under what circumstances, and to what extent, the international community is required to intervene.

One may find that the ambiguity as to what exactly the international community's responsibility entails, in providing assistance or taking collective action, arises from the difficulty of turning the responsibility to protect concept into legal norms.²⁹ In fact, it appears that the responsibility to protect has been widely considered a policy agenda and not a legally binding commitment by UN Member States.³⁰ Some even go further, arguing that at the core of the responsibility to protect discourse lies the desire among Western states to evade their policy re-

²⁶ The wording adopted in the 2005 World Summit Outcome reads: "we are prepared to take collective action, in a timely and decisive manner, ... on a case by case basis", A/RES/60/1, see note 2, para. 139. For details, see, e.g. L. Glanville, "The International Community's Responsibility to Protect", *Global Responsibility to Protect 2* (2010), 287 et seq. (292-293); A.J. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs* 20 (2006), 143 et seq. (166).

²⁷ Chandler, see note 24, 66-68.

²⁸ 2009 Report of the Secretary-General, see note 9, 9.

²⁹ For discussion, see H. Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter*, 2009, 225-233.

³⁰ See A. Bellamy, "The Responsibility to Protect – Five Years On", *Ethics & International Affairs* 24 (2010), 158 et seq. (166).

sponsibility and to prioritize policy rhetoric over political commitment.³¹ On the other hand, it has been argued that the concept of the responsibility to protect, referred to in the 2005 World Summit Outcome, means no more than restating the already existing responsibility of states and the international community under international law, rather than creating a new legally binding norm.³²

Under international human rights law, states are under a general duty of due diligence to ensure respect for human rights within their territory or jurisdiction.³³ Specifically, they are required to prevent and punish genocide under the Convention on the Prevention and Punishment of the Crime of Genocide,³⁴ which also requires states to exercise due diligence, within their power, in preventing genocide.³⁵ In the context of international humanitarian law, state parties to the 1949 Geneva Conventions are required, under common article 1, not only to respect

³¹ See e.g., D. Chandler, “Unravelling the Paradox of ‘The Responsibility to Protect’”, *Irish Studies in International Affairs* 20 (2009), 27 et seq. (36-38). See also D. Chandler, “The Security-Development Nexus and the Rise of ‘Anti-Foreign Policy’”, *Journal of International Relations and Development* 10 (2007), 362 et seq. (369-374).

³² Concept Note, see note 6, 3. This view is also shared by Member States. See, e.g. GAOR 63rd Sess., 97th Plenary Mtg., Doc. A/63/PV.97 of 23 July 2009, 25 (New Zealand); GAOR 63rd Sess., 98th Plenary Mtg., Doc. A/63/PV.98 of 24 July 2009, 1 (Austria), 5 (Switzerland), 26 (Nigeria); GAOR 63rd Sess., 99th Plenary Mtg., Doc. A/63/PV.99 of 24 July 2009, 18 (Mexico); GAOR 63rd Sess., 100th Plenary Mtg., Doc. A/63/PV.100 of 28 July 2009, 2 (Sri Lanka); GAOR 63rd Sess., 101st Plenary Mtg., Doc. A/63/PV.101 of 28 July 2010, 3 (Kenya).

³³ L. Arbour, “The Responsibility to Protect as a Duty of Care in International Law and Practice”, *Review of International Studies* 34 (2008), 445 et seq. (452). See also, B. Barbour/ B. Gorlick, “Embracing the ‘Responsibility to Protect’: A Repertoire of Measures including Asylum for Potential Victims”, *International Journal of Refugee Law* 20 (2008), 533 et seq. (551-553).

³⁴ UNTS Vol. 78 No. 1021, article 1.

³⁵ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, General List No. 91, 1 et seq. (hereinafter *Bosnian Genocide Case*), (154, para. 430).

but also to ensure respect for the Conventions in all circumstances,³⁶ though how far this obligation extends outside the state's jurisdiction remains unclear.³⁷ The precautionary obligation to protect civilian populations to the maximum extent feasible from armed attacks during armed conflicts applies to the respective parties of international and non international armed conflicts.³⁸

It must be noted, however, that the international community's responsibility to provide assistance or to take collective action is clearly different in nature from a sovereign state's responsibility towards its own population.³⁹ A state's responsibility to protect its population under the existing rules of international law cannot automatically be compared with the international community's responsibility to act when national authorities are manifestly failing to protect their citizens. It is ar-

³⁶ Of particular relevance for the protection of civilian populations is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, UNTS Vol. 75 No. 973.

³⁷ For an expansive interpretation of this general obligation, see, e.g., S. Wills, *Protecting Civilians: The Obligations of Peacekeepers*, 2009, 100-106; L. Boisson de Chazournes/ L. Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests", *Int'l Rev. of the Red Cross* 82 (2000), 67 et seq. See in contrast, F. Kalshoven, "The Undertaking to Respect and Endure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *Yearbook of International Humanitarian Law* 2 (1999), 3 et seq. The ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* only speaks of "an obligation not to recognize the illegal situation", "an obligation not to render aid or assistance in maintaining the situation", and the UN's duty to "consider what further action is required to bring to an end the illegal situation", *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136 et seq. (199-200, paras 158-160). The crucial question is whether common article 1 extends to include an obligation to take action to prevent violations or to protect civilians outside one's own control.

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, UNTS Vol. 1125 No. 17512, article 58; J.M. Henchaerts/ L. Doswald-Beck, *Customary International Humanitarian Law*, 2005, Vol. 1, 60.

³⁹ See A.J. Bellamy/ R. Reike, "The Responsibility to Protect and International Law", *Global Responsibility to Protect* 2 (2010), 267 et seq.; E. Strauss, "A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect", *Global Responsibility to Protect* 1 (2009), 291 et seq.

guable that the United Nations is bound by universal human rights and humanitarian norms and rules as reflected in the purposes and principles of the Charter.⁴⁰ Yet, even if that is the case, it lacks the same authority and capacity as sovereign states to enable it to assume the positive obligation to ensure the protection of human rights and respect for humanitarian law through law enforcement mechanisms.

The legal basis for the international community's responsibility to protect could be found in articles 40 and 41 of the ILC's Articles on State Responsibility,⁴¹ which provide a positive duty to cooperate to bring to an end any serious breaches, by a state, of an obligation arising under a peremptory norm of general international law.⁴² There is no doubt that the prohibition of genocide and war crimes is well established as a peremptory norm under international law,⁴³ though it is less clear in relation to ethnic cleansing and crimes against humanity.⁴⁴ As noted in the ILC's commentary, it remains an open question whether general international law at present prescribes such a positive duty to cooperate for states and international organizations as members of the

⁴⁰ See, e.g., E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 191 et seq.

⁴¹ Articles on the Responsibility of States for Internationally Wrongful Acts, reproduced in A/RES/56/83 of 12 December 2001. For a discussion see S. Szurek, "La responsabilité de protéger, nature de l'obligation et responsabilité internationale", in: Société Française pour le Droit International (ed.), *La responsabilité de protéger – colloque de Nanterre*, 2008, 91 et seq. (111-114).

⁴² See also arts 40 and 41 of the ILC's Draft Articles on Responsibility of International Organizations, ILC Report on the Work of its Sixty-First Session, GAOR 64th Sess., Suppl. No. 10, Doc. A/64/10 of 4 May to 5 June and 6 July to 7 August 2009, 125-128.

⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures, Order of 13 September 1993)*, ICJ Reports 1993, 325 et seq. (paras 29 et seq., 439-440); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq. (257, para. 79) (stating that fundamental rules of humanitarian law "constitute intransgressible principles of international customary law").

⁴⁴ To the extent that different practices constituting the act of ethnic cleansing qualify as genocide or war crimes, ethnic cleansing can be seen as being prohibited under peremptory norms; Strauss, see note 39, 315-316. For the view that the prohibition of crimes against humanity is also a peremptory norm, see e.g. A. Orakhelashvili, *Peremptory Norms in International Law*, 2006, 64; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, 1988, 596-600.

international community.⁴⁵ However, it is also acknowledged that “such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law.”⁴⁶

One may still cast doubt on the legal conception of the international community's responsibility due to the uncertainty surrounding the consequences of non-compliance.⁴⁷ However, it would be wrong to assume that the same or similar legal liability regime, as it applies to state responsibility, would equally apply to the international community's responsibility.⁴⁸ The ILC's work on the responsibility of international organizations has been extensively relying upon the Articles on State Responsibility without defining the meaning of “international responsibility” with regard to international organizations.⁴⁹ The strongest criticism against this approach came from the IMF, asking “how would an international organization be held responsible for a finding ... that it had failed to fulfill the mandate for which it was established?”⁵⁰ The inclusion of omission as an internationally wrongful act also poses peculiar problems, for an international organization may be held responsible for not taking action even if this inaction is the result of the organization's lawful decision-making process under its constitutive instrument.⁵¹

⁴⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 249.

⁴⁶ Ibid.

⁴⁷ C. Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, *AJIL* 101 (2007), 99 et seq. (117-118).

⁴⁸ Cf. J.E. Alvarez, “The Schizophrenias of R2P”, in: P. Alston/ E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force*, 2008, 275 et seq. (281-283).

⁴⁹ ILC Report on the Work of its Fifty-Fifth Session, GAOR 58th Sess., Suppl. No. 10, Doc. A/58/10 of 5 May to 6 June and 7 July to 8 August 2003, 30.

⁵⁰ ILC Responsibility of International Organizations: Comments and Observations Received from International Organizations, Doc. A/CN.4/545 of 25 June 2004, 12.

⁵¹ Ibid., 13. Cf. article 31 of the Draft Articles on Responsibility of International Organizations and accompanying commentary in ILC Report on the Work of its Sixty-First Session, see note 42, 113-114 (the responsible international organization may not rely on its rules as justification for failure to comply with its obligations, but without prejudice to the applicability of

In the absence of a clear standard of conduct, the action or inaction of the international community, or an international organization acting on its behalf, cannot be subject to legal assessment with regard to the extent to which its responsibility to protect is discharged. The legal nature of the international community's responsibility and the legal consequences arising from the failure of the international community to provide assistance or to take collective action to protect populations from mass atrocities cannot be understood within the framework of a traditional legal liability regime under international law. The responsibility to protect concept, as expressed in the 2005 World Summit Outcome, can thus far only be seen as the unanimous affirmation by states of their commitment to cooperate to bring to an end genocide, war crimes, ethnic cleansing, and crimes against humanity.

III. The Responsibility of the UN Security Council

Under Article 24 para. 1 of the Charter, the Security Council has the primary responsibility for the maintenance of international peace and security. On the basis of this responsibility entrusted to the Security Council, the key documents advocating the responsibility to protect identify the Security Council as the "right authority" to take collective action to fulfill the international community's responsibility.⁵² Yet it is not clear whether and to what extent the Security Council's responsibility under the Charter corresponds to the international community's responsibility to protect. While the Charter speaks of the "primary responsibility" of the Security Council for the maintenance of international peace and security, the international responsibility to protect is considered as secondary or subsidiary, given that each sovereign state has the primary responsibility to protect its own population according to the basic premise of the concept. The nature of the Security Council's responsibility to protect cannot be considered without first examining the different meanings that can be attached to the Security Council's responsibility under the Charter.

First, "responsibility" in Article 24 para. 1 of the Charter may have a jurisdictional meaning in the sense that it defines the authority and competence of the Security Council, giving it primacy in matters relat-

those rules in respect of its responsibility towards its Member States and organizations).

⁵² See notes 17-18 above and accompanying text.

ing to the maintenance of international peace and security.⁵³ The General Assembly's competence is therefore subject to constraint.⁵⁴ Responsibility in this jurisdictional sense not only indicates primacy in the exercise of power but also delimits the scope of the power. The Security Council's responsibility is limited to matters relating to the maintenance of international peace and security, which arguably renders any action that goes beyond this mandate null and void *ab initio*.⁵⁵ Council members clearly acknowledged the limit of the Security Council's responsibility, for example, during the open debate exploring the relationship between energy, security, and climate in 2007.⁵⁶ During the discussion, the prevailing view regarded those non-traditional security issues only as "development issues" and denied the direct link between those issues and the mandate of the Security Council.⁵⁷ In contrast, the Security Council discussed the issue of HIV/AIDS in 2000, stating that the HIV/AIDS pandemic, "if unchecked, may pose a risk to stability and security."⁵⁸

Second, responsibility can be understood in a political sense as the role that the Security Council plays in conflict management. As a creation of post-World War II politics for the purpose of restoration and maintenance of international peace and security, the Security Council can be seen as politically and diplomatically responsible for managing conflicts between states, and, increasingly, national conflicts which spread across national borders. It was not originally envisaged that actions of this organ would be guided by universally shared values such as the protection of human lives and human rights, as manifested by the responsibility to protect.⁵⁹ Even if it is generally accepted that the Security Council must act in accordance with the purposes and principles of

⁵³ J. Delbrück, "Article 24", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 442 et seq. (445-446).

⁵⁴ For details see, K. Hailbronner/ E. Klein, "Article 10", *ibid.*, 257 et seq.

⁵⁵ For details, see the author's discussion in H. Nasu, "Chapter VII Powers and the Rule of Law: The Jurisdictional Limits", *Austr. Yb. Int'l L.* 26 (2007), 87 et seq. See also K. Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, 2006, Chapter 2.

⁵⁶ SCOR 62nd Year, 5663rd Mtg., Doc. S/PV.5663 of 17 April 2007.

⁵⁷ See e.g., *ibid.*, 15-16 (South Africa), 17 (Russian Federation), 24 (Pakistan), 31 (Namibia).

⁵⁸ S/RES/1308 (2000) of 17 July 2000.

⁵⁹ See notes 24-25 above and accompanying text.

the Charter in discharging its political responsibility,⁶⁰ this restriction does not require the Security Council to make decisions based on universally shared values, nor does it change the political conditions that drive states to resort to force.

Third, the view has been expressed, even early in UN history, that the Security Council would be failing to fulfill its responsibility if it did not take particular action when it was supposed to or expected to do so.⁶¹ The underlying issue surrounding the legal nature of the Security Council's responsibility lies in the criticism of "double standards" without principled justification for its collective action.⁶² Its failure to act consistently has been criticized as being motivated by the self-interest of permanent members rather than the collective interests of UN Member States.⁶³ On the other hand, given the highly political nature of the decision-making processes in United Nations organs, such as the Security Council, it may also be true to say that "[i]ndeterminacies and inconsistencies have played a useful role in attaining important objectives."⁶⁴

The responsibility to protect concept could play a potential role here to enhance the legal significance of the Security Council's responsibility under Article 24 para. 1 of the Charter. Regardless of the original intention of the drafters, the subsequent practice of United Nations organs and Member States could clarify the interpretation of the Security Council's responsibility,⁶⁵ which may require the Security Council to act in relation to specific matters under certain circumstances. The question is to what extent the responsibility to protect concept and subsequent practice associated with that concept have made viable the interpretation of Article 24 para. 1 as imposing legal responsibility upon

⁶⁰ See especially de Wet, see note 40, 198-204.

⁶¹ L.M. Goordich/ E. Hambro/ A.P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd revised edition, 1969, 203.

⁶² See generally, D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council", *AJIL* 87 (1993), 552 et seq. (559-561).

⁶³ See e.g. M. Koskenniemi, "The Place of Law in Collective Security", *Mich. J. Int'l Law* 17 (1996), 455 et seq. (460-462); J. Quigley, "The 'Privatization' of the Security Council Enforcement Action: A Threat to Multilateralism", *Mich. J. Int'l L.* 17 (1996), 249 et seq. (270-273).

⁶⁴ O. Schachter, "United Nations Law", *AJIL* 88 (1994), 1 et seq. (9).

⁶⁵ Vienna Convention on the Law of Treaties, UNTS Vol. 1155 No. 18232, article 31 (3) (b). The subsequent practice does not exclude institutional practice. See R. Gardiner, *Treaty Interpretation*, 2008, 246-249.

the Security Council to protect. The legal significance of Article 24 para. 1 thus needs to be understood in the context of institutional practice.

IV. Theoretical Inquiry into the Concept of Responsibility

As discussed above, the responsibility to protect that the international community, or the Security Council as its agent, is required to implement is different from the responsibility of national authorities to protect their own population. The legal conception of the international community's responsibility to protect on behalf of national authorities should therefore not be considered within the traditional legal liability regime that governs the international law of state responsibility. In this section, three distinct conceptions of responsibility that characterize the responsibility to protect concept are examined, drawing on the general legal philosophy of responsibility as the theoretical basis for a contextual analysis of the extent to which the Security Council has embraced the legal responsibility to protect.

1. The Concept of *Ex Ante* Responsibility

In his famous taxonomy of responsibility, *H.L.A. Hart* identifies four types of responsibility: "role responsibility", which attaches to a particular role, status or office (e.g., a sea captain's responsibility for the safety of his or her ship); "causal responsibility", which refers to a contribution made by human beings, things, conditions, and events to an outcome of importance (e.g., the long drought was responsible for the famine in India); "liability responsibility", which refers to rule-based conditions of legal or moral liability such as to pay compensation and to be punished; and "capacity responsibility", which refers to mental and physical capacities, such as capacity of understanding and control of conduct, required for the attribution of liability responsibility or for an efficacious operation of law.⁶⁶ The conceptual apparatus underlying this taxonomy is undoubtedly focused upon individuals. However, those different conceptions of responsibility may find a more general application, *mutatis mutandis*, in respect of international organizations

⁶⁶ H.L.A. Hart, *Punishment and Responsibility*, 2nd edition, 2008, 210-230.

and their organs. For example, according to this taxonomy, the Security Council's responsibility in a political sense could be seen as a "role responsibility", whereas that of a jurisdictional meaning could be understood as a "capacity responsibility" should it be extended to embrace organizational capacity.

In exploring the legal nature of the Security Council's responsibility, *Hart's* account, particularly of "liability responsibility", is restrictive and unsatisfactory. *Peter Cane* points out that *Hart's* discussion of legal responsibility is primarily focused on criminal law, ignoring both civil law and public law.⁶⁷ More problematic for the purpose of the present inquiry is that *Hart's* account of legal responsibility is essentially backward-looking, regarding liability to incur a sanction as the core sense of responsibility. Without denying the importance of sanctions *Cane* emphasizes the significance of "prospective responsibility" – the idea that the law is as much concerned with telling us what our responsibilities are and how we should behave as with holding us accountable for the way we have behaved.⁶⁸

Legal responsibility in this prospective sense involves a positive obligation, requiring those who bear responsibility to take positive steps to achieve good outcomes or to prevent bad ones.⁶⁹ Unlike backward-looking responsibility, *ex ante* responsibility does not specify the exact nature of the required act, leaving room for discretion and choice.⁷⁰ It is rather guided by teleological norms that oblige an agent to bring about or to prevent certain states of affairs.⁷¹ Similarly, *Giorgio Gaja* draws the distinction between responsibility *sensu lato*, which can encompass a duty to protect in a prospective and positive sense, and responsibility *sensu stricto* dealing with the legal consequences of failing to fulfill that legal duty.⁷² Based on this distinction, *Sandra Szurek* characterizes the

⁶⁷ P. Cane, *Responsibility in Law and Morality*, 2002, 29.

⁶⁸ *Ibid.*, 31-35.

⁶⁹ Mark Bovens calls it active responsibility and contrasts it with passive responsibility that involves being held responsible after the event. See M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, 1998, 26-38.

⁷⁰ D. Birnbacher, "Philosophical Foundations of Responsibility", in: A.E. Auhagen/ H.W. Bierhoff (eds), *Responsibility: The Many Faces of a Social Phenomenon*, 2001, 9 et seq. (10).

⁷¹ *Ibid.*

⁷² G. Gaja, "Introduction", in: Société Française pour le Droit International see note 41, 87 et seq. (87).

responsibility to protect as encompassing positive obligations.⁷³ The responsibility to protect concept can thus be understood as a way of promoting such prospective responsibility to prevent mass atrocity crimes being committed.

2. The Concept of Remedial Responsibility

The second important aspect of the Security Council's responsibility concerns the distinction between outcome responsibility and remedial responsibility.⁷⁴ Outcome responsibility, according to *David Miller*, is the responsibility that we bear for our own actions and decisions, whereas remedial responsibility arises in a situation where we may have to come to the aid of those in need of help.⁷⁵ This distinction is significant for understanding the nature of the Security Council's responsibility at issue here.

The idea that the Security Council implements the responsibility to protect on behalf of the international community effectively means that the Security Council's responsibility entails remedial responsibility. Yet, remedial responsibility is by nature an undistributed duty, which everyone is subject to and is unlikely to be discharged by anyone unless it can be allocated in some way.⁷⁶ As discussed earlier, the consensus reached in the 2005 World Summit Outcome specifically refers to the Security Council as a "medium" for the international community taking collective action.

On what ground, then, can one say that the Security Council has a special responsibility to intervene to remedy the state of affairs in question? Under what circumstances is the Security Council responsible for providing remedial measures? It is possible to argue that the Security Council may be held responsible for a situation that needs to be remedied, because it has been directly caused by an action of the Security Council or its delegate authority. Yet, the responsibility to protect concept does not envisage situations where the Security Council's prior engagement might have caused mass atrocities. Therefore, the legal

⁷³ Szurek, see note 41, 94-97.

⁷⁴ For details, see D. Miller, *National Responsibility and Global Justice*, 2007, Ch. 4.

⁷⁵ *Ibid.*, 81.

⁷⁶ Miller, see note 74, 98.

ground upon which the Security Council assumes remedial responsibility must be sought somewhere else.

Drawing on the ICJ's findings in the *Bosnian Genocide Case*,⁷⁷ Louise Arbour identifies three elements that give rise to a special responsibility to take remedial measures – influence, proximity, and information.⁷⁸ She posits that members of the Security Council, particularly the five permanent members, hold a special responsibility to ensure the protection of populations from mass atrocities because of the power they wield and their global reach.⁷⁹ Likewise, David Miller refers to legal capacity and resource capacity as a possible ground for assigning remedial responsibility.⁸⁰ It is thus possible to argue that the Security Council is legally required to assume remedial responsibility to protect populations from mass atrocities by virtue of its legal capacity to take collective enforcement action. Yet, interestingly, the flipside of this argument is that the Security Council's remedial responsibility only extends so far as it can secure the resources necessary to carry out the responsibility.

3. The Concept of Collective Responsibility

The third distinctive characteristic of the Security Council's responsibility concerns collectivity, raising the question as to whether the Security Council is an entity to which collective responsibility can be ascribed. The question of what sorts of collectivities may qualify for the purpose of assigning responsibility has been a subject of controversy in different areas and disciplines – most prominently in relation to corporate responsibility.⁸¹ At the theoretical level, ideas of collective responsibility have been variably expressed, ranging from the view that it is merely an aggregate of individual responsibilities of the members of a group to one that understands it as truly non-reducible and non-distributive to

⁷⁷ *Bosnian Genocide Case*, see note 35, para. 430.

⁷⁸ Arbour, see note 33, 453-455.

⁷⁹ *Ibid.*, 453. Cf. J.M. Welsh/ M. Banda, "International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?", *Global Responsibility to Protect 2* (2010), 213 et seq. (221-226).

⁸⁰ Miller, see note 74, 103.

⁸¹ See generally e.g. B. Fisse/ J. Braithwaite, *Corporations, Crime and Accountability*, 1993; P. French, *Collective and Corporate Responsibility*, 1984.

individual members.⁸² Some argue that the international community's responsibility is based on an imperfect duty in the sense that no specific state or agent in the community is morally bound to intervene.⁸³ Others consider that the international community's responsibility is imposed on all rational beings,⁸⁴ leaving latitude to community members as to how to fulfill their collective responsibility.⁸⁵

Collective responsibility may arise when like-minded groups have a high level of solidarity, sharing aims and outlooks in common and recognizing their like-mindedness.⁸⁶ *Joel Feinberg* finds the basis of this justification in the vicarious liability of a party that has not contributed to the fault, which arises due to its position of being able to affect the conduct of other members.⁸⁷ The expectation that the whole group will be held responsible for the conduct of one or some of its members arises when there is a high degree of solidarity within the collectivity. This is achieved where there exists a community of interest that is often associated with bonds of sentiments directed towards common objects, whilst sharing common and indivisible goods and harms.⁸⁸

The notion of solidarity is recognized among states,⁸⁹ which, as *Rüdiger Wolfrum* observes, "has become a quite common structural

⁸² L. May/ S. Hoffman, "Introduction", in: L. May/ S. Hoffman (eds), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, 1991, 4 et seq.

⁸³ M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edition, 2000, xiii.

⁸⁴ Cf. 2009 Report of the Secretary-General, see note 9, para. 61 (speaking of "shared responsibilities").

⁸⁵ C. Bagnoli, "Humanitarian Intervention as a Perfect Duty: A Kantian Argument", in: T. Nardin/ M.S. Williams (eds), *Humanitarian Intervention*, 2006, 117 et seq. (122-124).

⁸⁶ Miller, see note 74, 117-119.

⁸⁷ J. Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility*, 1970, 233-243.

⁸⁸ *Ibid.* See also D. Warner, *An Ethic of Responsibility in International Relations*, 1991, 62-69. Some scholars consider that even more loosely structured groups without having much solidarity may identify themselves to be collectively responsible simply due to membership or the benefits they receive through membership, H. McGary, "Morality and Collective Liability", *Journal of Value Inquiry* 20 (1986), 157 et seq. (160); H. Arendt, "Collective Responsibility", in: J.W. Bernauer (ed.), *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt*, 1987, 43 et seq. (45).

⁸⁹ A/RES/59/193 of 20 December 2004, para. 4 (f).

principle of international law.”⁹⁰ *Karel Wellens* discusses solidarity as a constitutional principle that is evidenced in a selected variety of branches of international law and plays a normative role to a varying degree in different areas of law.⁹¹ The relevant question for the purpose of the present inquiry is whether the degree of solidarity has reached the stage where states are prepared to assume responsibility for the action or inaction of the Security Council as if the decision were taken on their own.

The mutual assistance under Article 49 of the UN Charter which all Member States have agreed to give in carrying out the measures decided upon by the Security Council remains merely a general commitment to burden-sharing and equitable distribution of costs.⁹² *Boisson de Chazournes* correctly points out that solidarity should be distinguished from the duty of mutual assistance and even from the UN collective security system more generally, as action under the Charter takes place in a regulated institutional framework without requiring the sense of solidarity.⁹³ The responsibility to protect concept agreed upon in the 2005 World Summit could be seen as a critical step towards a greater recognition of collective responsibility in the Security Council’s decision-making process on the grounds of solidarity of the international community as a whole.⁹⁴ The real test for nourishing collective responsibility of the international community in this sense lies in the extent to

⁹⁰ R. Wolfrum, “Solidarity amongst States: An Emerging Structural Principle of International Law”, *Indian Journal of International Law* 49 (2009), 8 et seq. (8).

⁹¹ K. Wellens, “Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections”, in: R. Wolfrum/ C. Kojima (eds), *Solidarity: A Structural Principle of International Law*, 2009, 3 et seq.; K. Wellens, “Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations”, in: R.St.J. Macdonald/ D.M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, 775 et seq.

⁹² Wellens, “Revisiting Solidarity as a (Re-)Emerging Constitutional Principle”, see note 91, 28-29; B.O. Bryde/ A. Reinisch, “Article 49” and “Article 50”, in: Simma, see note 53, 781 et seq. and 784 et seq.

⁹³ L. Boisson de Chazournes, “Responsibility to Protect: Reflecting Solidarity?”, in: Wolfrum/ Kojima, see note 91, 93 et seq. (96-97).

⁹⁴ *Ibid.*, 103.

which the value of solidarity prevails over sovereign self-interests in specific situations needing the Security Council's collective action.⁹⁵

Collective responsibility can also be found when there are clear rules and principles of attribution for conduct of individual members to a collective entity, where those participating in the practice share the benefits of the collective decision-making.⁹⁶ *Kok-Chor Tan* goes even further arguing that it is an obligation on the part of the international community to institutionalize the duty to protect, through cooperation and coordination.⁹⁷ The internal organizational structure and decision-making procedures of an organization introduce a requisite capacity of making patterns of coordinated action on a continuous basis.⁹⁸ Thus, for example, the UN's capacity responsibility was presumably the basis upon which the European Court of Human Rights considered that the conduct of UNMIK was attributable to the UN by virtue of the fact that it was a subsidiary organ of the UN created under Chapter VII of the Charter.⁹⁹ Yet, identifying collective responsibility based on the rules of attribution may well cause a potential tension with the notion of prospective responsibility discussed earlier. The internal organiza-

⁹⁵ P. Daillier, "La 'Responsabilité de protéger', corollaire ou remise en cause de la souveraineté?", in: Société Française pour le Droit International, see note 41, 41 et seq. (43).

⁹⁶ Miller, see note 74, 119-123; Cane, see note 67, 148-158; T. Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States", *Ethics & International Affairs* 15 (2001), 67 et seq. (71-72).

⁹⁷ K.C. Tan, "The Duty to Protect", in: Nardin/ Williams, see note 85, 84 et seq. (104).

⁹⁸ Erskine recognizes the collectivities possessing those characteristics as "institutional moral agents", Erskine, see note 96, 71-72. The focus of this article, however, is whether those institutional agents are capable of discharging collective responsibilities, not whether they can qualify as "moral agents".

⁹⁹ *Behrami v. France and Saramati v. France, Germany and Norway*, 2007, European Human Rights Reports 45 (2007), SE 10, paras 142-143. On the other hand, the attribution of the conduct of KFOR operating under NATO commands to the UN was found on the basis of a broad "ultimate authority and control" retained by the Security Council, which has been heavily criticized. See e.g. K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *EJIL* 19 (2008), 509 et seq.; A. Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases", *Human Rights Law Review* 8 (2008), 151 et seq.

tional structure and decision-making procedures not only indicate the existence of capacity responsibility. When paired with the purpose and competence of the institution, its legal power may well be limited under the doctrine of *ultra vires*, which has an implication for the allocation of liability responsibility for the failure to perform the prospective duty.

One may suggest that collective responsibility could descend to a member, or certain members, of the Security Council if the failure to protect populations from mass atrocities was due to those Council Member States. Yet, from the perspective of prospective responsibility, individual members' responsibilities cannot dispense with the notion of collective responsibility because of the difficulty in assigning specific shares of responsibility for the prevention of or reaction to mass atrocities. Should the share of responsibility descend to a member by virtue of its "special relationship of some sort to the people needing the protection", or to a state that is most capable of carrying out the protection duty?¹⁰⁰ Or should it be allocated to the five permanent members of the Security Council because of their privilege of holding a veto power? Or to a particular member who blocks the Security Council from taking required action?

Even in the context of retrospective liability responsibility for the failure to suppress mass atrocities, the cause of the failure is inherently structural in the sense that it resulted not so much from a decision of individual Member States, but from the decision-making process within the constraints of a more systemic institutional structure.¹⁰¹ One may consider that if a permanent member exercises a veto to block a resolution, that particular state is responsible for the Security Council's failure to take action. Yet the allocation of responsibility will not be complete without taking into account the fact that UN Member States have agreed to this decision-making rule that confers veto power upon permanent members. UN Member States also have supported the Security Council as the responsible authority in taking action to prevent and suppress mass atrocities despite the possible exercise of the veto power. This institutional context reinforces the view that the Security Council's responsibility should be understood in the collective sense, to the extent, if any, that members of the international community entrust the

¹⁰⁰ Tan, see note 97, 96, 107.

¹⁰¹ Cf. N.C. Crawford, "Individual and Collective Moral Responsibility for Systemic Military Atrocity", *Journal of Political Philosophy* 15 (2007), 187 et seq. (189-192).

Security Council with an additional duty to protect populations from mass atrocities.

V. Responsibility Practices of the UN Security Council

It is thus necessary to understand that there is no abstract meaning of responsibility that reveals the intrinsic nature of the concept itself. *Cane* observes that the language of responsibility “marks a variegated and heterogeneous set of practices and concepts which can only be fully understood by context-determinate analyses.”¹⁰² Based on this observation, *Cane* proposes that “study of actual and contextually determinate responsibility practices can contribute to our understanding of responsibility generally.”¹⁰³ Likewise, *Nicola Lacey* suggests that the concept of responsibility is inevitably shaped through social practices in the historical context, demonstrating this proposition by tracing the shift in the predominant philosophical approach to criminal responsibility in English criminal law from the mid-eighteenth to the late twentieth century.¹⁰⁴ An important implication of her study is that responsibility practices are normative and constructive in their effect as they organize both our practices and our interpretation of the world in distinctive and contingent ways, which is of central relevance to political decisions about the design of social institutions generally.¹⁰⁵

The legal nature of the Security Council's responsibility can thus be ascertained through the examination of its own responsibility practices, which is consistent with the interpretive approach suggested earlier.¹⁰⁶ From a theoretical point of view, this will allow an examination of the legal nature of the Security Council's responsibility to be detached from the development of contemporary philosophical analysis of responsibility, which is grounded in the notion of human personhood, as has emerged from Europe in the philosophy of the Enlightenment. The centrality of human personhood to the concept of responsibility is already rejected in the course of developing the international law of state responsibility, favoring the objective determination of responsibility

¹⁰² Cane, see note 67, 25.

¹⁰³ *Ibid.*, 30.

¹⁰⁴ N. Lacey, “Responsibility and Modernity in Criminal Law”, *Journal of Political Philosophy* 9 (2001), 249 et seq.

¹⁰⁵ *Ibid.*, 253.

¹⁰⁶ See note 65 above and accompanying text.

without inquiring into human psychological elements such as motives and intention.¹⁰⁷ *Scott Veitch* considers that different forms of responsibility practices are best seen as providing organizational capabilities, fulfilling distinctive and varied regulative visions and requirements set by the relevant social conditions and structures.¹⁰⁸ It is hence conceivable that ascertaining the form of responsibility practices of the Security Council, particularly since the emergence of the responsibility to protect concept, will also reveal the Security Council's organizational capabilities in fulfilling the international responsibility to protect within the distinctive regulatory framework of the Charter.

In the following sections, the Security Council's responsibility practices are examined with a view to ascertaining the legal nature of the Security Council's prospective, remedial and collective responsibility. A particular focus of this examination is whether and to what extent recognition has emerged so that the Security Council must assume the international responsibility to protect, as part of, or distinct from, its primary responsibility for the maintenance of international peace and security as envisaged in the Charter.

To that end, the following sections will examine the Security Council's response to mass atrocity crises since the emergence of the responsibility to protect concept. A particular attention is drawn to the mass atrocity crises in the Democratic Republic of the Congo, Myanmar, and Darfur, where the Security Council's responsibility became a point of controversy during Council debates. These crises, particularly the situation in Myanmar, are subject to different views as to whether they fall within the scope of the responsibility to protect and therefore warrant the Security Council's response.¹⁰⁹ Yet, the purpose of this inquiry is to gauge the nature and meaning of responsibility as understood by states in relation to the Security Council's authority in dealing with actual or potential mass atrocities.

¹⁰⁷ See generally, I. Brownlie, *System of the Law of Nations: State Responsibility Part I*, 1983, 38 et seq.

¹⁰⁸ S. Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, 2007, 39-41.

¹⁰⁹ The situations in Zimbabwe, Kenya, and Sri Lanka have also been described as concerns falling within the ambit of the responsibility to protect concept, Evans, see note 10, 72-73. However, no discussion about the Security Council's responsibility was made during Council debates and therefore these situations are excluded from inquiry here.

1. The Democratic Republic of the Congo

The armed violence in and around the Democratic Republic of the Congo in the late 1990s stemmed from cross-border conflicts in the Great Lakes region of Africa, which escalated into a humanitarian crisis. Those conflicts were fuelled by several rebel groups, whose genus traced back to the aftermath of the 1994 Rwanda genocide and the collapse of the Zairian state.¹¹⁰ The conclusion of the Lusaka Ceasefire Agreement on 10 July 1999, between the Democratic Republic of the Congo and several surrounding countries, sought to end this conflict,¹¹¹ expressing the request of the parties for the Security Council's intervention.¹¹² Despite its reluctance to intervene,¹¹³ the Security Council finally authorized the deployment of MONUC (UN Organization Mission in the Congo) on 30 November 1999,¹¹⁴ and later gave the mission amongst others a mandate to protect civilians.¹¹⁵ The cautious, phased deployment reflected a division of views as to the role of the Security Council, and a confused understanding about who was to bear which responsibility. On the one hand, African countries called for the Security Council's engagement referring to the Security Council's primary responsibility for the maintenance of international peace and security.¹¹⁶ Western countries, on the other hand, emphasized the primary responsibility of the parties themselves for taking action to implement the

¹¹⁰ For details of the historical background of the conflict, see, e.g., H.F. Weiss, "The Democratic Republic of the Congo: A Story of Lost Opportunities to Prevent or Reduce Deadly Conflicts", in: R.H. Cooper/ J.V. Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century*, 2009, 115 et seq.

¹¹¹ Doc. S/1999/185/Annex of 23 July 1999.

¹¹² Ibid., para. 11 (a).

¹¹³ SCOR 54th Year, 3987th Mtg., Doc S/PV.3987 and S/PV.3987 (Resumption 1) of 19 March 1999.

¹¹⁴ S/RES/1279 (1999) of 30 November 1999, paras 4-6.

¹¹⁵ S/RES/1291 (2000) of 24 February 2000, para. 8.

¹¹⁶ See, e.g., SCOR 54th Year, 3987th Mtg., Doc. S/PV.3987 (Resumption 1) of 19 March 1999, 2-3 (Sudan), 7 (Zambia), 15 (Kenya), 22 (Democratic Republic of the Congo); SCOR 54th Year, 4083rd Mtg., Doc S/PV.4083 of 16 December 1999, 14 (Namibia), 18 (Gabon); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 of 24 January 2000, 6 (Zambia), 10 (Mozambique); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 1) of 24 January 2000, 2 (South Africa).

ceasefire agreement.¹¹⁷ Here, two different notions of responsibility were intertwined, leaving some delegates confused about the seemingly contradictory positions.¹¹⁸ Although at that stage the responsibility to protect was not yet articulated as a concept, the Secretary-General's reports on Srebrenica and Rwanda in 1999 appear to have influenced this debate.¹¹⁹

The shift in focus from a responsibility for the maintenance of international peace and security to a responsibility to protect could be found in remarks that described the Security Council as a body acting on behalf of the international community and as having a collective responsibility to address this conflict and the suffering of civilians in the Congo.¹²⁰ However, MONUC has since then been embroiled in the repeated failure to protect civilians from large-scale violence,¹²¹ prompting the Security Council to re-emphasize the civilian protection mandate,¹²² albeit without necessarily clarifying later its relationship with

¹¹⁷ See, e.g., SCOR 54th Year, 4083rd Mtg., Doc. S/PV.4083 of 16 December 1999, 16 (United Kingdom); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 of 24 January 2000, 4 (United States); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 1) of 24 January 2000, 4 (Belgium); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 2) of 26 January 2000, 9 (Russia).

¹¹⁸ See, e.g., SCOR 54th Year, 4083rd Mtg., Doc. S/PV.4083 of 16 December 1999, 15 (Brazil).

¹¹⁹ See, e.g., SCOR 54th Year, 4083rd Mtg., Doc. S/PV.4083 of 16 December 1999, 10 (Canada); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 of 24 January 2000, 21-23 (Rwanda); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 1) of 24 January 2000, 9-12 (Canada).

¹²⁰ SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 of 24 January 2000, 8-9 (President Chiluba of Zambia), 25 (Secretary-General of the Organization of African Unity); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 1) of 24 January 2000, 11 (Canada); SCOR 55th Year, 4092nd Mtg., Doc. S/PV.4092 (Resumption 2) of 26 January 2000, 8 (Malaysia).

¹²¹ For details, see, e.g., V. Holt/ G. Taylor/ M. Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Success, Setbacks and Remaining Challenges*, 2009, 241 et seq.; J. Marks, "The Pitfalls of Action and Inaction: Civilian Protection in MONUC's Peacekeeping Operations", *African Security Review* 16 (2007), 67 et seq.; K. Månsson, "Use of Force and Civilian Protection: Peace Operations in the Congo", *International Peacekeeping* 12 (2005), 503 et seq.

¹²² S/RES/1565 (2004) of 1 October 2004, paras 4 (b), 6; S/RES/1592 (2005) of 30 March 2005, para. 7; S/RES/1794 (2007) of 21 December 2007, paras 2, 5; S/RES/1856 (2008) of 22 December 2008, paras 2, 3 (a)-(e), 5-6.

the responsibility to protect concept,¹²³ even after the adoption of the 2005 World Summit Outcome.

This raises the question as to how far the Security Council's responsibility to protect extends. One view could be that the Security Council is considered to have fulfilled its responsibility once it takes action, for example, by deploying a peacekeeping mission with the mandate to protect civilians.¹²⁴ Another view might require the Security Council to ensure that civilians are in fact protected from mass atrocities as part of its responsibility. The absence of reference to the responsibility to protect concept since the deployment of MONUC until today appears to indicate that the former view might be the prevailing understanding among Council members.¹²⁵

2. Myanmar

Since the military coup d'état in 1962 and 1988 the people of Myanmar have been subjected to widespread human rights violations by the military junta, particularly against political dissidents and ethnic minorities.¹²⁶ However, it was not until September 2006 that the situation in Burma (renamed as Myanmar by the military junta) became a subject of discussion in the Security Council. By that time, the scale of repression and humanitarian crisis was well documented in reports from various

¹²³ E.C. Luck, "Taking Stock and Looking Ahead – Implementing the Responsibility to Protect", in: Winkler/ Rød-Larsen/ Mikulaschek, see note 4, 61 et seq. (67).

¹²⁴ The Security Council also imposed an arms embargo (S/RES/1493 (2003) of 28 July 2003, paras 18, 20-22) and set up a committee to monitor the implementation of the sanctions measures (S/RES/1533 (2004) of 12 March 2004), which has also been relevant to the protection of civilians.

¹²⁵ S/RES/1925 (2010) of 28 May 2010, listing the civilian protection mandate as the first priority at para. 12 (a).

¹²⁶ For details of the conflicts in Myanmar, see, e.g., A. South, *Ethnic Politics in Burma: States of Conflict*, 2008; M. Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, 2007.

sources.¹²⁷ Even then, there was significant disagreement over the inclusion of the situation in Myanmar on the Security Council's agenda.¹²⁸

The first argument that caused disagreement was that the issue in Myanmar was the internal affair of the state and that it did not constitute a threat to the peace that would have warranted Security Council's action. China and the Non-Aligned Movement were particularly vocal about this point of threshold, alleging that large-scale human rights violations and social issues such as the trafficking of people and narcotics were not sufficient to constitute a threat to the peace.¹²⁹ These remarks were made despite the fact that transnational organized crimes were along with terrorism and weapons of mass destruction recognized as a global security threat in the Secretary-General's High-Level Panel Report.¹³⁰ Interestingly, the threshold issue was debated by reference to the traditional standard for Security Council action – a threat to the peace – rather than to the threshold for shifting the responsibility to protect from a sovereign state to the international community. Reference was hardly made to the willingness or ability of the military regime to protect its population in the context of whether the Security Council should assume responsibility over the situation.¹³¹

The second and more fundamental point of disagreement among Council members concerned the boundaries of the Security Council's competence. Qatar, South Africa, and the Democratic Republic of the Congo expressed the view that questions of human rights would not fit

¹²⁷ See e.g., Human Rights Watch, "They Came and Destroyed Our Village Again: The Plight of Internally Displaced Persons in Karen State", 9 June 2005, <<http://www.hrw.org/sites/default/files/reports/burma0605.pdf>>.

¹²⁸ The situation in Myanmar came to a spotlight more widely in 2008 when the government refused to accept foreign aid after the devastation caused by Cyclone Nargis. This decision led to intense debate regarding the potential application of the responsibility to protect concept in order to justify military intervention for the purpose of delivering humanitarian aid. However, the issue was not included on the Security Council's agenda and therefore is not dealt with here. For a detailed analysis of the issue, see, e.g., R. Barber, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study", *Journal of Conflict & Security Law* 14 (2009), 3 et seq.

¹²⁹ SCOR 61st Year, 5526th Mtg., Doc. S/PV.5526 of 15 September 2006, 2 (China); SCOR 62nd Year, 5619th Mtg., Doc. S/PV.5619 of 12 January 2007, 4 (Indonesia), 8 (Congo).

¹³⁰ High-Level Panel Report, see note 9, 23.

¹³¹ Cf. SCOR 62nd Year, 5753rd Mtg., Doc. S/PV.5753 of 5 October 2007, 10.

with the Charter mandate conferred upon the Security Council, but would be best left to the Human Rights Council.¹³² The United States was not explicit on this question of competence, though remarked rather clearly that the situation “does not pose a risk to peace and security beyond its borders.”¹³³ On the contrary, the United Kingdom regarded the situation as representing a threat to regional peace and security and “to the security of the Burmese people” and hence falling within the responsibilities of the Security Council.¹³⁴ Here, the reference to responsibility appears to have been made in the sense of a competence and capacity responsibility, with the emphasis that the Security Council’s responsibility would not be exclusive to but rather complementary and supportive of other UN organs. Ghana and Panama also expressed a holistic view concerning the Security Council’s responsibility as part of the international community’s efforts to protect the population of Myanmar from mass atrocities.¹³⁵ This disagreement arguably indicates increasingly diverse views about the scope of the Security Council’s responsibility – the narrowest view being based on the strict reading of the Charter mandate, whereas the wider ones are more or less influenced by the incorporation of the responsibility to protect concept into the Security Council’s responsibility under the Charter.

3. Darfur

The conflict in Darfur, in the west of Sudan, stems from ethnic disputes over resources, typically between the region’s tribal farmers and Arab herders.¹³⁶ The gradual expansion of the Sahara desert into areas previously used by nomads aggravated the situation. The conflict escalated when the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) forces began violently attacking government military installations in early 2003, aiming to compel the government to address

¹³² SCOR 61st Year, 5526th Mtg., Doc. S/PV.5526 of 15 September 2006, 3 (Qatar); SCOR 62nd Year, 5619th Mtg., Doc. S/PV.5619 of 12 January 2007, 3 (South Africa), 5-6 (Qatar), 8 (Congo).

¹³³ SCOR 62nd Year, 5619th Mtg., Doc. S/PV.5619 of 12 January 2007, 6.

¹³⁴ *Ibid.*, 7.

¹³⁵ *Ibid.*, 8 (Ghana), 9 (Panama).

¹³⁶ For a general overview of the violent history in Darfur, see, G. Prunier, *Darfur: A 21st Century Genocide*, 3rd edition, 2008; J. Flint/ A. de Waal, *Darfur: A Short History of a Long War*, 2005; D.H. Johnson, *The Root Causes of Sudan’s Civil Wars*, 2003.

decades of political marginalization and underdevelopment of non-Arabs in Darfur. The government responded by not only deploying its armed forces but also by arming and supporting militias known as Janjaweed, which engaged in atrocious violence against citizens suspected of supporting the rebels.¹³⁷

The first Security Council resolution in relation to Darfur was adopted on 11 June 2004. Council members saw the crisis in Sudan at that time from a more traditional dispute settlement perspective, urging the parties involved in the conflict to reach a peaceful settlement of the conflict.¹³⁸ A notable exception is the remark made by the German delegate who explicitly linked a peaceful settlement of the conflict with “an end to the sweeping and widespread human rights violations in the conflict regions in the Sudan.”¹³⁹ In line with this concern, para. 6 of the resolution called upon the parties involved “to use their influence to bring an immediate halt to the fighting in the Darfur region ...”¹⁴⁰

The failure of the Sudanese government to disarm the Janjaweed and protect the population of Darfur led the Security Council to adopt S/RES/1556 on 30 July 2004. Adopted with mandatory terms under Chapter VII of the Charter, the resolution imposed an arms embargo on the region and gave the Sudanese government 30 days to disarm the Janjaweed, whilst expressing its intention to consider further action under Article 41 of the Charter in the event of non-compliance.¹⁴¹ While recognizing that the Sudanese government had the primary responsibility to protect its population, many states stressed the need for the inter-

¹³⁷ For details of the event, see, e.g., G. Austin/ B. Koppelman, *Darfur and Genocide: Mechanisms for Rapid Response, An End to Impunity*, 2004. The International Commission of Inquiry on Darfur established by S/RES/1564 (2004) of 18 September 2004 found that crimes against humanity and war crimes had been committed in Darfur, but made a negative finding about genocide: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, 131-132. In contrast, the US Senate and House of Representatives passed a resolution on 22 July 2004 declaring that the mass atrocities in Sudan constituted genocide: US Congress Resolution 467, 108th Cong., 2nd Sess.

¹³⁸ S/RES/1547 (2004) of 11 June 2004, paras 1-5. See also SCOR 59th Year, 4988th Mtg., Doc. S/PV.4988 of 11 June 2004, 3 (Algeria), 4 (Pakistan). This response is not surprising as the resolution was adopted prior to the 2005 World Summit.

¹³⁹ SCOR 59th Year, 4988th Mtg., Doc. S/PV.4988 of 11 June 2004, 2.

¹⁴⁰ S/RES/1547, see note 138, para. 6.

¹⁴¹ S/RES/1556 (2004) of 30 July 2004, paras 6-7.

national community's intervention.¹⁴² France, for example, observed that "[g]iven the nature of this crisis, the international community cannot remain on the sidelines."¹⁴³ The Philippines more categorically explained the context in which Resolution 1556 was adopted as follows:

"Sovereignty also entails the responsibility of a State to protect its people. If it is unable or unwilling to do so, the international community has the responsibility to help that State achieve such capacity and such will and, in extreme necessity, to assume such responsibility itself."¹⁴⁴

This discussion and the adoption of S/RES/1556 suggest that Council members seem to have adopted an approach different from the one expressed previously, framing their statements with the language of the responsibility to protect.

Some members variably expressed their understanding of the role and responsibility of the Security Council, in adopting Resolution 1556 and the subsequent resolutions on Sudan.¹⁴⁵ Romania and the Philippines, for example, spoke of the legal responsibility of the Security Council to respond to mass atrocities on behalf of the international community.¹⁴⁶ The United Kingdom clearly distinguished the role of the Security Council from that of the international community regarding the adoption of Resolution 1556 as the Security Council's own commitment to ensure the Sudanese government fulfilled its duty to protect its own citizens.¹⁴⁷ Algeria considered the role of the Security Council, in assuming its responsibility under the Charter, to rather complement and support the efforts of the African Union, arguing that

¹⁴² With the exception of China, which abstained from the vote, arguing that mandatory measures would not help in resolving the situation in Darfur and might even further complicate it. SCOR 59th Year, 5015th Mtg., Doc. S/PV.5015 of 30 July 2004, 3.

¹⁴³ Ibid., 9.

¹⁴⁴ Ibid., 10-11.

¹⁴⁵ See, A.J. Bellamy/ P.D. Williams, "The UN Security Council and the Question of Humanitarian Intervention in Darfur", *Journal of Military Ethics* 5 (2006), 144 et seq. (149-154).

¹⁴⁶ SCOR 59th Year, 5040th Mtg., Doc. S/PV.5040 of 18 September 2004, 12.

¹⁴⁷ SCOR 59th Year, 5015th Mtg., Doc. S/PV.5015 of 30 July 2004, 5. Williams and Bellamy explain western states' reluctance to press for intervention as being politically motivated with consideration of strategic implications of intervention for their own national security. P.D. Williams/ A.J. Bellamy, "The Responsibility to Protect and the Crisis in Darfur", *Security Dialogue* 36 (2005), 27 et seq.

Africans have a special duty and a primary responsibility when there is a conflict in Africa.¹⁴⁸

S/RES/1590 of 24 March 2005 established the UN Mission in Sudan (UNMIS).¹⁴⁹ However, UNMIS was deployed to the south of the country in support of the Comprehensive Peace Agreement. The situation in Darfur was still left only with a small-sized African Union Mission in Sudan (AMIS), deployed by the African Union, which by late 2005 was too “stretched to effectively implement its mandate.”¹⁵⁰ Although the African Union subsequently increased the size of the contingent,¹⁵¹ the intensified violence led the African Union to request the deployment of a UN peacekeeping force, even after the conclusion of the Darfur Peace Agreement in May 2006 between the Sudanese government and one of the main rebel groups.

When urged to intervene in Darfur, the Security Council’s responsibility to protect and what it entails was tested for the first time since the 2005 World Summit and the subsequent affirmation of the responsibility to protect by the Security Council in the context of civilian protection.¹⁵² In adopting S/RES/1706 of 31 August 2006 to expand the deployment of UNMIS to Darfur,¹⁵³ the United Kingdom delegate remarked that the adoption of this resolution showed the Security Council’s readiness to assume its responsibilities towards the people of Darfur, whilst emphasizing that UN peacekeepers were to act in support of the Sudanese government.¹⁵⁴ Likewise, France, Argentina, and Denmark spoke of the Security Council’s collective responsibility to protect or act,¹⁵⁵ whereas Greece and Slovakia framed it only as a moral duty.¹⁵⁶

¹⁴⁸ SCOR 59th Year, 5015th Mtg., Doc. S/PV.5015 of 30 July 2004, 5-6. See also, J. Allain, “The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union”, *Max Planck UNYB* 8 (2004), 237 et seq.

¹⁴⁹ S/RES/1590 (2005) of 24 March 2005.

¹⁵⁰ Communique of the 28th Mtg. of the Peace and Security Council, AU Doc PSC/PR/Comm. (XXVIII), 28 April 2005, para. 3.

¹⁵¹ For an assessment of the African Union’s contribution in Darfur, see P.D. Williams, “Military Responses to Mass Killing: The African Union Mission in Sudan”, *International Peacekeeping* 13 (2006), 168 et seq.

¹⁵² S/RES/1674, see note 3.

¹⁵³ S/RES/1706 (2006) of 31 August 2006.

¹⁵⁴ SCOR 61st Year, 5519th Mtg., Doc S/PV.5519 of 31 August 2006, 3-4.

¹⁵⁵ *Ibid.*, 7 (France), 9 (Argentina), and 10 (Denmark).

¹⁵⁶ *Ibid.*, 8.

Victoria Holt and Glyn Taylor observe that “[t]his general sentiment of responsibility was understood as the reason for the rapid adoption of resolution 1706.”¹⁵⁷ It is interesting to note that the reference to Chapter VII was made in respect of the protection of civilians by authorizing peacekeepers to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities “to protect civilians under threat of physical violence” and “in order to support early and effective implementation of the Peace Agreement, to prevent attacks and threats against civilians.”¹⁵⁸

The Sudanese government refused to give consent to and cooperate with the deployment of UNMIS in Darfur, alleging insufficient consultation and attention to its peace efforts prior to the adoption of the resolution.¹⁵⁹ There was a general agreement that no peacekeeping operation should be imposed without the consent of the Sudanese government,¹⁶⁰ whilst some states reiterated the international community's responsibility to protect populations from mass atrocities.¹⁶¹ The Sudanese government's suspicions and concerns regarding the deployment of a UN peacekeeping mission in Darfur were not dispelled until Sudan finally agreed to a UN/AU hybrid operation in Darfur (UNAMID) in 2007.¹⁶² UNAMID was mandated, *inter alia*, to support early and effective implementation of the Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians without prejudice to the responsibility of the Sudanese government all under Chapter VII of the Charter.¹⁶³ Since the decision to deploy UNAMID, little reference has been made to the Security Council's responsibility to protect. This was the case despite the fact that the deployment of forces at the required level was significantly hampered because of insufficient provision of key resources by the international community, inadequate preparation on the part of the United Nations in building up the capacity in the field, and the obstruction on the part of the Sudanese gov-

¹⁵⁷ Holt/ Taylor/ Kelly, see note 121, 342.

¹⁵⁸ S/RES/1706, see note 153, para. 12 (a).

¹⁵⁹ SCOR 61st Year, 5520th Mtg., Doc. S/PV.5520 of 11 September 2006, 4-6.

¹⁶⁰ *Ibid.*, 10 (Congo), 12 (China), 13 (Tanzania and Russian Federation), 18 (Japan).

¹⁶¹ *Ibid.*, 9 (United Kingdom), 14 (Slovakia), 15 (Argentina), 16-17 (France), 19 (Peru).

¹⁶² S/RES/1769 (2007) of 31 July 2007.

¹⁶³ *Ibid.*, para. 15 (a) (ii).

ernment.¹⁶⁴ The focus among Council members appears to have shifted back to more traditional peacekeeping,¹⁶⁵ whilst the situation in Darfur since 1 July 2002 was referred to the Prosecutor of the ICC.¹⁶⁶

VI. Evolving Conception of the Security Council's Responsibility

The analysis above seems to illustrate a gradual expansion amongst Council members of their conception of the Security Council's responsibility. The Security Council's responsibility to address physical violence against civilians during an armed conflict in the early 2000s was referred to, by and large, in the traditional context of dispute settlement and the maintenance of international peace and security.¹⁶⁷ Since 2004, however, Council members seem to have become more vocal about the Security Council's responsibility to protect people and respond to mass atrocities on behalf of the international community.¹⁶⁸ It seems as if this expanded conception of the Security Council's responsibility has been influenced by the responsibility to protect concept and its development. Yet, the question arises as to what extent Council members, or UN Member States in general, have embraced the expansion of its responsibility beyond that for the maintenance of international peace and security, as a matter of its legal authority and power. In other words, has the Security Council fostered sufficient responsibility practices to re-characterize its institutional competence, role, and legal authority to accommodate the responsibility to protect as part of its institutional activities? The case studies above seem to illustrate three impediments to the establishment of sufficient responsibility practices required to demonstrate the Security Council's legal responsibility to protect.

¹⁶⁴ See Report of the Secretary-General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur, Doc. S/2008/400 of 17 June 2008, 9-10; Report of the Secretary-General on the Sudan, Doc. S/2007/653 of 5 November 2007, para. 32.

¹⁶⁵ See, e.g., remarks made by the United Kingdom delegate: SCOR 62nd Year, 5784th Mtg., Doc. S/PV.5784 of 27 November 2007, 14; SCOR 63rd Year, 5922nd Mtg., Doc. S/PV.5922 of 24 June 2008, 10.

¹⁶⁶ S/RES/1593 (2005) of 31 March 2005.

¹⁶⁷ See notes 116, 138 above and accompanying text.

¹⁶⁸ See notes 134, 143-148, 154-156 above and accompanying text.

First, there are competing threshold issues as the basis of the Security Council's action. As outlined above the traditional understanding is that the Security Council cannot take action unless it determines that the situation constitutes a threat to the peace, a breach of the peace, or an act of aggression within the meaning of Article 39 of the Charter. The Security Council has an inherent power to make an initial determination of its own institutional competence (*la compétence de la compétence*), which is presumed to have *prima facie* validity.¹⁶⁹ The Security Council is prepared to take collective action in accordance with the responsibility to protect concept when peaceful means are inadequate and national authorities are manifestly failing to protect their population from mass atrocities.¹⁷⁰ Still, it is not clear whether the Security Council is expected to take action if it finds that national authorities are manifestly failing to protect their population from mass atrocities even without making a finding of a threat to the peace. Nor is it certain whether the Security Council has the competence to determine that national authorities are manifestly failing to protect their population from mass atrocities. One may argue that a situation could be easily recognized as a threat to the peace when national authorities are manifestly failing to protect their population from mass atrocities. The former Secretary-General Kofi Annan implicates this presumption by posing the question,

“as to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”¹⁷¹

It is true that when many states stressed the need for the international community's intervention in Darfur in 2004, the Security Council adopted a resolution recognizing the situation as a threat to the peace. Yet, it was not only the humanitarian crisis and violence against civilians but also the cross-border effects of the armed conflict that led to

¹⁶⁹ *Certain Expenses of the United Nations*, ICJ Reports 1962, 151 et seq. (168); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. (22, para. 20).

¹⁷⁰ A/RES/60/1, see note 2.

¹⁷¹ *In Larger Freedom*, see note 9, para. 125. See also, D. Kuwali, “Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes”, in: R.I. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages*, 2010, 25 et seq. (26).

this determination.¹⁷² Additionally, the debate among Council members over the issue in Myanmar solely concerned whether the situation constituted a threat to the peace without any consideration of the willingness or ability of the military regime to protect its population.¹⁷³

Shifting the threshold basis for the Security Council's collective action from a threat to the peace to the unwillingness or inability of national authorities to protect their population involves an inevitable difficulty in the determination of whether national authorities are manifestly failing to protect their population. Does the Security Council have the authority to declare that a certain state is manifestly failing to protect its population as the basis for collective action? The basic premise of the concept, that national authorities have the primary responsibility to protect their population and only when national authorities are manifestly failing to do so can the responsibility shift to the international community, appears to implicate the notion of complementarity. Unlike the principle of complementarity embedded in the Rome Statute of the ICC,¹⁷⁴ however, the legal authority to determine the shift of responsibility is not clearly vested with the Security Council. It is a highly sensitive issue to declare that national authorities are manifestly failing to protect their citizens, particularly when there is a functioning government in power.

Second, as *ex ante* remedial responsibility, it is difficult to measure the extent to which the Security Council has fulfilled its responsibility to protect. Is the Security Council required only to take action as it deems necessary and plausible within its capabilities and resources to protect populations from mass atrocities? Or is it considered to have failed if mass atrocity crimes are in fact committed? The failed attempt to set out guidelines for a military intervention by the Security Council, due to the strong refusal of China, Russia, and the United States during the 2005 World Summit,¹⁷⁵ clearly indicates resistance to the idea of clear standards of conduct by reference to which the Security Council's

¹⁷² S/RES/1556, see note 141.

¹⁷³ See notes 129-131 and accompanying text.

¹⁷⁴ Rome Statute of the International Criminal Court, UNTS Vol. 2187 No. 38544. See generally, M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, 2008.

¹⁷⁵ For details, see, Bellamy, see note 10, 83-85; N.J. Wheeler, "A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit", *Journal of International Law and International Relations* 2 (2005), 95 et seq. (99-101).

action and inaction to fulfill its responsibility to protect can be assessed. In the absence of clear standards of conduct, it is a matter of policy decision, not susceptible to legal assessment, as to what measure is necessary and effective to avert mass atrocities.

Third, it remains unresolved whether the Security Council's failure to fulfill its responsibility to protect may entail legal consequences and, if it does, what those legal consequences might be. Conspicuously, the 2005 World Summit Outcome is silent on what should happen if the Security Council is unable or unwilling to implement the responsibility to protect. While the international community, through the United Nations, maintains its position that it is prepared to take action on a case by case basis,¹⁷⁶ no legal consequence would arise from arbitrary decision-making. However, should sufficient responsibility practices be fostered, they may give rise to a legitimate expectation for the consistent implementation of the Security Council's responsibility to protect. Thereafter, a failure to take action would have negative impacts on the legitimacy of its decisions.¹⁷⁷

In a much wider context, any action or inaction, success or failure, by the international community will have an impact on the normative force and interpretation of the basic principles of international law such as the non-use of armed force and the prohibition of genocide.¹⁷⁸ In the absence of an instruction from an international legal authority, those competing norms and principles could pull in potentially conflicting directions – for example, an unlawful use of force required to prevent genocide. A lack of attention to and understanding of this normative link would be fatal to the discussion of the responsibility to protect concept, as illustrated by the debate on humanitarian intervention, which underlines the indeterminacy of competing basic principles and the extent to which the international rule of law “constitutes a highly

¹⁷⁶ A/RES/60/1, see note 2.

¹⁷⁷ J. Quigley, “The United Nations Security Council: Promethean Protector or Helpless Hostage?”, *Tex. Int'l L. J.* 35 (2000), 129 et seq. (167-170); Caron, see note 62, 559-561.

¹⁷⁸ The idea of connecting the legal nature of responsibility to the normative force and interpretation of international law principles is more fully elaborated in Nasu, see note 29, 229-233; H. Nasu, “Responsibility to React? Lessons from the Security Council's Response to the Southern Lebanon Crisis of 2006”, *International Peacekeeping* 14 (2007), 339 et seq. (344-346).

manipulable regime that lends itself to politicization.”¹⁷⁹ Such a normative link between the international legal authority to apply and interpret competing principles, and the normative force of those principles, underpins the significance of understanding the international community’s responsibility to protect as a legal concept and the potential role of the Security Council.

Still, there is a growing level of responsibility practices which encompasses legal responsibility assumed by the Security Council acting in the capacity of an agent of the international community. The Security Council’s swift response to the atrocities against the civilian population in Libya of 26 February 2011, and the subsequent resolution of 17 March 2011 to establish and enforce a no-fly zone to protect civilians, are the latest testimony to the evolving process of fostering responsibility practices.¹⁸⁰ It remains to be seen whether the events in Libya in March 2011 become a critical step towards the legal conception of the Security Council’s responsibility to protect.¹⁸¹ The scope of the responsibility to protect is currently limited due to the fact that even though the Security Council relies pragmatically upon its own institutional standards for collective action under the Charter, its role in the international community to implement the responsibility to protect has been recognized separately from the internal rules and principles governing the UN structure. Moreover, the responsibility to protect may well compel the Security Council to take action and not to remain silent in the face of potential or actual mass atrocities, yet does not go further to provide what the Security Council is expected to do in order to fulfill its responsibility to protect. In light of all those factors, at the present stage, the Security Council can hardly be seen as having fostered sufficient responsibility practices to re-characterize its institutional competence, role, and authority to accommodate the responsibility to protect as part of its institutional activities.

¹⁷⁹ R.G. Teitel, “Humanity’s Law: Rule of Law for the New Global Politics”, *Cornell Int’l L. J.* 35 (2002), 355 et seq. (387).

¹⁸⁰ S/RES/1970 (2011) of 26 February 2011, preamble para. 9 recalling “the Libyan authorities’ responsibility to protect its population”; S/RES/1973 (2011) of 17 March 2011, preamble para. 4 and paras 4 and 6.

¹⁸¹ See in this respect the language used throughout the Council debate SCOR 66th Year, 6491st Mtg., Doc. S/PV.6491 of 26 February 2011, 3 (United States), 5 (France), 7 (Brazil); SCOR 66th Year, 6498th Mtg., Doc. S/PV.6498 of 17 March 2011, 3 (Lebanon citing the resolution of the League of Arab States of 12 March 2011), 4 (United Kingdom), 7 (Colombia), 10 (South Africa).

VII. Conclusion

The responsibility to protect is a multifaceted and still evolving concept. The concept does not evolve in a vacuum without having influence on the operation and development of international law, politics, and institutional practice. The Security Council is no exception, since in fact it has been portrayed as the "right authority" to exercise collective enforcement powers to implement the international community's responsibility to protect. This is despite the fact that it is a creation of post-World War II politics for the purpose of the maintenance of international peace and security.

As discussed in Part III., the Security Council's responsibility can be variably understood, and its normative significance may only be understood in the context of institutional practice. The Security Council's responsibility practices since the emergence of the responsibility to protect concept evidence a limited scope of responsibility to be assumed by the Security Council, as an agent of the international community. However, Council members have not clearly formed a shared view to articulate the Security Council's organizational capability to exercise the international responsibility to protect, nor have they sufficiently developed a shared legitimate expectation that would guide the Security Council as to how it is expected to fulfill the responsibility to protect. The conception of the Security Council's responsibility to protect is still incubating in the UN's institutional framework.

The legal conception of the international community's responsibility to protect is characterized by the prospective, remedial, and collective nature of responsibility. Because of this distinctive nature, the international community's responsibility to protect in a legal sense should not be considered within the traditional framework of a legal liability regime under international law. It should rather be understood in terms of its impacts on the normative force and interpretation of competing international law principles and rules. Such an understanding of responsibility opens up the scope in which a legal conception of the Security Council's responsibility to protect can be fostered through its own responsibility practices. In light of the distinct conceptions of responsibility that characterize the responsibility to protect, the following three points would need to be addressed to that end:

(1) Emphasis should be placed on the prospective nature of this responsibility and on the creation of institutional mechanisms that ensure the Security Council conforms to the expectation held by Member States to take action consistently to protect populations from mass

atrocities. Despite the difficulty of illustrating any clear standards of conduct, the establishment of an independent monitoring body such as an ombudsman, for example, could strengthen public scrutiny and guide more responsible action by the Security Council through fostering inter-institutional dialogues.¹⁸² The problem of unfulfilled expectations shared by UN Member States at large is inextricably linked to the absence of mechanisms for holding the Security Council accountable for its failure to play the remedial role.¹⁸³

(2) The Security Council's organizational capabilities to implement remedial responsibility should be realistically assessed and mobilized. This would mean that the scope of the Security Council's protection activities should be restrictively envisaged.

(3) At the same time, the international community's responsibility to protect should be institutionalized through greater cooperation and clearer coordination among different organs of the United Nations, e.g. a greater dialogue between the Security Council and ECOSOC to facilitate early response to human rights violations,¹⁸⁴ as well as a closer cooperation with regional organizations, as envisaged in the 2005 World Summit Outcome.¹⁸⁵ Further, the creation of a new UN subsidiary body that specializes in protecting civilians during armed conflict, could be pursued without requiring a reform of the Security Council.¹⁸⁶ The building of organizational capabilities among United Nations organs and international or regional institutions in a coordinated and cooperative manner will ensure that the international community implements its responsibility to protect in its entirety.

¹⁸² For detail of the author's argument, see H. Nasu, "Who Guards the Guardian?: Towards Regulation of the UN Security Council's Chapter VII Powers through Dialogue", in: K. Rubenstein/ J. Farrall (eds), *Sanctions, Accountability and Governance in a Globalised World*, 2009, 123 et seq.

¹⁸³ Welsh/ Banda, see note 79, 219.

¹⁸⁴ C. Breen, "The Necessity of a Role for the ECOSOC in the Maintenance of International Peace and Security", *Journal of Conflict and Security Law* 12 (2007), 261 et seq.

¹⁸⁵ A/RES/60/1, see note 2, para. 139.

¹⁸⁶ H. Nasu, "Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict", *Journal of Conflict & Security Law* 14 (2009), 209 et seq. (238-241). Cf. M. ul-Haq, "Global Governance for Human Security", in: M. Tehranian (ed.), *Worlds Apart: Human Security and Global Governance*, 1999, 79 et seq. (88-94).