Chapter 5

The Doctrine of 'Responsibility to Protect' and the EU Stance: A Critical Appraisal

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1. Introduction

The 'responsibility to protect' (known under the difficult new acronym of R2P) has been generally welcomed as one of the (very) few proposals finally endorsed by the members of the United Nations at the World Summit of September 2005 that marked the 60th anniversary of the organisation. In the fact sheet delivered by the UN press service, the R2P is presented in the following two ways:

> "Clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Willingness to take timely and decisive collective action for this purpose, through the Security Council, when peaceful means prove to be inadequate and national authorities are manifestly failing to do it".[1]

This session was supposed to achieve a comprehensive reform of the UN in order to improve its capacity to cope with new threats, and more broadly, to achieve a more effective system of collective security for the 21st century. A brief look at the media coverage on the UN Summit shows disappointed feelings about the final outcomes, but most of the time, critics are tempered by enthusiastic comments on the R2P doctrine. Some of them underline the fact that this emerging norm is a challenge to the 'sacrosanct' sovereignty principle and therefore suggest a paradigmatic shift in the conduct of international relations. Others point to the fact that the sovereign state remains responsible for the protection of the people on its territory while the international community is vested with a special responsibility to protect if a state is unable or unwilling to meet its obligations. Notwithstanding these divergent interpretations, most commentators consider that the R2P is an emerging legal norm in

1. 2005 World Summit, High-level Plenary Meeting, (14-16 September 2005), accessed 20 March 2006, at <http://www.un.org/summit2005/>

international relations and thus a major step forward, both for the UN and for people all over the world.

The first part of this paper challenges this assumption by demonstrating that this principle has not given birth to a legal norm, but is barely a political commitment to do something in cases of huge human sufferings. Nonetheless, it deserves attention, since it encapsulates the ideological features of the current debate on collective security and captures the controversies underpinning the use of force in international relations for the sake of humanity. The second part of the paper focuses on the position of the European Union (EU) towards the R2P. I argue that, because of the peculiar normative identity and manner in which the EU developed its security and defence policy, the EU is better equipped to implement the R2P than are other international actors. In fact, the EU has welcomed the results of the UN conference and has included itself as one of those actors which endorsed an enlarged concept of security. However, it is far from certain that this support can be explained by its enduring commitment to humanitarian interventionism because, as will be demonstrated, the EU has never pledged support for a unilateral right to intervene in cases of huge human sufferings.

2. Towards a new legal norm governing humanitarian intervention?

The responsibility to protect (R2P) has to be situated in a broader perspective in order to understand the significance of the discussions held at the UN World Summit in New York in September 2005. The R2P is notably the result of vivid and lengthy debates on the issue of humanitarian intervention. To a certain extent, the R2P is a by-product of diverging interests and values of the international community and of the failure to agree on a right to interfere (*droit d'ingérence*). The R2P contains doctrinal aspects that partly borrow from the doctrine of 'humanitarian intervention', but is in no way a new legal norm, and this is precisely the reason why a consensus has been achieved. This principle is supposed to bear on the members of the Security Council when fulfilling their duties under the Charter, and in so doing, does not endanger the collective security system (at least in theory) because it still forbids unilateral use of force by a country or a regional organisation (such as NATO).

In this section, I dealt with two partly distinct arguments that are made by proponents of the R2P. One school of thought maintains that the decisions

taken at the UN Millennium Summit are part of a process of legalisation of a customary rule in international law. More specifically, the argument is that the position taken on the R2P by the UN High-Level Panel in December 2004, the pronouncement made by Kofi Annan in March 2005 and the decisions taken at the UN Millennium Summit (September 2005) represent an endorsement of the principle of the R2P. Another argument is that, although the UN Millennium Summit did not explicitly endorse the R2P because of division within the international community, nevertheless, there is already an existing norm regarding humanitarian intervention and a new consensus on the limits of state sovereignty.

The rise of the 'Responsibility to Protect'

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) produced a report on the 'responsibility to protect' (R2P).[2] The R2P is an idea according to which sovereign states have a responsibility to protect their own citizens from avoidable catastrophes, but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.[3] Hence, one may state that it is merely a conceptual reframing of the 'right to intervene' that simply tries to overcome the reluctance of the majority of states to abandon the sovereignty principle or to derogate from the principle of non-intervention in domestic affairs.[4]

2. *The Responsibility to Protect*, Ottawa, December 2001, accessed 20 March 2006, at <http://www.iciss.ca/report2-en.asp>. See also the comments made by Simon Chesterman following the New York Seminar on "The Responsibility to Protect", website of the International Peace Academy, accessed 20 March 2006, at<http// www.ipacademy.org>
3. *An Overview of the Responsibility to Protect – Civil Society Project*, January 2004, The World Federalist Movement-Institute for Global Policy, at <http://www.wfm.org/ html/3x06wuef.html>
4. Kat Barton and Howard Clark, "Responsibility to Protect", *Peace News*, December 2004-February 2005, p. 33. Daniel Warner, "The Responsibility to Protect and Irresponsible, Cynical Engagement", *Millennium: Journal of International Studies*, Vol. 32, No.1, 2003, p. 113.

As one of the co-chairs of the Commission, Gareth Evans, acknowledges, "[this] issue was first characterised as 'humanitarian intervention'."[5] According to him:

> "The first, and perhaps ultimately the politically most useful, was to invent a new way of talking about the whole issue of humanitarian intervention. We sought to turn the whole weary debate about the 'right to intervene' on its head, and to re-characterise it not as an argument about any 'right' at all but rather about a 'responsibility' – one to protect people at grave risk – with the relevant perspective being not that of the prospective interveners but, more appropriately, those needing support".

It also introduces a new way of thinking about sovereignty, whose essence should not be seen as control but as responsibility.[6] Indeed, "[w]hereas the 'right of intervention' put the emphasis on the international interveners to justify and legitimise their actions, the 'responsibility to protect' sought to deflect this 'attention on the claims, rights and prerogatives of the potentially intervening states'".[7]

Since the ICISS's report was published, a number of developments have taken place that have led some commentators to argue that "the responsibility to protect is a kind of norm that is being recognised through a process of legalisation and is deemed to become a customary rule in international law".[8] Other advocates of the R2P argue that this doctrine is a new customary international rule on which the UN Charter should be based for three reasons. First, because the UN High-Level Panel on Threats, Challenges and Change evoked the doctrine in its report agreed in

5. Keynote address by Gareth Evans, President of the International Crisis Group and Co-chair of the ICISS, London, 1 July 2005, available at <http://www.crisisgroup.org/home/index.cfm?id=3551&l=1> ; World Federalist Movement-Institute for Global Policy, *An Overview of the Responsibility to Protect – Civil Society Project, op. cit.* (Note3).
6. This way of presenting sovereignty is certainly fraught by ideological concerns and at least controversial. For a discussion Barbara Delcourt, *Droit et souverainetés. Analyse critique du discours européen sur la Yougoslavie*, (P.I.E/PeterLang, Bruxelles, 2003), pp. 333 and ff.
7. David Chandler, "How 'state-building' weakens states", *Spiked Essays*, 24 October 2005; David Chandler (Spring 2004) 'The Responsibility to Protect. Imposing the 'Liberal Peace', *International Peacekeeping*, Vol. 11, No. 1, pp. 59-81.
8. Evans, *op. cit* (Note 5), p. 7. Jerry S.T. Pitzul, Kirby Abbott and Christopher K. Penny, "Réflexions sur la responsabilité de protéger et le droit militaire", *Revue militaire canadienne*, Winter 2004-2005, pp. 31-38 ; Lothar Borck and Tanja Brühl, "After the UN Reform Summit. Proposals to Strengthen Collective Action for Securing Peace", *Policy Paper 24 of the Development and Peace Foundation*, February 2006, p. 5.

December 2004.[9] Second, because Kofi Annan, the UN Secretary-General, embraced it in his recommendations of March 2005 to the UN Security Council.[10] And finally, because the heads of state and governments agreed to it at the Millennium Plus Five Summit in September 2005, during which they also adopted it.[11]

Indeed, media comments suggested that a crucial decision was taken during the Millennium Summit in the field of international law that will probably substantially modify the Westphalian system.[12] Armand de Decker, the Belgian state secretary for cooperation and development, supported this interpretation immediately after the summit. He explicitly argued that the summit ratified a *droit d'ingérence.*[13]

But is the R2P really a new legal rule? In international law, the emergence of a new legal rule depends above all on the will of the states. In the case of the UN Millennium Summit, one cannot use the agreement issued by the states as evidence for the existence of a new customary rule, since states manifestly do not want it to become a new legal rule, as I will demonstrate below. Additionally, the High-level Panel experts along with Kofi Annan are not entitled in international law to decide on the new legal rules by

9. A/59/565, § 203, Nicholas Wheeler rightly pinpoints the fact that this panel has omitted any discussion of what should happen if the Security Council was unable or unwilling to act, in "A Victory for Common Humanity? The responsibility to protect after the 2005 World Summit", *Paper to be presented to a conference on 'the UN at Sixty: Celebration or Wake?* Faculty of Law, University of Toronto, Canada, 6-7 October 2005, p. 3. Gareth Evans participated in the panel and organized a very active campaign in favour of R2P.
10. Report of the Secretary-General of the United Nations, accessed 20 March 2006 at http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement, (A/59/2005), § 135.
11. Evans, *op. cit* (Note 5), p. 7; Gareth Evans, "La responsabilité de protéger", *Revue de l'OTAN*, (Winter 2002), p. 2, accessed, 20 March 2006, at http://www.nato.int/docu/review/2002/issue4/english/analysis.html
12. Eric Marclay, *La responsabilité de protéger. Un nouveau paradigme ou une boîte à outils?*, Etude Raoul Dandurand No.10, 2005, p. 26, accessed 20 March 2006, at:< http://www.dandurand.uqam.ca>; "To protect and defend", *The Guardian*, September 17, 2005; "The positives from the UN Summit", *Irish Times*, September 17, 2005. The enduring concern of the ICISS was to find a way to accommodate humanitarian intervention and state sovereignty, (see the comment made in *An overview of the Responsibility, op. cit*, (Note3), p. 2 and by Robert Keohane cited by David Chandler, "How 'state-building' weakens states", *op. cit.* (Note 7)).
13. Entretien avec Colette Braeckman, "Un échec à l'ONU serait inimaginable", *Le Soir*, 8 septembre 2005; Assembly of WEU, *Assembly Conference on Peacekeeping in Africa: prospects for the strategic security partnership between the EU and Africa*, accessed 20 March at <http://www.assembly-weu.org/en/presse/cp/2005/31.html>

which the states have to abide. International law is normally made by the states, and relies, for better or worse, on their consent to be bound by certain legal norms. There is an apparent paradox here: Great Britain (or possibly also the United States), as a country that is more prone to resort to military force for the 'sake of humanity' or for fighting terrorism, has developed a very restrictive view on the conditions under which a customary rule can actually emerge. In front of the International Court of Justice a British agent has stated:

> "This Court has on many occasions set out the real requirements of custom. There must be a coherent body of State practice. That practice must be of sufficient generality to show widespread support among States. The practice must embody a positive belief that it is required by law. Support for the existence of the rule must be evident [...] Custom is not something which can be conjured from the air or even in the tempest from the vastly deep. It requires evidence [...] It is not something which can be assumed, or deduced from appeals to general principles of humanity".[14]

Following this very traditional and widespread manner of conceiving the custom, we have to consider that neither pre-emptive action nor humanitarian intervention are new legal norms; there are no practices, no precedents and no *opinio juris* shared by the international community that could provide a legal basis to resort to force without a due authorisation of the UN Security Council.[15] Therefore, the existence of a right to interfere or a right to pre-emptive action could only be justified by a different doctrine more grounded on ethics, natural law or the new fashionable 'liberal imperialism' as advocated by Robert Cooper,[16] which will remove the approach based on 'old' positivist or voluntarist doctrines that are grounded on the principle of sovereign equality of the states.[17] Indeed, scholars supporting pre-emptive actions or humanitarian intervention are

14. ICJ, *Legality of the Threat or the Use of Nuclear Weapons (Request for an Advisory Opinion Submitted by the General Assembly of the UN)*, Verbatim Record CR95/34, 15 November 1995, p. 50.
15. Olivier Corten, *Le retour des guerres preventives. Le droit international menacé* (Bruxelles, Labor), 2003, pp. 38 and ff . It's also worthy pointing out the fact that rulings from the International Court of Justice are quite clear regarding the so-called humanitarian intervention or the right to wage pre-emptive war, see for instance: ICJ, *Case Concerning Armed Activities in the Territory of Congo*, 19 December 2005 and Olivier Corten and Pierre Klein, *Droit d 'ingérence ou obligation de réaction?*, 2nd ed., (Bruylant, Bruxelles), 1996.
16. Robert Cooper, "The new liberal imperialism", *The Observer Worldview*, 7 April 2002; Manchester University/The Centre for International Politics, *Normalizing Empire, Ignoring Imperialism*, Working Paper Series, No.11, May 2005.
17. Barbara Delcourt, "International Norms in Theories of Interdependence: Towards State-Less Law?", in Klaus-Gerd Giesen and Kees Van der Pijl (eds.), *International Norms for the 21st Century*, Cambridge Scholar Press, Cambridge, forthcoming

a minority; that is the reason why they are compelled to propose a new (legal) doctrine (or a new methodology) in order to persuade reluctant states or colleagues.[18] Most of the time, their comments rely on an understatement according to which customary rules are indeed the rules that are sustained, not by the majority of states, but by some liberal states[19] or 'enlightened people' from international civil society.

What was then concluded at the UN Summit? A careful examination of the documents released for the 60th anniversary of the UN shows that there is no element sustaining the existence of a *right* to resort to force unilaterally even in cases of massive violations of human rights. After having recalled the responsibility of each individual state to protect its populations (§ 138), paragraph 139 of the final document restates the importance to respond to genocide, war crimes, ethnic cleansing and crimes against humanity through multilateral institutions:

> "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with chapters VI and VII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[20]

This statement is not that astonishing, because within the UN system the right to interfere has long been considered a kind of colonial legacy, a norm enabling powerful countries to interfere in the domestic affairs of the poor.[21] What is significant about the debate is the attempt to widen and

18. Authors like David Malone, Christopher Greenwood and Antonio Cassese are acknowledged to be the main representatives of this trend, see Jerry S.T. Pitzul, Kirby Abbott and Christopher K. Penny, *op. cit* (Note 8), pp. 31 and ff and Chris Walker, "Humanitarian intervention", *Crimes of War/Essay*, December 1999, accessed 20 March 2006, at <http://www.crimesofwar.org/archive/archive-humaninter.html>
19. See the statement of Jerry S.T. Pitzul, Kirby Abbott and Christopher K. Penny, *op. cit* (Note 8), p. 34; Mario Telò, *Europe: A Civilian Power. European Union, Global Governance, World Order*, (Palgrave Macmillan, Houndmills, Basingstone, 2006), p. 6.
20. *Follow-up to the outcomes of the Millennium Summit*, 20 September 2005, accessed 20 March 2006, at <http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement>,A/60/L.1, p. 31.
21. Olivier Corten, *Le retour des guerres préventives*, (Labor, Bruxelles), 2003, pp. 5 and ff.; Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford University Press, Oxford, 2004), p. 31.

reinterpret the scope of the Charter by, for example, defining certain military operations that were undertaken with UN legitimisation as humanitarian intervention in order to attempt to create a new legal norm.[22] This attempt at legitimising a new norm is taking place at a time when the existing legal regime already enables states to resort to force and to interfere in domestic affairs provided that the Security Council finds a threat or a breach to international peace and security under Chapter VII, which allows the member states to "take all necessary measures" to deal with such a threat.[23]

However, during the 59th session of the General Assembly, many states remained opposed to any interpretation of 'the responsibility to protect' that could entail a unilateral right of intervention. The representative of Ukraine, speaking on behalf of Georgia, Uzbekistan, Moldova and Azerbaijan (the GUUAM group),

> "[...] agree[s] that it is important to define and adopt criteria for the legitimate authorization by the Council of the use of force. Situations in which national authorities are unwilling or unable to protect their populations from genocide, ethnic cleansing or crimes against humanity may require effective action by the international community in accordance with international law, including enforcement measures in exceptional circumstances. We believe that such measures can be taken only as a last resort and under the explicit mandate of the Security Council".[24]

Representatives from Uganda,[25] Russia[26] and San Marino,[27] among many others, have also pushed forward the same conditions for accepting the responsibility to protect. No doubt that, for the majority of the UN members, and according to the representative of Chile:

> "It is not a question of recognizing a right of humanitarian intervention or accepting pretexts for aggression, but rather enunciating an international obligation to be

22. For example, Martin Ortega, *L'intervention militaire et l'Union européenne*, Cahiers de Chaillot 45, (EU Institute for Security studies, Paris, 2001).
23. Erica de Wet, *The Chapter VII powers of the United Nations Security Council*, (Oxford and Portland Oregon), 2004, pp. 133-177; Gray, *op. cit.*(Note 21), pp. 252 and ff.; Simon Chesterman, "State-Building and Human Development", *Human Development Report Office, Occasional Paper*, 2005/1, pp. 9-10.
24. UN General Assembly, Debates on the 2005 World Summit, A/59/PV.88, 7 April 2005, p. 22, accessed 20 March 2006, at: <http://www.un.org/ga/59/pv.html>
25. UN General Assembly, Debates on the 2005 World Summit, A/59/PV.88, 7 April 20 p. 8. web-access *ibid*
26. UN General Assembly, Debates on the 2005 World Summit A/59/PV.87,7 April, pp. 6-7. web-access *ibid*
27. UN General Assembly, Debates on the 2005 World Summit A/59/PV.86, 6 April 2005, p. 24. web access *ibid*

> exercised by the Security Council if states are unable to do so in extreme situations."[28]

Most importantly, very few states mentioned the R2P in their respective statements. There were some noticeable exceptions. Paul Martin, Prime Minister of Canada, made the most explicit comment, recalling that the "R2P has Canadian lineage", although he referred to it as a guideline.[29] Indeed, none of the states seem to consider it as a new legal norm.[30] Rather, the few representatives that have mentioned the responsibility to protect qualified it as either a "principle" (France, Monaco, Estonia and Sweden), a "concept" (Belgium, Bulgaria and Iceland), or a "joint commitment" (Lithuania).[31]

In his speech delivered on 14 September 2005 in New York, George Bush did not even mention it. This is not to say that the R2P was not a concern for the United States. In a letter addressed to his colleagues on the 30th of August, John Bolton, the representative of the USA to the UN, noted the existence of a widespread consensus in support of this principle and expressed confidence about a positive outcome of the conference on this item. Interestingly, he stated:

> "In such cases, the role of the Security Council is critical. In carrying out that responsibility, the Council may, and is fully empowered to, take action under the Charter, including enforcement action, if so required. We reject the argument that the principle of non-intervention precludes the Security Council from taking such action. At the same time, we note that the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace. Accordingly, we believe just as strongly that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but should remain a decision in purview of the Security Council. For its part, the United States *stands ready to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter and, as appropriate,*

28. UN General Assembly, Debates on the 2005 World Summit A/59/PV.86, 6 April 2005, p. 20. web-access *ibid*
29. Statement by Paul Martin to the High-level meeting of the sixtieth session of the UN General Assembly, September 16, 2005, A/60/251 available at: http://www.un/org/ga/60.
30. Even Canadian authorities do not mention the responsibility to protect as a new legal norm, see *Canadian action agenda on conflict prevention (final, December 2004).*
31. All statements are available, accessed 20 March 2006, at http://www.un.org/webcast/summit2005/statements15.html#am

> *in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations*".[32]

This statement seems to be perfectly consistent with the positions of a large majority of UN members and might even be surprising in its insistence on the special responsibility of the Security Council at the very moment when the US strategy was heavily criticised for disregarding the role of international organisations and their main organ, the UN Security Council.[33] But this commitment to abide by the Charter is, in this case, strictly linked to the R2P, something the United States may consider less important than the pursuit of their interests or the maintenance of their national security. As noted by Nicholas Wheeler, the United States' position is motivated by reluctance to set up guidelines for intervention that could restrict their margin for manoeuvre or push them into actions they are not ready to undertake.[34]

As regards the nature of this principle, it is obvious that Washington does not want to consider it as a legal norm. Following the Bolton letter, the responsibility to protect is merely conceived in a moral sense as far as the international community is concerned.[35] Commenting on the draft that circulated within the UN (§ 118), John Bolton clarified the views of his administration:

> "[...] we agree that the host state has a responsibility to protect its populations from such atrocities, and we agree in a more general and *moral sense* that the international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we want to avoid formulations that suggest that the other countries are inheriting the same responsibility the host state has".[36]

He went on to reject any obligation to intervene under international law by specifying: "[...] we would make clear that the obligation/responsibility

32. John Bolton, August 30, 2005 (italics is mine) <http://www.eyeontheun.org/assets/attachments/documents/bolton_responsibility_to_protect.pdf>
33. Indeed, some statements made by USA officials are more ambiguous on this issue, see for example the controversies that surrounded the adoption of the 1999 NATO's strategic concept, Barbara Delcourt and François Dubuisson, "Les missions 'non-article 5' de l'OTAN. Contribution au débat juridique », *Revue belge de droit international*, 2002, Vol. 1, No. 2, pp.439-467.
34. Wheeler, *op. cit.* (Note 9), p. 7.
35. Security Council presidential statement stresses 'moral imperative' of preventing escalation of armed conflicts, humanitarian crises, Security Council 5225th meeting, *Press Release SC/8443*.
36. Bolton, *op. cit.* (Note 32).

discussed in the text is not a legal character [...]. *We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law*".[37]

The final provision relating to the R2P does not in fact entail an *obligation* to react. The text in French uses the word "*devoir*", which is illustrative of the *moral* dimension the states have intended to confer to this principle.[38] Moreover, it appears that the permanent members resisted demands by India that they will not use their veto over decisions on this matter.[39] It is also worth noting that, like the right to interfere, "the responsibility to protect is conceived to be applied only towards some countries, any military action against the five permanent members or other major powers being unthinkable".[40]

3. The debate about 'Humanitarian intervention' and the revised notion of sovereignty

Martin Ortega, in a contribution to this book, argues that, although the UN Summit did not fully endorse the R2P as a new norm because of opposition from countries from the South, there is nevertheless an emerging consensus about the right of humanitarian intervention and new practices that put human rights above state sovereignty. Ortega makes three key arguments in his analysis: first, there is a new agreement among the permanent members of the Security Council that has led to new types of interventions in which a wide range of activities that span from economic sanctions to the use of force have been undertaken without the consent of the governments concerned; second, the recognition that human rights are a central value of international relations has also affected previous conceptions of state sovereignty and there is today a consensus that state boundaries can no longer prevent intervention to protect human rights; third, there has been a growing acceptance by the international community of the right of states to intervene on humanitarian grounds. Specific cases mentioned are: India's intervention in East Pakistan (1971) Vietnam's intervention in Cambodia (1978-79) and Tanzania's intervention in

37. *Ibid* (emphasis added); see Daniel Flitton's comment, *Canberra Times*, September 15, 2005.
38. Marie Boëton, "ONU: l'impossible réforme", *Politis*, Thursday 22 September 2005.
39. Mark Turner, "UN 'must never again be found wanting genocide'", *Financial Times*, September 16, 2005; "UN reform deal set to dash hopes of overhaul", *Financial Times*, September 12, 2005.
40. Gareth Evans, Keynote address, *op. cit* (Note 5), p. 5.

Uganda (1978-79). The other four cases mentioned as being based on the principle of humanitarian intervention are: ECOMOG in Liberia, Operation Provide Comfort in northern Iraq (April 1991), NATO's intervention in Kosovo (March–June 1999) and British intervention in Sierra Leone (from May 2000).

Ortega is right to point out that Western states are involved in less developed countries through different forms of interventions. However, this does not mean that these kinds of engagements conform to the principles enshrined in the UN Charter nor that they contribute to change the legal regime regarding the use of force in international relations.

As many commentators have argued, the new practices can be seen as a challenge to the established international system founded after the Second World War. It could be argued that these new practices represent a new form of 'legalised hegemony' or changed form of global domination. Thus, for example, Gerry Simpson has eloquently argued that since the end of the Cold War the UN system has been transformed with the emergence of a new balance between competing principles that have shaped the relationship between politics and law in international relations. He outlines how the structure of the international system has been shaped by various ideas such as formal equality, legislative equality and existential equality, but he suggests that, "while states are formally equal within the system, their legislative and existential equality has traditionally been compromised by the presence of respectively, legalised hegemony and anti-pluralism".[41] At present, we are experiencing a shift away from the principles of sovereign equality and the emergence of a new unprecedented form of 'legalised hegemony', defined as:

> "The existence within an international society of a powerful elite of states whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality".[42]

In Simpson's view, this 'legalised hegemony' is based on a specific form of 'anti-pluralism': the estrangements of some nations and their criminalisation and demonisation on an unprecedented historical scale since the formation of the Westphalia system.[43] This process has affected countries such as Iran, Iraq, Libya, Serbia and Sudan. The arguments put

41. Gerry Simpson, *Great Powers and Outlaw States*. (Cambridge University Press, Cambridge, 2004), pp. 6-7.
42. *Ibid.*, p. 68.
43. *Ibid.*, XII.

forward by Ortega attempt to legitimise and legalise practices that lie outside the international legal order established after the Second World War.

Many Western states and international security organisations have, since the end of the Cold War, intervened more intensively in less developed societies or in countries undergoing internal conflicts using the arguments of protection of human rights, and by so doing have modified previous conceptions of state sovereignty. Nevertheless, the relationships that are emerging between Western states and international security organisations, which at times involve 'protectorates' or new forms of 'shared sovereignty', as mentioned in the contribution by David Chandler in this volume, are not based on a universal consensus that such practices are either democratic, legal or legitimate. Indeed, the emerging practices in countries such as Kosovo, Afghanistan, Iraq, etc, appear to represent the return to illegitimate forms of domination with empire-like features.[44]

In addition, Ortega maintains that the international community endorsed a number of 'humanitarian operations' conducted during the 1990s. By so doing he generally conflates the legitimacy and legality of such operations. In most of these cases, military operations were mainly motivated by humanitarian concerns, and in this way they could be called 'humanitarian interventions', yet these military operations were not based on a new norm legalising unilateral use of force but rather on an extensive interpretation of the Security Council powers as enshrined in the Charter.[45] Some of them relied on another legal basis (such as consent issued by the entitled sovereign) or simply had no legal basis in international law.[46] As a consequence, those who claim that there is a new legal norm governing humanitarian intervention cannot use these kinds of military operations as precedents.[47]

44. David Chandler, *From Kosovo to Kabul. Human Rights and International Intervention*, (Pluto Press, London, 2002); Barbara Delcourt, "Pre-emptive Action in Iraq. Muddling Sovereignty and Intervention?", *Global Society*, Vol. 20, No. 1, January 2006, pp. 47-67; Barbara Delcourt, « Le principe de souveraineté à l'épreuve des nouvelles formes d'administration internationale de territoires », *Pyramides*, No.9, Spring 2005, pp. 87-109.
45. Corten, *op. cit.* (Note 21), pp. 48-62.
46. This was the case of operation 'provide comfort' in Northern Iraq. A careful examination of resolution 688 shows that there was no legal basis for undertaking a military action to protect Kurdish people, Gray, *op. cit.* (Note 21), p. 34. And this was also the case for the NATO operation in Yugoslavia. The author demonstrates that intervening powers like the USA and the UK rather than resorting to the doctrine of the "implied authorization by the Security Council", *ibid.* p. 35.
47. For example, Ortega, *op. cit.* (Note 22).

Ortega claims that operations such as those undertaken by India in East Pakistan, Vietnam in Cambodia and Tanzania in Uganda were considered legitimate and therefore contributed to legalisation of a humanitarian intervention norm. However, there is extensive literature that puts into question such a claim.[48] First, such military interventions have mainly been justified by the intervening countries on the basis of their right to self-defence and not by some humanitarian concerns. More importantly, third-party countries or international organisations have never endorsed such endeavours nor have they considered them to be legal. On some occasions, the lack of a firm condemnation has been explained by political and ethical concerns, but in no way could this amount to an acceptance of an emerging *right* to resort unilaterally to military means in order to put an end to crimes of war or crimes against humanity (see the EU position as presented below).

An example of the controversy about the legality of humanitarian intervention can be found in the position taken by countries after the Kosovo war of 1999. Only Slovenia and Latvia pledged support for a new legal norm to sustain humanitarian intervention.[49] In addition, even states that had participated in the NATO bombings did not defend themselves by resorting to the right to interfere in cases of widespread human rights violations.[50]

Apart from the very clear and unambiguous declarations made within the UN against the right to intervene, a considerable number of states remain against a new rule for humanitarian intervention and many have criticised the NATO operation against Yugoslavia.[51] This position can be found in a

48. See the references used by Gray, *op. cit.* (Note 21), pp. 31 and ff. and Simon Chesterman, Hard Cases Make "Bad Law: Law, Ethics, and Politics in Humanitarian Intervention" in Anthony F. Lang JR (ed.), *Just Intervention*, (Georgetown University Press, Washington, D.C., 2003), pp; 49-50.
49. 7 September 2000, Press Release, GA/9753. See also 16 September 2000, Press Release, GA/9769, 27 September, 2000, Press Release GA/9782; 20 October 1999, Press Release GA/9637. Olivier Corten et Barbara Delcourt (eds.), *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo*, (Bruylant, Bruxelles), 2000/1. Before the International Court of Justice, Belgium was the only NATO's member to justify its participation in the NATO bombings campaign through the existence of a customary rule enabling individual state to resort to force in case of huge human sufferings, see Gray, *op. cit.* (Note 21), p. 43. In the aftermath, Louis Michel, the Belgian Foreign minister, did not endorse this position. In front of the General Assembly, he clearly rejected that the Kosovo military campaign set a precedent for a right to intervene unilaterally in such a case, see references below (Note 80).
50. Chesterman, *op. cit.* (Note 48), pp. 52 and ff.
51. Christine Gray underlines that even NATO officials did not invoke humanitarian intervention as a legal doctrine. In 1999, they only said that the situation in Kosovo was a threat to the peace ad the security of the region, *op. cit.* (Note 23), p. 38.

number of declarations issued in September 1999 by the G-77 (a gathering of 132 states). At that meeting, foreign ministers denounced the so-called right to intervene and reminded the group that neither the UN Charter, nor international law in general, provided a legal basis for a humanitarian intervention decided and implemented on a unilateral basis and without due authorisation issued by the UN Security Council.[52] A few months later, such a statement was reiterated during the G-77's South Havana Summit[53] and has also inspired the non-aligned movement meeting in Kuala Lumpur, where 115 states clearly rejected the possibility to resort to force unilaterally for the "sake of humanity".[54] In June 2000, the Islamic conference endorsed the same position: "It affirmed its rejection of the so-called right to humanitarian intervention under *whatever name or from whatever source*, for it has no basis in the Charter of the United Nations or in the provisions of the principles of the general international law".[55]

The reference to another expression that could possibly be used to label operations such as those conducted by NATO against Serbia in 1999 can be explained by the very fact that the Secretary-General of the UN called the international community to find a consensus and that this led to the report on the 'responsibility to protect', drafted by the International Commission on Intervention and State Sovereignty in 2001.[56]

But as I have argued the consensus has not been achieved on fully legal grounds. As a matter of fact, Western countries have also participated in the banishment of this norm that was deemed to be the cause of major disorders between the two world wars. This is not to say that nothing can or have to be done in case of genocide or crimes against humanity. On the contrary, some authors clearly demonstrated that some international law instruments contain obligations to react when ethnic cleansing, genocide,

52. See §§ 69-70; Déclaration prononcée à l'occasion du 35ème anniversaire de la création du « Groupe des 77 ; at < http://www.g77.org/Docs/Decl1999.html>
53. The text has been published by *Revue générale de droit international public*, 2000, p. 755.
54. Final Document of the XIII Conference of Heads of State and Government of the NAM, Kuala Lumpur, 24-25 February 2003, accessed, 21 March 2006 at <http://www.nam.gov.za/media/030227e.htm>, § 16.
55. Final Communiqué of the 27th session of the Islamic Conference of Foreign ministers, Kuala Lumpur, Malaysia, accessed 21 March 2006 at <http://www.oic-oci.org/english/fm/27/final27.htm >, § 79 (emphasis added).
56. *The Responsibility to Protect*, *op. cit.* (Note 2) See also the comments of Simon Chesterman following the New York Seminar on the responsibility to protect, *op. cit.* (Note 2).

war crimes, crimes against humanity occurred inside a country or during an interstate conflict; but, in no way, this obligation to react could amount to a military intervention that would not be consistent with the relevant provisions of the UN Charter.[57]

Indeed, the existing legal regime enables states to resort to force and to interfere in domestic affairs providing that the Security Council finds a threat or a breach to international peace and security and, under Chapter VII, allows the member states to "take all necessary measures" to deal with. As pointed out in the Barcelona report (*A Human Security Doctrine for Europe*).[58]

In some cases, personnel will be deployed with the permission of or even at the request of the state in question. In other cases, there may be no such permission, or there may no longer be a functioning government that might give permission. The UN Security Council has authorised interventions in cases that are considered to constitute a 'threat to peace, breach of peace, or act of aggression'. Since the end of the cold war, it has regularly characterised situations of massive human rights violations in these terms, and has authorised interventions on this basis in northern Iraq[59], Somalia, Bosnia, Liberia and Sierra Leone".[60]

As far as humanitarian intervention is concerned, "[i]t is difficult to point a case in which international law alone has prevented a state from otherwise acting to protect a foreign population at risk".[61] In this sense, the problem is more one of political commitment and will.

57. Corten and Klein, *op. cit.* (Note 15).
58. The Barcelona Report of the Study Group on Europe's Security Capabilities. Barcelona, 15 September 2004, at < http://www.lse.ac.uk/Depts/global/Publications/HumanSecurityDoctrine.pdf>
59. See Note 46.
60. The Barcelona Report of the Study Group on Europe's Security Capabilities, *A Human Security Doctrine for Europe*, Barcelona, 15 September 2004.
61. Chesterman, *op. cit.* (Note 48) p. 47.

4. The EU stance on 'humanitarian intervention' and 'responsibility to protect'[62]

The refusal to endorse a 'right for intervention' (droit d'ingérence): 1970s to 2003

Within Europe, the basic principles of the UN concerning peaceful coexistence between its member states have frequently been used during the Cold War to condemn or criticise military interventions all over the world, with a few exceptions mainly involving US military interventions. There are many reasons for such an attitude. European states were no longer colonial powers in pursuit of territorial expansion and they were aware of the dangerous consequences of unilateral interventions conducted on 'moral' or political grounds.[63] From the 1970s onwards, such a position explains Europe's firm condemnations of South Africa's interventionism,[64] Israel's military campaigns,[65] the invasion of Afghanistan by soviet troops[66] and Vietnamese intervention in Cambodia against the Khmer Rouge regime.[67] A thorough examination of the texts produced in the framework of the European Political Cooperation (EPC) reveals that no humanitarian concerns were ever used to justify the unilateral use of force.[68] By the same token, it should be noted that intervening states themselves rarely justify their actions on the basis of

62. Barbara Delcourt, « Le recours à la force et la promotion des valeurs et normes internationales: quel(s) fondement(s) pour la politique européenne de sécurité et de défense? », *Etudes internationales,* Vol. XXXIV, No.1, March 2003, pp. 5-24; an update version in English will be published in the *Baltic Yearbook of International Law* (Proceedings of the Inaugural Conference of the European Society of International Law, Firenze, 2004).
63. Olivier Corten, « Droit, force et légitimité dans une société internationale en mutation », *Revue interdisciplinaire d'études juridiques,* Vol. 37, 1996, pp. 86-87; Urs Schwarz, *Confrontation and Intervention in the Modern World,* (Dobs Ferry, New York, Oceana Publications Inc., 1970), p. 89.
64. *Bulletin de la Communauté européenne,* 7/8-1985, p. 112; *ibid.,* 9-1985, pp. 84-85; *ibid.,* 2-1986, pp. 91-92; *ibid.,* 5-1986, p. 81; *ibid.,* 4-1987, p. 65; *ibid.,* 6-1987, p. 109.
65. *Bulletin de la Communauté européenne,* 2-1977, p. 69; *ibid.,* 6-1979, p. 100; *ibid.,* 12-1981, p. 76; *ibid.,* 4-1982, pp. 50-51; *ibid.,* 6-1982, pp. 84-85.
66. *Bulletin de la Communauté européenne,* 1-1980, p. 7, *ibid.,* 2-1980, p. 85; *ibid.,* 3-1981, p. 10; *ibid.,* 6-1981, p. 9; *ibid.,* 12-1985, p. 118.
67. *Bulletin de la Communauté européenne,* 7/8-1980, p. 91; interventions in Thailand have also been condemned, *Bulletin de la Communauté européenne,* 4-1983, p. 68 et 1-1984, p. 55.
68. This is the case of most members of UN, Nicolas Wheeler "Pluralist and solidarist Conceptions of International Societies: Bull and Vincent on Humanitarian Intervention", *Millennium: Journal of International Studies,* Vol. 21 (No. 3), 1992, p. 472.

humanitarian concerns and prefer to motivate intervention with an extensive interpretation of the principle of self-defence.[69] But this was not sufficient to convince European states of the well-founded nature of military operations led by Vietnam in Cambodia or India in Pakistan, or even Tanzania in Uganda.[70]

In the case of traditional interstate wars, such as those that have opposed Iraq and Iran or India and Pakistan, the EC and its member states have repeatedly recalled the prohibition of the use of force and the necessity to solve conflicts by peaceful means.[71] On the other hand, they have never condemned the use of force by the United States against Libya, the capture of Noriega during the military operation in Panama or the bombing of Nicaragua's harbours in the 80s (and the military training of the Contras). This absence of official reactions left groundless any kind of justification for exceptions to the prohibition on the use of force (such as in the cases of intervention against terrorism and narcotrafficking, promoting the restoration of democracy or making respect for human rights more effective).[72]

Until the 1990s, the EC and its member states refused to accept military interventions for the 'sake of humanity' or in order to 'project a Hexagon of civilisation' (rule of law, democratic participation, peaceful resolution of conflicts, social justice, interdependence and state monopoly of violence).[73] If the EC has had a tendency to portray itself as an original security actor, it is largely due to its identification with alternative dimensions of security (e.g. social, political, environmental and so on) alongside the development of a so-called genuine pacific culture.[74]

69. Chesterman, *op. cit.* (Note 48), p. 49.
70. Ibid.
71. *Bulletin de la Communauté européenne,* 4-1986, p. 115, *ibid.*, 7/8-1986, p. 109, *ibid.*, 1-1987, p. 694, *ibid.*, 4-1990, pp. 77-78, see also the positions defended in the name of Europe in front of the General Assembly of UN, *ibid.*, 9-1987, p. 117.
72. As Stanley Hoffmann states, during the cold war, interventionist doctrines like those of Brejnev or Reagan, didn't actually rely on humanitarian concerns, Stanley Hoffmann "The Politics and Ethics of Military Intervention", *Survival*, Vol. 37 (No. 4) Winter 1995/6.
73. Laurent Goetschel, L'Union européenne et la sécurité collective ", *Relations internationales*, Vol.86, Summer 1996, pp. 143-161; H.-G. Ehrart, "Quel modèle pour la PESC? ", *Cahiers de Chaillot 55,* (EU Institute for Security Studies, Paris, Octobre 2002) pp. 10-11 et pp. 12-13.
74. Helen Sjursen, "New Forms of Security Policy in Europe", *Arena Working Papers WP 01/4*; Ann Deighton "The European Security and Defence Policy", *Journal of Common Market Studies*, Vol. 40, No.4, p. 722; Goetschel, *op. cit*, (Note 73) p. 159; Marie Bacot-Décriaud, ' L'UE confrontée aux interventions d'humanité: une délicate conceptualisation', in Jean-François Rioux (ed.), *La sécurité humaine. Une nouvelle conception des relations internationales*, Paris, L'Harmattan 2001, pp. 205-244.

In the aftermath of 1989, some changes began to appear in the European discourse, while foreign ministers continued to condemn aggressive actions[75] such as the occupation of Kuwait by the Iraqi regime.[76] During this period, the most remarkable detail to emerge was the tendency to consider as 'illegal' the use of military force *within* a country.[77] For instance, in the case of Yugoslavia, Europeans recalled the principle prohibiting the use of force even before recognising the independence of the Republics.[78] This was clearly a change in relation to their traditional stand on civil warfare, partly motivated by the need to protect individual and minority rights. This is still the case when states want to strengthen a cease-fire or a process of internal pacification.[79] In such cases, there is a tendency to

75. Like the ones in Nagorno-Karabach, *Bulletin de la Communauté européenne,* 5-1992, p. 115; *Bulletin de l'Union européenne,* 9-1993, p. 84; *ibid.*, 1-1994, pt. 1.3.7.; the military intervention of Yugoslavian army in Bosnia-Herzegovina, *Bulletin de la Communauté Européenne*, 4-1992, p. 87; *ibid.*, 5-1992, pp. 112-113. The UE seems to develop a more understanding attitude towards the Turkish military actions in northern Iraq in 1995, *Bulletin de l'Union européenne,* 4-1995, pt. 1.4.17 and 5-1995, pt. 1.4.15. But the UE will stand on a more critical position against military interventions in Congo, *Bulletin de l'Union européenne,* 1/2-1997, pt. 1.3.19. In the conflict between Ethiopia and Eritrea, the UE Presidency has constantly been recalling the principle of pacific resolution of conflicts, see by instance, *Bulletin de l'Union européenne*, 5-1998, pt. 1.3.7.
76. *Bulletin de la Communauté européenne,* 7/8-1990, pp. 127-130; *ibid.*, 9-1990, pp. 84-86; *ibid.*,1/2-1991, pp. 107 and ff.
77. In the Baltic States for example, *Bulletin de la Communauté européenne,* 3-1990, pp. 81-82; *ibid.*, 1/2-1991, pp. 109-110; in Sri-Lanka, *ibid.*, 10-1990, p. 105; see also the condemnation of military actions against Karen population in Myanmar, *ibid.*, 4-1992, p. 88. For a general comment on this issue, Barbara Delcourt, " Le monopole de la violence légitime dans les Etats en crise", *Revista de Estudios Juridicos*, forthcoming
78. *Bulletin de la Communauté européenne,* 3-1991, p. 77; *Bulletin de la Communauté européenne,* 5-1991, p. 90. In the common statement delivered on 5th of July, EC and its members states declared: «[q]u'il appartient aux seuls peuples de la Yougoslavie de décider de l'avenir de leur pays. Ils soulignent, par conséquent, leur ferme opposition à tout usage de la force», *Bulletin de la Communauté européenne,* 7/8-1991, p. 117.
79. Declaration by the Presidency on behalf of the EU on recent developments in Côte d'Ivoire, Brussels, 22 September 2003, *12745/03 (Presse 277) P 115/03*; Declaration by the Presidency on behalf of the EU on the Peace Process in Sudan, Brussels, 8 August 2003, *11973/03 (Presse 238) p 96/03*; Declaration by the Presidency on behalf of the EU on the Peace Process in Liberia, Brussels, 28 July 2003, *11832/1/03 REV (Presse 223), p 92/03;* Declaration by the Presidency on behalf of the EU on Peace Agreement in Liberia, 22 August 2003, *12062/03 (Presse 246) P 101/03*; Declaration by the Presidency on behalf of the EU on the latest military attacks in Bujumbura (Burundi), Brussels, 10 July 2003, *11367/03 (Presse 206) P85/03*.

criticise the *excessive* use of force by a state against its own population rather than an actual wish to extend the scope of the traditional rule that only operates between states.[80] The reason for this prudence undoubtedly lies in the necessity to avoid an upheaval of the principle that characterises modern states, that is the 'state monopoly of legitimate violence'. The events in Côte d'Ivoire seem to confirm this interpretation.[81]

This 'liberal' attitude has not led to a radical departure from the non-interference rule enshrined in the UN Charter. Even if the 'right to interfere' ranked high on the agenda by the early 1990s, no European foreign minister has ever pledged support for the unilateral use of force in international fora and has never endorsed it or understood it as being an emergent norm in international law.[82] In fact, they have shown a remarkable consistency in condemning unilateral military intervention.[83] In their repeated demands for the neighbours of Congo and Burundi to stop their military aid to the belligerents, they clearly adhere to the traditional rules prohibiting indirect interventionism.[84]

Since the end of the Cold War the UN Security Council has been able to manage some international crises without being paralysed by a veto. As

80. EU Declaration on Chechnya, *Bulletin de l'Union européenne*, 1/2-1995, p. 94 and the Press release delivered in Brussels on the 17th of January 1995, *Documents d'actualité internationale (D.A.I.)*, No.5-1er March 1995, p. 61.
81. See also the tremendous efforts of the international community to restore a monopoly of force in Afghanistan and the way Europeans tried to cope with the Albanian rebels (UCK) in Macedonia, Claire Piana, "La PESC après Saint-Malo: de la diplomatie à la défense", Colloque du CERI "l'Union europénne, acteur international", 20-21 June 2002, accessed 21 March 2006, at<*http://www.ceri-sciences-po.org/themes/europe/home.htm*> see also the request made by the Council to the illegal armed group in Columbia "to cease all hostilities", 2559th Council meeting "external relations", Brussels, 26 January 2004.
82. Even during the Kosovo War, see Olivier Corten, "La référence au droit international comme justification du recours à la force: vers une nouvelle doctrine de la guerre juste?", *in* Anne-Marie Dillens (ed.), *L'Europe et la guerre*, (Bruxelles, Facultés Universitaires Saint-Louis, 2001), pp. 69-94.
83. Declaration by the Presidency on behalf of the EU on the recent massacres in and around Drodro, North-Eastern part of DRC, Brussels, 14 April 2003, *8433/03 (Presse 115) P47/03*; Declaration by the Presidency on behalf of the EU on the withdrawal of Ugandan people's Defence Forces from Ituri region of DRC, Brussels, 30 April 2003, *8827/03 (Presse 121) P52/03*.
84. Declaration by the Presidency on behalf of the EU on the situation in the East of the DRC, Brussels, 27 June 2003, *11016/1/03/REV 1 (Presse 192) P77/03*; Declaration by the Presidency on behalf of the EU on the massacres in the province of Ituri in the DRC, Brussels, 13 October 2003, *13526/03 (Presse 301) P 127/03*; Declaration by the Presidency on behalf of the EU on the latest military attacks in Bujumbura (Burundi), Brussels, 10 July 2003, *11367/03 (Presse 206) P85/03*

mentioned in the first part of this chapter, insofar as massive human rights violations in internal conflicts may qualify as 'threats to international peace and security', the Security Council can authorise states to 'use all necessary means' to enforce peace agreements, the delivery of humanitarian assistance, no-fly zones, etc.[85] In these circumstances, European states have participated with their armed forces on multilateral peacekeeping or peace enforcement missions.[86]

Nevertheless, the Yugoslav conflicts have raised some questions about the legitimacy of the very restrictive rules concerning the use of force in international relations. On the one hand, Europe was incapable of ending the slaughter that was taking place in its own backyard. While its economic power is undeniable, it was insufficient to ensure that respect for the fundamental principles of human and minority rights were upheld. The UN itself was losing its credibility as a result of its involvement in the area, while NATO made a 'bold' display of its capacity to project power vis-à-vis the Serbs in Bosnia. At that time, more and more Europeans were becoming convinced of the need to develop new military capabilities within the EU. Hence, it was not very surprising that during the Kosovo crisis European heads of state and governments chose to endorse military action against Yugoslavia without due authorisation of the Security Council.[87]

However, at the end of the Kosovo war, some European ministers, such as Joschka Fischer, Louis Michel and Hubert Védrine, expressed their refusal to endorse such a permissive regime, pointing out the potential dangers of such a precedent for the global security system.[88] France, Germany and Belgium used the same kind of argument to convince their partners not to engage in or sustain a military operation against Iraq without the formal approval of the Security Council. They succeeded in some way when, in February 2003, all the participants of this extraordinary European Council stated: "We [as members of the European Union] are committed to the

85. Corten and Klein, *op. cit*, (Note 15).
86. Ortega, *op. cit* (Note 22); Jolyon Howorth, "L'intégration européenne et la défense: l'ultime défi?", *Cahiers de Chaillot 43*, (EU Institute for Security Studies, Paris, Novembre 2002), pp. 1-101.
87. At that moment, there were also divergences among Europeans on the question of the legal basis, see Barbara Delcourt, " La décision de recourir à la force contre la Yougosalvie : quels niveaux de pouvoir ? Quel rôle pour l'Europe ? ", *in* Corten and Delcourt (eds.), *Droit, légitimation, op. cit*. (Note 46), pp. 31-84
88. Barbara Delcourt et François Dubuisson, "Contribution au débat juridique sur les missions 'non-article 5' de l'OTAN", *Revue belge de droit international*, 2002/1-2, pp.439-467; Tony Blair who was one of the leaders that referred the most to humanitarian intervention also emphasized the exceptional nature of the air campaign, Chesterman, *op. cit*, (Note 45) p. 51.

United Nations remaining the centre of the international order. We recognise that the primary responsibility for dealing with Iraqi disarmament lies with the Security Council".[89] Even in light of subsequent events this remains a very important official statement that deserves attention, especially when *opinio juris* is to be taken into consideration for assessing the emergence of a new norm governing the use of force.[90]

From the EU to the responsibility to protect: an enduring commitment

EU foreign ministers have given support to the responsibility to protect before the Millennium Summit, and in particular, when meeting their Canadian colleagues.[91] In the paper submitted to the High-Level Panel on Threats, Challenges and Change,[92] they did not mention explicitly the 'responsibility to protect', but implicitly referred to the principle in reminding of the importance of sovereignty as a fundamental principle in international law (§ 17), the obligations bearing upon the sovereign states (§ 18) and the proper responsibility of the international community (§ 19). In an EU Presidency statement made at the informal thematic consultations of the General Assembly (April 2005), it was stated that:

> "The EU endorses the concept of 'Responsibility to protect'. Grave and massive violations of human rights and acts of genocide call for strong response and action on the part of [the] international community. The EU endorses the Secretary-General's important proposal concerning the 'Responsibility to protect'. In our view, this proposal should be considered from a broad perspective. The basic principle of state sovereignty is and should remain undisputed. It should also be recognized that state sovereignty implies not only rights, but also responsibilities. One of these responsibilities is the responsibility of each state to protect its own citizens – that comes first. However, if a state is unable or unwilling to do so, and if a situation of genocide, war crimes and crimes against humanity, or massive human rights violations occur or threaten to occur, the international community will have a responsibility to protect these civilians and thereby also help to maintain international peace and security; first and foremost through diplomatic, humanitarian and other measures, such as support to capacity building and other development activities. But if such measures would have no immediate effect or would come too late, enforcement measures through the Security Council or approved by the Security Council should be possible, if needed and as a measure of last resort".[93]

89. *Extraordinary European Council*, Brussels, 17 February 2003; *Presidency Conclusions, Brussels*, 20-21 March 2003, §§ 67 and 69.
90. Chesterman, *op. cit.* (Note 48), p. 49.
91. Delegation of the European Commission to Canada, "EU-Canada Partnership Agenda", March 18, 2004; Joint Summit Declaration Canada-EU Summit Niagara-on-the-Lake, 19 June 2005
92. *Paper for Submission to the High-Level Panel on Threats, Challenges and Change*, § 25, accessed 21 March 2006, at <http://ue.eu.int/uedocs/cmsUpload/EU%20written%20contribution2.pdf>

Hence, it was no surprise that the EU backed the principle during the World Summit of September 2005.[94] In a resolution on the reform of the UN adopted on the 9th of June 2005, the European Parliament also approved this endeavour.[95] Given the previous commitment of EU institutions to foster the UN and to promote 'effective multilateralism',[96] it is not surprising that they clearly stated that the Security Council has the primary responsibility to take a decision on such an action.[97] Nevertheless, this quite clear commitment in favour of the Security Council's competence might also be interpreted as a reaction to the criticisms that have been raised since the adoption of the European Security Strategy in December 2003. Indeed, the document has been inspired by the National Security Strategy of the US, and the paragraphs relating to the conditions under which the EU will use force were quite ambiguous.[98]

Thus, the same conclusion can be drawn for the R2P as for the right to interfere: the responsibility to protect might be politically relevant for the EU and be morally attractive, but as far as international law is concerned, it is not a new legal rule. It is merely a political commitment to avoid a worst-case scenario such as the one that occurred in Rwanda in 1994. Even from this perspective, it is far from certain that it is a new way of thinking or that it has changed the minds of EU leaders. Proof of this is in a remark

93. EU Presidency Statement, April 19, 2005, <http://europa-eu-un.org/articles/en/article_4591_en.htm>; see also the Presidency Conclusions adopted in June 2005, "Préparation du Sommet des Nations Unies", *Bulletin de l'Union Européenne*, 6-2005, (IV relations extérieures, pt. 37).
94. Statement of the European Union accompanying the Speech of Tony Blair, 14 September 2005, available on the website of the UK mission to the UN at: <http://www.ukun.org/articles_chow.asp?SarticleType=17&article_ID=987>
95. European Parliament resolution on the reform of the United Nations, 9 June 2005, B6-0328/2005, (§§ D and 4).
96. See especially in the European Security Strategy (*A Secure Europe in a Better World*) adopted in December 2003, accessed, 21 March 2006 at< http://ue.eu.int/uedocs/cmsUpload/78367.pdf> and Valérie Arnould, "Security in the 21st Century: EU and UN Approaches", *Presentation to the Japan-EU Think Tank Roundtable on 'Next Steps in Global Governance'*, EPC-NIRA-Japan Foundation, January 13-15 2005, Tokyo, accessed 20 March, at <http.irri.be/papers/papJapan-vArnould.htm>
97. *Paper for Submission to the High-Level Panel on Threats, Challenges and Change, op. cit.*(Note 84), § 25. *Bulletin de l'Union Européenne*, 6-2005: p. 37.
98. Eric Remacle, " La stratégie européenne de sécurité, plus occidentale qu' européenne ", in Barbara Delcourt, Denis Duez et Eric Remacle (eds.), *La guerre d'Irak, prélude d'un nouvel ordre international ?*, (P.I.E.-Peter Lang, Bruxelles, 2004), pp. 41-59.

made during a meeting of the International Development Committee at the House of Commons regarding the Darfur crisis:

> "The United Nations Security Council was equally slow to react; nor did Britain seek to change this. Despite the issue of a press release as early as October 2003, the Security Council waited until July 2004 before a full discussion of Darfur. It is regrettable that the important report 'responsibility to protect', published by the Canadian government and submitted to the United Nations in 2001, with its emphasis on the need to respond earlier to emerging crises in order to prevent potential large-scale loss of life, has largely been ignored".[99]

Nonetheless, the R2P has been utilised in the debate regarding the African Union-led mission in Sudan.[100] The R2P is likely to be invoked randomly by the EU. Gareth Evans, one of the key architects of this doctrine as previously explained, has already noted that the conditions set out for intervention such as "the balance of consequences test" are true constraints, as these would prevent any military action against the five permanent members or other major powers.[101] In other words, this moral duty to stop human sufferings is intrinsically linked to political and strategic concerns, a bias that has been traditionally emphasised by the opponents to the right for intervention.[102] This is perhaps the reason why European countries and their Western allies (Japan, Canada and the US) were ready to endorse such a principle. More fundamentally, the R2P is attractive for the EU insofar as it fits its political agenda of the EU encompassing the three dimensions of its crisis-management policy: prevention, reaction and post-conflict reconstruction.[103] Indeed, the ICISS report on the R2P stresses the necessity to develop a fully fledged policy from conflict prevention to post-conflict reconstruction.[104]

99. See also "De la responsabilité de protéger: le test échoué du Darfour", *Sécurité mondiale*, No.18, Octobre 2005.
100. Victoria K. Holt, *The Responsibility to Protect: Considering the Operational Capacity for Civilian Protection*, January 2005, p 6. Simpson Center, <http://cms.isn.ch/public/docs/doc_10935_290_en.pdf>(Full sources, city?) "UN weighs options for Sudan's Darfur region as funds for the African Union force run low", January 17, 2006, accessed, 21 March 2006 at: <http://www.un.org/news>
101. Evans, *op. cit.* (Note 5), p. 5.
102. Jean Bricmont, *Impérialisme humanitaire. Droits de l'homme, droit d'ingérence, droit du plus fort ?* (Bruxelles, éditions Aden), 2005.
103. Sven Biscop, *The European Security Strategy. A global Agenda for a Positive Power*, (Ashgate, London, 2005).
104. See ICISS Report, there is a responsibility to prevent, a responsibility to react and a responsibility to rebuild that are considered to be under the umbrella of the R2P. See also the "Canadian Non-Paper on the Responsibility to Protect and the Evolution of the United Nations' Peace and Security Mandate: Submission to the UN High Level Panel on Threats, Challenges and Change, § 3.3 and § 6, accessed 21 March 2006, at < http://www.dfait-maeci.gc.ca/canada_un/ottawa/menu-en.asp>

Nevertheless, as Nicolas de Torrenté has argued, the way humanitarian duties are decided on today are not consistent with the humanitarian tradition because today's humanitarianism is increasingly policy-oriented rather than targeted to the real needs of the people.[105] By advocating humanitarian activities to be isolated from political agenda, he stresses that humanitarian action must stick to its traditional principles of impartiality and neutrality and does not have to be designed for the reshaping of foreign societies.[106] The R2P is going in the opposite direction insofar as it is being merged with a comprehensive agenda of preventive diplomacy and post-conflict reconstruction aimed at promoting development and security.[107] Thus, the R2P is sometimes viewed not as a truly humanitarian motto but rather as an instrument for an imperialist project.[108] The future of the R2P and other doctrines of interventions are unclear. According to Eric Marclay, for instance, the R2P will not be the Trojan horse of Western countries, for interference both in domestic affairs and the state sovereignty principle is alive and well.[109] No doubt the ambiguities underlying the discourses on this new concept will nourish additional controversies in political and academic fields.

5. Conclusion

How can we explain the partial success story of the R2P? The fact that the R2P does not amount to a new legal norm legitimising *unilateral* intervention is certainly the main reason for the consensus achieved during

105. Nicolas de Torrenté, "Humanitarianism Sacrificed: Integration's False Promise", *Ethics &International Affairs*, Vol. 18, No.2, 2004, p. 10. Jaap de Wilde has also demonstrated that the EU prevention discourse could become a powerful instrument of legitimizing intervention, in "Orwellian Risks in European Conflict Prevention Discourse", *Global Society*, Vol. 20, No.1n January 2006, pp. 87-99.
106. Nicolas de Torrenté, *ibid* p. 11. See also for the Afghan case, Nicholas J. Wheeler, "Humanitarian Intervention after September 11, 2001", in Lang JR (ed.), *op. cit.*(Note 48), p. 199 and Catherine Dumait-Harper, MSF delegate to the UN in a speech delivered at the International Peace Academy for the launch of the Report of the ICISS, February 15, 2005.
107. Guy Dinmore, "US posed for radical reform of foreign aid programme", *Financial Times*, January 18, 2006.
108. Anthony Fenton, "'Legalized Imperialism': 'Responsibility to Protect' and the Dubious Case of Haiti", *briarpatch (fighting the war on terror)*, accessed 21 March 2006, at http://briarpatchmagazine.com/news/?p=48, see also Naomi Klein, "The Rise of Disaster Capitalism", *The Nation*, May 2, 2005.
109. Eric Marclay, *La responsabilité de protéger. op. cit.* (Note 12), p. 26.

the UN World Summit of September 2005.[110] As argued, UN members are not yet ready to abandon the sovereignty principle, and refuse to rewrite the UN Charter by recognising extended interpretations of the possibility to resort to force in international relations. In this debate, legal arguments are of utmost importance, but they are also accompanied by political concerns. The statement by the representative of Brazil encompasses both types of argument:

> "We have been called upon to deal with new concepts such as 'human security' and 'responsibility to protect'. We agree that these merit an adequate place in our system. But it is an illusion to believe that we can combat the dysfunctional politics at the root of grave human rights violations through military means alone, or even economic sanctions, to the detriment of diplomacy and persuasion. Human security is mainly the result of just and equitable societies, which promote and protect human rights, strengthen democracy and respect the rule of law, while creating opportunities for economic development and social justice. The United Nations was not created to disseminate the notion that order should be imposed by force. This extreme expedient can only be considered when all other efforts have been exhausted and peaceful solutions have indeed proved not viable. The judgement regarding the existence of such exceptional circumstances must always be a multilateral one".[111]

Third-world countries or emerging powers are not the only states criticising the right to interfere. Western governments are not prone to defend the existence of a right for intervention, not only because they are convinced by the arguments set out by traditional opponents to it, but also because they fear it could be used by other states in particular situations.[112] If the existing procedural mechanism enshrined in the UN Charter is sometimes considered as a constraint for conducting "legitimate" humanitarian intervention (as was stated during the Kosovo crisis), it also appears as a guarantee for the maintenance of the vested rights of major powers. The R2P has been accepted because it does not endanger this status quo. This is the one of the reasons why scholars such as Nicholas Wheeler find it disappointing:

> "The UN's endorsement of this new norm fails to address the fundamental question of what should happen if the Security Council is unable or unwilling to authorise the use of force to prevent or end a humanitarian tragedy, and secondly, it fails to address the question of how this norm could be better implemented to save strangers in the future".[113]

110. Hisashi Owada, Judge of the International Court of Justice, "Keynote speech at the Research Forum on International Law", *European Society of International Law/ Graduate Institute of International Studies*, 26 May 2005, p. 5.
111. Brazil Statement at the Millennium Summit, 14-15 September 2005, accessed, 21 March 2006 at <http://www.un.org/webcast/summit2005/statements.html>
112. Chesterman, *op. cit.*(Note 48), p. 50.

A second reason for this success can be found in the ideological and political backgrounds underpinning the current changes in the international system. Indeed, David Chandler, among others, argues that, since 1990, national foreign policy and international financial institutions have shared a new agenda revolving around new human-centred development strategies and renewed commitments to 'ethical foreign policy'. As a result, the language of ethics is more and more superseding the language of 'interests', and so the engagement with non-Western states is being presented through a depoliticised discourse in which power concerns are removed.[114] When interests are not totally hidden, they are conflated with universal values so as to present the pursuit of national interests as being consistent with widespread liberal norms.[115] The R2P is deeply rooted in the ideological changes occurring at the international stage, and its moral dimension is certainly an element explaining its partial success.

In the academic field the same trend is also taking place. Michael Barnett and Raymond Duvall note that, "because of this tendency to tie global governance to institutionalized cooperation, coordination of convergent interests, and the production of collective goods, many scholars diminish or overlook the role of power."[116] For Martti Koskenniemi, a professor of international law:

> "Our Kantian ethics invite us to assume that everyone wishes to be treated like we would like. This is rubbish; to think in terms of moral universals creates demands on ourselves (and the UN) that we (or the UN) have absolutely no means to fulfil. Our inevitable guilt will need only a small push to turn into cynicism and brutalization (a push daily attempted by journalists' accounts of 'UN failures')".[117]

The ongoing debate about the R2P is fraught with misunderstandings and hidden agendas. The R2P is a new password for mobilising troops and

113. Wheeler, *op. cit* (Note 9), p. 2.
114. David Chandler, "The 'Other-regarding' Ethics of Empire in Denial", draft of forthcoming chapter in V. Heins and D. Chandler (eds.), *Rethinking Ethical Foreign Policy. Pitfalls, Possibilities and Paradoxes*, (London, Routledge).
115. Indeed, in many European or American discourses rely on the existence of a "natural" convergence between values and interests in Western countries, Delcourt, "Le recours à la force *op. cit.* (Note 54), p. 19.
116. Michael Barnett and Raymond Duvall, "Power in International Politics", *International Organization*, Vol. 59, Winter 2005, p. 40.
117. Martti Koskenniemi, "The Police in the Temple. Order, Justice and the UN: A Dialectical View", *European Journal of International Law*, Vol. 6, No.3, 1995, p. 337.

governments, though on some occasions it rather becomes a mere advertising slogan for those NGO activists who consider themselves the "bodyguards of the humanitarian temple".